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# At the Intersection of *Erie* and Administrative Law: Front-Loading the *Erie* Question into the Adoption of a Federal Rule

Jeffrey L. Rensberger

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**AT THE INTERSECTION OF *ERIE* AND ADMINISTRATIVE  
LAW: FRONT-LOADING THE *ERIE* QUESTION INTO THE  
ADOPTION OF A FEDERAL RULE**

*Jeffrey L. Rensberger\**

I.	Introduction .....	323
II.	Locating the <i>Erie</i> Issue .....	325
III.	The Alternative Approach: Front-Loading the <i>Erie</i> Question.....	333
	A. A Primer on the Rules-Creation Process .....	334
	B. The Administrative Law Analogy .....	336
	C. The Historical Practice of the Supreme Court and the Advisory Committee.....	340
IV.	Advantages of Front-Loading the <i>Erie</i> Issue.....	348
	A. Private Benefits to the Parties .....	348
	B. Public Benefits to the Judicial System.....	352
	C. The Process of Deciding the <i>Erie</i> Issue Would be Improved .....	353
	D. What Entity Should Make Preemption Statements? .....	362
V.	Conclusion .....	366

I. INTRODUCTION

It is generally understood that there are two kinds of *Erie* problems. One involves a conflict between state law and federal judge-made (common) law. The other involves a conflict between state law and a federal rule of civil procedure (or federal statute). In the latter, the analysis calls for the use of the federal rule if it is valid and the rulemakers intended

**SYMPOSIUM, *ERIE* AT EIGHTY: CHOICE OF LAW ACROSS THE DISCIPLINES**

for it to apply to the matter at hand (if it is “on point”<sup>1</sup>). While the latter branch of the analysis appears to be much simpler than the “relatively unguided *Erie*” analysis the court must engage in when there is no written federal rule,<sup>2</sup> the cases reveal a deeper complexity. The Supreme Court interprets written federal rules with an eye toward *Erie* policies, and so determining whether a federal rule is intended to apply is far from a mechanical process. The cases, even on this more straightforward branch of *Erie*, are hard to reconcile and the results are difficult to predict.

When the applicability and validity of a federal rule is at issue before the Supreme Court, the Court will have touched the federal rule twice. The second interaction with the rule—during litigation—is where the issue described above comes into play. But the Court previously encountered the rule in its role as a promulgator of the federal rules and a transmitter of them to Congress. The *Erie* question as to the rule’s applicability in the face of contrary state law is not decided at the front end of this process but at the back end of it; it occurs at the time of litigation over the rule and not at the time of the rule’s creation.

This article examines whether there is some good reason for this structure. Back-loading the analysis of a rule’s displacement of state law—its intended scope—as the current structure does, appears on its face to be inefficient. It leaves potential litigants uncertain of the resolution of the *Erie* issue until they become actual litigants and secure a ruling on the issue from a court. Superficially, this *Erie* question should sensibly be answered at the front end of the process, at the time of rule adoption. This could be done by the Supreme Court issuing a statement accompanying the adoption of the rule or by a statement from the actual drafters of the rule—the Advisory Committee on the Rules of Civil Procedure (Advisory Committee)—as to its applicability in diversity cases. Such an approach to rulemaking is found in administrative law, where agencies sometimes issue regulations with an explicitly claimed force of preemption of state law or state in a preamble guidance suggesting preemption. On the other

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1. See *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1307 (11th Cir. 2002) (“If a federal statute or rule of procedure is on point, the district court is to apply federal rather than state law.”) (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1539 (10th Cir. 1996) (“[W]here a federal rule of procedure is directly on point, that rule applies.”) (citing *Hanna*, 380 U.S. at 471).

2. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988) (“A district court’s decision whether to apply a federal statute . . . involves a considerably less intricate analysis than that which governs the ‘relatively unguided *Erie* choice.’”) (quoting *Hanna*, 380 U.S. at 471).

hand, given that this approach has never been undertaken, there are perhaps good reasons for declining to front-load the process in the context of the federal rules.

This article examines the questions raised by the proposal to decide the *Erie* question of state law displacement at the front end of the process. After identifying the exact *Erie* issue under consideration in Part I, the article proceeds to explain the proposal to front-load the analysis in Part II, comparing it to common practices in administrative law and delving into the history of the Advisory Committee and Supreme Court's comments accompanying the promulgation of the rules. Part III concludes the analysis by considering the advantages and disadvantages of such an approach. In the end, the case for such an approach is surprisingly strong given that it has never been the usual practice of the creators of the rules.

## II. LOCATING THE *ERIE* ISSUE

The *Erie* problem, in general, addresses how state and federal law interact in cases based substantively on state law.<sup>3</sup> It is commonly accepted that there are two subsets of the *Erie* problem.<sup>4</sup> The first, the subject of the *Erie* case<sup>5</sup> itself and of later cases such as *Guaranty Trust Co. v. York*,<sup>6</sup> *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,<sup>7</sup> and *Gasperini v. Center for Humanities, Inc.*,<sup>8</sup> involves a conflict between state law and federal judge-made law (i.e., federal procedural common

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3. See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to Cafa and Shady Grove*, 106 NW. U. L. REV. 1, 4 (2012) (“*Erie* analysis is now concerned with whether federal or state law should be applied. . .”).

4. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 697–98 (1974) (“[T]he indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of ‘the *Erie* doctrine’ or ‘the *Erie* problem,’ has served to make a major mystery out of what are really three distinct and rather ordinary problems. . .”). Ely got to three distinct problems by differentiating between conflicts between state law and a federal statute as opposed to between state law and a federal rule of civil procedure. I would combine those two. See also Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1134 (2011) (describing the bifurcated approach in the cases).

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

6. 326 U.S. 99, 101 (1945) (addressing the conflict between a state statute of limitations and the federal common law on the time limit for suit in equity cases).

7. 356 U.S. 525, 533–34, 537 (1958) (addressing the conflict between state law that making a certain factual issue a matter to be decided by the judge rather than the jury and the unwritten federal practice that disputed facts are ordinarily decided by the jury).

8. 518 U.S. 415, 422–23 (1996) (addressing the conflict between state law setting a more rigorous review of the size of jury verdicts than the federal judge-made shock the conscience standard). For the sake of precision, it should be noted that the Justices in *Gasperini* disagreed on whether Federal Rule 59 conflicted with state law. See *infra* note 40.

law). The second involves a conflict between state law and a federal standard that is found in a federal rule of civil procedure or federal statute.

This dichotomy was established in *Hanna v. Plumer*.<sup>9</sup> In *Hanna*, state law on the method of service of process conflicted with Federal Rule 4.<sup>10</sup> The Court rejected an argument based on *York* that state law should be used because the difference between state and federal law was determinative of the outcome.<sup>11</sup> The Court explained that when a “situation is covered by one of the federal rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.”<sup>12</sup> When a federal rule is at issue, the federal rule controls, so long as it “neither exceed[s] the congressional mandate embodied in the Rules Enabling Act nor transgress[es] constitutional bounds. . . .”<sup>13</sup> If the rule in question is within the grant of the Enabling Act, it is therefore the standard.<sup>14</sup> Thus, as a matter of the Supremacy Clause,<sup>15</sup> a federal rule must “be applied if it represents a valid exercise of Congress’ rulemaking authority. . . .”<sup>16</sup>

Terminologically, some would not include the *Hanna* case and similar problems (those involving a clash between a federal rule and state law) within the scope of *Erie*, since the former’s resolution depends upon the Rules Enabling Act<sup>17</sup> and the Supremacy Clause, while the latter (*Erie*

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

10. *Id.* at 462.

11. *Id.* at 466.

12. *Id.* at 471.

13. *Id.* at 464.

14. *Id.*

15. On the role of the Supremacy clause in *Hanna*, see Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 187, 205 (2013) (describing *Hanna* as “a pure expression of the Supremacy Clause.”); Donald L. Doernberg, “*The Tempest*”: *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: The Rules Enabling Act Decision That Added to the Confusion-But Should Not Have*, 44 AKRON L. REV. 1147, 1155 (2011) (explaining that in cases involving the federal rules, “[T]he Supremacy Clause . . . mandate[s] the triumph of federal law (even a Federal Rule of Civil Procedure) over any contrary state rule.”); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 114 n.50 (2011) (“[V]alid and applicable federal law would preempt state law by virtue of the Supremacy Clause.”); Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 674 n.20 (1988) (explaining a valid “Federal Rule controls under the Supremacy Clause.”); see also Jeffrey L. Rensberger, *Erie and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591, 1610 (2015) (illustrating cases and “commentators agree that this strand of *Hanna* is a matter of preemption. . . .”).

16. *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

17. 28 U.S.C. § 2072 (2012).

proper) is an application of the Rules of Decision Act.<sup>18</sup> I prefer to keep the two doctrines under a single umbrella, “*Erie*,” for both convenience and, I believe, precision.<sup>19</sup> A hard dichotomy—splitting the hemispheres of the *Erie* brain—hides the underlying similarity of the two branches. Both are instances of preemption.<sup>20</sup> This is easiest to see in the *Hanna* wing of the *Erie* problem. When a federal rule of civil procedure (or a federal statute) conflicts with state law, valid federal law preempts conflicting state law. But federal common law, which is the original *Erie* part of the doctrine, also has preemptive power. This is true of substantive federal common law and is equally true of federal procedural common law.<sup>21</sup>

This article focuses on the *Hanna*—federal rule of civil procedure—side of *Erie*. Under the standard *Hanna* analysis, a written federal rule trumps conflicting state law so long as the federal rule is valid, i.e., within the grant of authority under the Rules Enabling Act, and not unconstitutional for some other reason. But not every federal rule proffered by a party as controlling is in fact relevant. Sometimes, “the federal rule was not as broad as the losing party argued.”<sup>22</sup> The first question in these cases is “whether the scope of the federal rule in fact is sufficiently broad to control the issue before the Court.”<sup>23</sup> If the rule is of such a breadth, it controls over conflicting state law, so long as it is within the scope of the Enabling Act.

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18. The Rules of Decision Act, 28 U.S.C. § 1652 (2012) (“[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.”) On the distinction between the problems raised under the Rules of Decision Act and those arising under the Rules Enabling Act, see Ely, *supra* note 4 & accompanying text.

19. Suzanna Sherry agrees that cases involving a federal rule should be analyzed under the *Erie* umbrella:

[F]raming the question as one of the validity of the Federal Rule under the REA—as *Sibbach* did—hides the real *Erie* issue: Application of a Federal Rule might impair substantive rights in one state but not in another, or in one type of case but not another. And it is the *Erie* doctrine, not the REA, that controls the decision of whether a particular state rule prevails over a conflicting federal one.

Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can't Fix the Erie Doctrine*, 10 J.L. ECON. & POLICY 173, 178 (2013); see also Donald L. Doernberg, *supra* note 15, at 1209 (“[T]he terms ‘*Erie* problem’ and ‘*Erie* doctrine’ customarily refer to the entire vertical choice-of-law enterprise, and it has gotten too late in the day to expect successful recharacterization as “the vertical choice-of-law problem.”).

20. I have argued elsewhere for a “recoupling of the *Hanna* and non-*Hanna* branches of *Erie*” because on “either side of the analysis, one must consult some ordering principles to aid in the interpretation of the scope of federal law.” See Rensberger, *supra* note 15, at 1622.

21. See *id.* at 1611.

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

23. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

The scope question is not a simple matter of text. Some rules that seemed facially applicable were determined by the Supreme Court not to be. Federal Rule 3, for example, provides simply that a “civil action is commenced by filing a complaint with the court.”<sup>24</sup> Is the action timely if it was filed before the statute of limitations runs but service does not occur until after? What if state law expressly provides that both filing and service must occur before the statute runs?

Before *Hanna* (decided in 1965) had established the preemption analysis for conflicts between state law and federal rules, the Court ruled in *Ragan v. Merchants Transfer & Warehouse Co.*<sup>25</sup> that state law, not Rule 3, applied in this situation. This may be a fine result as a matter of *Erie* policies. The difference between state and federal law would be highly determinative of the outcome of the case (this was in fact the basis for the Court’s decision).<sup>26</sup>

And *York*, using this same “outcome determinative” test, had already determined that state statutes of limitations had to be adhered to in diversity.<sup>27</sup> Since the subject of *Ragan* was a rule that implemented a statute of limitations, it would be sensible for the tail to go with the dog that was wagging it—the rule concerning whether service or mere filing suffices to satisfy the statute of limitations should be attached to the rule that is the statute of limitations. But whatever the wisdom of such an outcome, it is hard to square with *Hanna*, which says that a valid federal rule applies in the face of conflicting state law.

The Court later resolved this tension between *Ragan* and *Hanna* by asserting that *Ragan* had not held that Rule 3 was invalid or that *Erie* prevented its application. Instead, in *Walker v. Armco Steel Corp.*<sup>28</sup> the Court explained that Rule 3 was not as broad as was argued and therefore there was “no federal rule which covered the point in dispute.”<sup>29</sup> *Walker* dealt with exactly the same issue as *Ragan*—Rule 3 versus a state law that required service before the expiration of the statute of limitations—and reached the same result of using state law despite *Hanna*. Per the Court,

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24. FED. R. CIV. P. 3.

25. 337 U.S. 530 (1949).

26. *Id.* at 532:

*Erie* . . . was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court.

27. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109–10 (1945).

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

29. *Id.* at 750.

there was no indication that Rule 3 “was intended to toll a state statute of limitations, much less . . . displace state tolling rules.”<sup>30</sup>

The basis for saying that Rule 3 was not intended to apply to this issue is not apparent. It is not the result of textual analysis. The Court stated that “Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”<sup>31</sup> But this doesn’t fly; there were no other timing requirements in the federal rules tied to the commencement of the action at the time Rule 3 was promulgated.<sup>32</sup> Timing requirements in the rules are tied to the date of service, not commencement.<sup>33</sup> Moreover, lower courts had previously ruled that Rule 3 *did* serve to define what must be done to beat the statute of limitations in cases arising under federal law<sup>34</sup> and after *Walker* they reached the same conclusion<sup>35</sup> as did the Supreme Court.<sup>36</sup> Indeed, *Walker* itself noted the potential applicability of Rule 3 to toll a federal cause of action.<sup>37</sup> *Walker* relies upon a very granular reading of the rulemakers’ intent.<sup>38</sup> Rule 3, the Court explained was not

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30. *Id.* at 750–51.

31. *Id.* at 751.

32. See Jeffrey L. Rensberger, Hanna’s *Unruly Family: An Opinion for Shady Grove Orthopedic Associates v. Allstate Insurance*, 44 CREIGHTON L. REV. 89, 92 (2010). Rule 38(b) in the original rules did establish a time-frame for a jury trial demand—“any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.” See Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 663, 714 (1939). But that was not a timing requirement. It sets the beginning of a period not a deadline for completion. It would seem to be a mere truism that one could not demand a jury trial before filing a complaint in the action.

33. See Rensberger, *supra* note 32.

34. See *Bomar v. Keyes*, 162 F.2d 136, 140 (2d Cir. 1947) (holding that “it is the filing of the complaint which tolls the statute” by virtue of Rule 3).

35. See *Sentry Corp. v. Harris*, 802 F.2d 229, 231–32 (7th Cir. 1986); See also *Wright & Miller et al.*, 4 FED. PRAC. & PROC. CIV. § 1056 (4th ed.) (explaining “the filing of the complaint commences a federal question case for statute of limitations purposes” subject to the requirement of timely service in Rule 4.).

36. See *Henderson v. United States*, 517 U.S. 654, 657 n.2 (1996). The Court noted, in dicta, that in “a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations.” *Id.* When a case arises under federal law and the courts borrow an analogous statute of limitations from another federal statute, the Court has held that Rule 3 determines tolling. See *West v. Conrail*, 481 U.S. 35, 39 (1987) (“[W]hen the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been ‘commenced’ in compliance with Rule 3 within the borrowed period.”).

37. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 n.11 (“We do not here address the role of Rule 3 as a tolling provision for a statute of limitations . . . if the cause of action is based on federal law.”).

38. See Rensberger, *supra* note 32, at 91–92:

*Walker* in fact was oddly careful in its language. It did not say that Rule 3 was not intended to give a tolling rule for statutes of limitations. It instead said that Rule 3 was not “intended



“intended to toll a *state* statute of limitations”<sup>39</sup> but might well be (and indeed was later held to have) intended to provide the tolling rule for federal causes of action. This intent was nowhere to be found in the rule’s text or the notes of the Advisory Committee.

In contrast to *Ragan’s* and *Walker’s* curiously narrow reading of Rule 3,<sup>40</sup> in other cases the Court has expanded a rule that was not clearly textually applicable and used it to trump state law under *Hanna*. In *Burlington Northern Railroad Co. v. Woods*,<sup>41</sup> the Court held inapplicable in diversity cases a state statute that required an automatic ten percent penalty against an unsuccessful appeal of a money judgment. State law did not apply, the Court held, because it conflicted with Federal Rule of Appellate Procedure 38, which provides for a discretionary award of damages and costs for frivolous appeals.<sup>42</sup> But this conflict was not necessary. Federal Rule 38 could have been read as supplementing, not contradicting, state law by giving an extra and discretionary penalty for frivolous appeals on top of the automatic ten percent tax of all losing appeals under state law. And Rule 38 is not in its text prohibitory. It nowhere says that its scheme of discretionary damages for frivolous appeals is to exclude all other awards.<sup>43</sup>

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to toll a state statute of limitations.” Now, that is slicing the bread rather finely. Rule 3 was “intended” to provide a tolling rule for statutes of limitations for causes of action based on federal law, but it was not intended to do so for causes of action based on state law. Where one finds this intention for the differential application of Rule 3 is nowhere stated.

39. *Walker*, 446 U.S. at 750 (emphasis added).

40. *Hanna’s* treatment of *Ragan* “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.” Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067, 1097 (2011). Other cases giving an unnecessarily narrow scope to a federal rule and thereby avoiding the *Hanna* preemption analysis include *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996). In *Gasperini*, the Court allowed state law to govern the standard of review to be used in reviewing the size of a jury verdict. The Court casually dismissed the argument—which was more than plausible as a textual matter—that Federal Rule 59 governed. *Id.* at 418–19. Rule 59 provides for a new trial on grounds that “heretofore” had been used. *See* FED. R. CIV. P. 59 (a)(1)(A). Since the state law was a recent innovation, it was not a ground “heretofore” used. *See Gasperini*, 518 U.S. at 467–68 (Scalia, J., dissenting).

41. 480 U.S. 1 (1987).

42. *Id.*

43. *See* Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of Byrd*, 44 CREIGHTON L. REV. 61, 72 (2010) (“Why those two rules could not co-exist is not explained, probably because the Court had not by that time conceded that it was reading rules with a sensitivity to [*Erie* policies].”).

Many commentators agree that the Supreme Court has been inconsistent in its interpretative approach to federal rules.<sup>44</sup> It is also generally understood that this interpretive inconsistency results from the Court's desire to avoid having a federal rule—all but automatically triumphant over state law under *Hanna*—impinge upon state interests or create unhealthy forum-shopping opportunities.<sup>45</sup> The Court at one time denied using an interpretive filter on the rules. In *Walker v. Armco Steel Corp.*, the Court stated that the federal rules are not “to be narrowly construed in order to avoid a ‘direct collision’ with state law” and that they should “be given their plain meaning.”<sup>46</sup> But it finally owned up to the practice in *Gasperini v. Center for Humanities, Inc.*,<sup>47</sup> where it acknowledged that “Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”<sup>48</sup>

The policy-based interpretive approach to reading the federal rules was spread across the several opinions produced by the fractured ruling in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*<sup>49</sup> Justice Scalia, for the Court, agreed federal rules should be read to avoid “substantial variations [in outcomes] between state and federal litigation,” as long as the federal rule had some textual ambiguity.<sup>50</sup> Justice Stevens articulated two bases for giving a federal rule a narrowing construction. First, to respect “Congress’ command that [the] rules not alter substantive rights,” they must be read with “sensitivity to important state interests and

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44. See, e.g., Benjamin Ernst, *Fighting Slapps in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181, 1192–93 (2015); Thomas, *supra* note 15, at 207 (“Thus, even after *Hanna*, the Court continued to account for federalism concerns by examining the state policy purpose underlying the law being displaced, and by using creative interpretive approaches to avoid applying particular Rules.”); Stephen R. Brown, *For Lack of A Better Rule: Using the Concept of Transsubstantivity to Solve the Erie Problem in Shady Grove*, 80 U. CIN. L. REV. 1, 14 (2011) (“To avoid the more rigid Enabling Act analysis, courts have at times interpreted the Federal Rule to avoid a conflict with state law.”).

45. See Freer & Arthur, *supra* note 43, at 72 (“[E]ven though unwilling to own up to it, the Court pretty clearly applied a substantive canon of construction: if possible, read Federal Rules narrowly to avoid trenching on state substantive interests. . . .”); Rensberger, *supra* note 32, at 96–100; Bollas Genetin, *supra* note 40, at 1068:

[T]he Court often constr[ue]d Federal Rules narrowly to avoid a conflict with state law, (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), [and] sometimes constr[ue]d Federal Rules broadly and seeming to reach out to find conflict where conflict was not necessary.

46. 446 U.S. 740, 750 n.9 (1980).

47. 518 U.S. 415 (1996).

48. *Id.* at 428 n.7.

49. 559 U.S. 393 (2010). Parts of the opinion were a plurality only. See *id.* at 395.

50. See *id.* at 405 n.7 (quoting *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001)).

regulatory policies.”<sup>51</sup> Second, they should be interpreted “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.’”<sup>52</sup> Likewise Justice Ginsberg in dissent agreed that the rules should be interpreted to protect important state interests and regulatory policies.<sup>53</sup>

Thus, *Hanna*’s attempt to create a clear safe harbor for the applicability of the federal rules has been frustrated by the Court’s unwillingness to allow a federal rule to intrude unduly on state policies that are sufficiently substantive or to create opportunities for destabilizing forum-shopping. Cases involving a conflict between state law and a federal rule remain difficult *Erie* questions, with the *Erie* policies of protecting state regulatory autonomy and avoiding differing outcomes in state and federal court remaining relevant. The fundamental question is whether the federal rule displaces state law, and that question is addressed in the cases not as a simple factual question but as a normative one. The question is not whether the federal rule in fact displaces state law, it is whether the federal rule *should* displace state law. Stated simply, the Court employs a preemption model that takes the *Erie* policies into account when deciding the preemption question.<sup>54</sup>

The end result on the *Hanna* side of the *Erie* family is a form of enlightened *Hanna*, or perhaps one might say *Hanna* with a human face. True, a federal rule will trump state law, but one reaches that conclusion only after answering two antecedent questions that soften the absolutism of *Hanna*. First, one asks if the federal rule was intended to apply to the matter at hand. This question is answered by looking at the policies that undergird the *Erie* doctrine: respect for state substantive policies and the instability and unfairness created by forum-shopping.<sup>55</sup> Second, there is always at least a potential issue of validity: only a valid federal rule will trump state law. In order to apply, the rule must be within the scope of the

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51. *Id.* at 418–19 (Stevens, J., concurring) (quoting *Gasperini*, 518 U.S. at 427 n.7)).

52. *Id.* at 419 (quoting *Hanna v. Plumer*, 380 U.S. 460, 473 (1965)).

53. *See id.* at 442 (quoting *Gasperini*, 518 U.S. at 427, n.7, 438).

54. *See generally* Rensberger, *supra* note 15, at 1620-34.

55. One could add to this list of policies a countervailing one that pushes toward using federal law: the presence of federal interests in using federal law. *See* *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958) (“[A]ffirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.”). The *Erie* policies favoring use of state law are “tempered by the third core interest—the interest of the federal judicial system as an ‘independent system for administering justice to litigants who properly invoke its jurisdiction.’” Freer & Arthur, *supra* note 43, at 66 (quoting *Byrd*, 356 U.S. at 537).

Enabling Act. This last question, however, is largely theoretical since the Supreme Court has set an extremely low hurdle for a rule's validity. It must merely "really regulate[] 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."<sup>56</sup> No federal rule has failed to meet this standard.

All the action in the *Hanna* line of cases is thus found on the first question of "whether the scope of the federal rule in fact is sufficiently broad to control the issue before the Court."<sup>57</sup> It is on this question that this article focuses. Could the question of the proper scope of a federal rule in diversity cases be addressed at the time of its creation? The article, it should be noted, does not propose that the rulemakers should explicitly address the second *Hanna* question of the validity of the rule under the Rules Enabling Act. As to that latter question, the rulemakers implicitly assert validity else they would not create and transmit the proposed rule.

### III. THE ALTERNATIVE APPROACH: FRONT-LOADING THE *ERIE* QUESTION

The foregoing brings my proposal into focus. The Supreme Court interacts with the federal rules in several ways. First, in litigation, it may be presented with a question of how to interpret an admittedly applicable federal rule. Cases such as *Ashcroft v. Iqbal*,<sup>58</sup> which addressed the proper understanding of Federal Rule 8 on the sufficiency of pleadings, and *Wal-Mart Stores, Inc. v. Dukes*,<sup>59</sup> which addressed the proper interpretation of Rule 23 on class actions, are two relatively recent examples. Second, in a diversity case, the question is not what the federal rule means, but whether it is applicable at all. Does it displace state law? Cases such as *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*<sup>60</sup> (which dealt with the applicability in a diversity case of Rule 23) is a recent example of this type of case. The third (and underappreciated) interaction of the Supreme Court with a federal rule is during the time the Court adopts the rule and transmits it to Congress. Under standard practice, the Court transmits proposed rules without comment. Could the Court profitably address the question of the rule's applicability in diversity as against state law earlier, at the time of transmittal to Congress? What

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

57. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

58. 556 U.S. 662 (2009).

59. 564 U.S. 338 (2011).

60. 559 U.S. 393 (2010).

would be the advantages and disadvantages of such an approach? If not the Court, should the rules Advisory Committee provide in their comments a note on the *Erie* issue? These matters are taken up below.

#### A. *A Primer on the Rules-Creation Process*

Before analyzing what the Supreme Court could do, it is helpful to remind ourselves what it actually does. What is the structure of the federal rule creation process?

The federal rules have their genesis in the Rules Enabling Act.<sup>61</sup> It grants to the Supreme Court the power to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts.”<sup>62</sup> The Court, of course, does not itself write the rules. Congress has directed the Judicial Conference, which consists of “the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit,” to “carry on a continuous study of the operation and effect of the general rules of practice and procedure” and to recommend “[s]uch changes in and additions to those rules as [it] may deem desirable . . . to the Supreme Court for its consideration and adoption, modification or rejection.”<sup>63</sup> Beneath the Judicial Conference is the Standing Committee on Rules of Practice and Procedure.<sup>64</sup> The Chief Justice appoints members (federal judges, state judges, academics, practitioners, and representatives of the Justice Department) to the Standing Committee.<sup>65</sup> Finally, beneath the Standing Committee are subject-matter specific Advisory Committees.<sup>66</sup>

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61. Summaries of the rulemaking process may be found in Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1200–02 (2012); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 144–45 (2015); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1664–74 (1995).

62. 28 U.S.C. § 2072 (2012).

63. 28 U.S.C. § 331 (2012).

64. 28 U.S.C. § 2073(b) (2012) (“The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure. . .”).

65. For a description of the Standing Committee, see <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [<https://perma.cc/AK4W-DLP5>]. Its current roster may be found at [http://www.uscourts.gov/sites/default/files/2017\\_committee\\_roster.pdf](http://www.uscourts.gov/sites/default/files/2017_committee_roster.pdf) [<https://perma.cc/5JKJ-RDD6>]. Advisory Committees are authorized by 28 U.S.C. § 2073(a)(2) (2012) (“The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.”).

66. See Mulligan & Staszewski, *supra* note 61, at 1200–01 (2012).

Each Advisory Committee is to “recommend[] rules to be prescribed.”<sup>67</sup> The Advisory Committees’ meetings are open to the public, as are their minutes.<sup>68</sup> Proposals for changes to rules can start with a member of the public (a lawyer, judge, or academic submitting a proposal to the Advisory Committees<sup>69</sup>) or they can originate with the Committee as a part of the continuous study of the rules that Congress has demanded of the Judicial Conference.<sup>70</sup> The Committee’s Reporter, a law professor with expertise in the field, prepares drafts for the Advisory Committee.<sup>71</sup> The Advisory Committee then decides whether to forward a proposed rule to the Standing Committee.<sup>72</sup> The Advisory Committee is statutorily obliged to accompany proposed rule changes with a commentary explaining the proposal.<sup>73</sup> If the proposed rule goes to the Standing Committee, that body then decides whether to take the next step, which is to release the proposal to the public for comment.<sup>74</sup> After possible revisions by the Advisory Committee in response to comments,<sup>75</sup> the rule is forwarded by the Standing Committee to the Judicial Conference,<sup>76</sup> which in turn submits it to the Supreme Court.<sup>77</sup> Once there, the Court has

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67. 28 U.S.C. § 2073(a)(2) (2012).

68. 28 U.S.C. § 2073(c) (2012).

69. See McCabe, *supra* note 61, at 1672.

70. See 28 U.S.C. § 331 (2012).

71. See United States Courts, *Committee Membership Selection*, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [https://perma.cc/HM8X-UA2E] (“The reporters research the relevant law and draft memoranda analyzing suggested rule changes, develop proposed drafts of rules for committee consideration, review and summarize public comments on proposed amendments, and generate the committee notes and other materials documenting the rules committees’ work.”).

72. See Procedures for Committees on Rules of Practice and Procedure, 320 F.R.D. 845, 846 (2015).

73. See 28 U.S.C. § 2073(d) (2012) (“[T]he body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body’s action, including any minority or other separate views.”).

74. See 320 F.R.D. at 846; See also 28 U.S.C. § 2073(b) (2012) (stating that the “standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed. . .”).

75. See 320 F.R.D. at 847 (“The advisory committee reviews the proposed change in light of any comments and testimony.”).

76. See *id.* at 848 (explaining that the Standing Committee is charged with “deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.”).

77. See 28 U.S.C. § 331 (2012) (“[C]hanges in and additions to those rules as the Conference may deem desirable . . . shall be recommended by the Conference from time to time to the Supreme Court. . .”).

the prerogative of transmitting the rule to Congress or declining to do so.<sup>78</sup> In recent years, the Court has acted more or less as a conduit, passing along proposed rules from the foregoing rulemaking apparatus without objection or comment.<sup>79</sup> Unless Congress acts to change the rule, it takes effect.<sup>80</sup>

In this arrangement, similar to many bureaucracies, authority and actual labor are inversely related. Ultimate authority resides at the top, in the Supreme Court, and below it the Judicial Conference. Nothing goes to Congress without the approval of these bodies. But all the heavy lifting—the research and actual drafting—is performed at the lowest levels, by the Advisory Committee and especially the Reporter. Official action toward a rule in addition to developing its text, such as a statement of its intended scope, would logically best reside at one of these poles, either with the body with the most authority (the Supreme Court) or the one that does most of the actual labor (the Advisory Committee).

#### B. *The Administrative Law Analogy*

The institutional arrangements set out above closely mirror that of an administrative agency charged by Congress with developing rules to govern a given subject matter. In the Rules Enabling Act, Congress directs that the Supreme Court and the Judicial Conference study and create rules to govern litigation in the federal courts. The rule-creating body consists of experts in the field, lawyers, judges, and academics. After the rules are created, they have the force of law. In both rulemaking under the Enabling Act and administrative rule making, experts with “direct experience and specialized knowledge” act to “set agendas and incorporate policy preferences.”<sup>81</sup> The Rules Enabling Act mimics the Administrative Procedure Act in requiring “notice, an opportunity for public comment, and reasoned rulemaking.”<sup>82</sup> In common with agencies, the Court as a

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78. See McCabe, *supra* note 61, at 1673; see also 28 U.S.C. § 2074 (2012) (“The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.”).

79. See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 942 (2011).

80. See McCabe, *supra* note 61, at 1673.

81. Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1, 11 (2018).

82. Marcus, *supra* note 79, at 935.

rulemaker “is an institution that sets policy . . . with a discretionary docket and the choice of setting policy by way of adjudication or rulemaking.”<sup>83</sup>

Agencies, not infrequently, issue regulations or statements about the preemptive effect of their regulations. The Federal Communications Commission, for example, issued regulations upholding a “policy [that] prohibits state and local technical regulations” of cable television signals “that are inconsistent with those adopted by the Commission.”<sup>84</sup> Likewise, the Food and Drug Administration stated that “under existing preemption principles, FDA approval of labeling under the act . . . preempts conflicting or contrary State law” as to tort liability for mislabeling prescription drugs.<sup>85</sup> Preemption assertions by agencies may occur in a variety of legislative contexts. Congress may have expressly authorized the agency to determine preemption.<sup>86</sup> Such pronouncements are determinative<sup>87</sup> under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>88</sup> *Chevron* requires courts to defer to agency interpretations that are a “permissible construction of the statute,”<sup>89</sup> a low standard, satisfied so long as the interpretation is reasonable<sup>90</sup> or simply not irrational.<sup>91</sup> Or Congress may have granted the agency rulemaking power and a statutory provision contains an express preemption clause.<sup>92</sup> The cases are divided on whether agencies have authority to issue preemption regulations as a part of their power to issue substantive regulations or whether it is necessary that Congress expressly delegate this power to the agency.<sup>93</sup> Or the agency could operate under a statute that has no preemption provision, but bases a power to preempt on its delegated power to regulate and a perceived incompatibility of its regulations with

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83. Mulligan & Staszewski, *supra* note 61, at 1202.

84. See Technical and Operational Requirements of Part 76 Cable Television, 50 FR 52462–02 (1985). The preemption was upheld in *City of New York v. F.C.C.*, 486 U.S. 57, 66 (1988) (“[T]he Commission acted within the statutory authority conferred by Congress when it pre-empted state and local technical standards.”).

85. See Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 FR 3922–01 (2006). The purported preemption was rejected in *Wyeth v. Levine*, 555 U.S. 555 (2009).

86. See William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1242 (2010).

87. See *id.*

88. 467 U.S. 837 (1984).

89. *Id.* at 843.

90. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 110 (2018).

91. See *Mayo Found. for Med. Educ. & Research v. U.S.*, 562 U.S. 44, 60 (2011) (“[T]he Department certainly did not act irrationally.”).

92. See Funk, *supra* note 86, at 1242–43.

93. See Funk, *supra* note 86, at 1243–47.



state law.<sup>94</sup> As an alternative to determining the preemption issue by regulation, the agency may simply offer an opinion on the matter in a preamble or as an amicus in litigation.<sup>95</sup> Whether or not the underlying legislation has a preemption provision, such statements serve as “an opinion as to how the effect of state law would conflict or stand as an obstacle to the full accomplishment of the agency’s regulation.”<sup>96</sup>

My proposal to front-load the *Erie* issue fits into this paradigm. Like an agency, the Advisory Committee or the Judicial Conference or the Supreme Court could opine in writing about how the rule interacts with state law—whether it preempts state law in federal courts. Which of these entities, if any, should perform this function will be examined later.<sup>97</sup> But any one of them could do so. And if the agency analogy holds, its statements would be entitled to some deference in later litigation.

The Rules Enabling Act has no preemption clause. It does have a supersession clause: “All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”<sup>98</sup> But it has been convincingly demonstrated that this clause is directed at prior *federal* law that conflicts with a federal rule.<sup>99</sup> And there is no power granted to the Supreme Court to issue preemption statements. In such cases in administrative law, when “there is neither a statutory preemption provision nor a delegation to the agency to make a preemption determination” the agency lacks authority to make a “preemption determination with the force of law.”<sup>100</sup> That is, it may not issue a regulation governing preemption. But it may offer its opinion in a preamble or other non-regulatory statement, and the courts will value the “agency’s experience” and its “particularly valuable perspective on the question of whether those state laws should be preempted by the agency’s

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94. See Funk, *supra* note 86, at 1247.

95. See Funk, *supra* note 86, at 1249.

96. See Funk, *supra* note 86, at 1250.

97. See *infra* notes 237–55 and accompanying text.

98. 28 U.S.C. § 2072 (b) (2012).

99. See Roosevelt III, *supra* note 3, at 38 (“[T]his sentence is most naturally read to be not about the interaction of the Rules with state law but instead about their interaction with federal laws. It affirms . . . that valid Rules can displace prior inconsistent federal statutes.”); Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 322 (1989) (“[O]nly a federal law could be superseded, for ‘such rules’ are limited in their application to federal courts, and ‘all laws’ therefore cannot include state laws written primarily to be enforced in state courts.”); see also Leslie M. Kelleher, Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously, 74 NOTRE DAME L. REV. 47, 93 (1998) (“Congress’ animating concern with the Rules Enabling Act in 1934 was the allocation of authority between Congress and the Supreme Court.”); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1109–11 (1982).

100. See Funk, *supra* note 86, at 1248.

regulations.”<sup>101</sup> Thus, such an agency pronouncement is entitled to some deference. As the Court explained in *Wyeth v. Levine*, while strict *Chevron* deference is not applicable, the softer deference under *Skidmore v. Swift & Co.*<sup>102</sup> is:

While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.<sup>103</sup>

Under *Skidmore*, agency actions “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>104</sup> Thus a court may determine that preemption exists based on “the agency’s current views of the regulation’s pre-emptive effect.”<sup>105</sup> In *Geier v. American Honda Motor Co., Inc.*,<sup>106</sup> the Court found preemption and gave as a supporting reason the Department of Transportation’s view “that a tort suit such as this one would ‘stan[d] as an obstacle to the accomplishment and execution’ of those objectives.”<sup>107</sup> Because of the complexity of the issue, the “agency is likely to have a thorough understanding of its own regulation and its objectives and is ‘uniquely qualified’ to comprehend the likely impact of state requirements.”<sup>108</sup>

Thus, if the promulgation of the rules were treated in a manner similar to the promulgation of agency regulations, the rulemakers could not issue *Chevron*-style ukases, but they could issue a statement offering a view on how state and federal law interact. Such a statement would be given some weight in later litigation.

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101. See Funk, *supra* note 86, at 1248.

102. 323 U.S. 134 (1944).

103. *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (citations omitted) (citing *Skidmore*, 323 U.S. at 140).

104. *Skidmore*, 323 U.S. at 140.

105. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011).

106. 529 U.S. 861 (2000).

107. *Id.* at 883.

108. *Id.*

C. *The Historical Practice of the Supreme Court and the Advisory Committee*

I am proposing that the Supreme Court or the Advisory Committee at the time a rule is promulgated include a statement as to its displacement of state law. How great a change would this be? What kind of comments have the Court and the Advisory Committee provided in the past?

As to the Supreme Court, there is no tradition of comment on a new rule's application in a diversity case. There are the occasional dissents from a transmission to Congress. Even rarer is the Court declining to transmit a proposed rule.<sup>109</sup> The dissents are also receding in time, the last one coming in 1993.<sup>110</sup> And the dissents (let alone the transmittals) do not address the *Erie* issue of whether and how the rule will apply in diversity cases. Very infrequently a dissent raises a question of the rule's validity under the Enabling Act.<sup>111</sup> More frequently, they discuss the merits of the rule itself.<sup>112</sup>

More fundamentally, these statements are indeed dissents, not the voice of the Court. The Court, in transmitting the Rules, does not comment upon the Rules. For years, the Supreme Court has used a standard form adopting amendments to the rules that is unadorned with

109. See 535 U.S. 1158 (2002) (declining to transmit proposed Rule of Criminal Procedure); 500 U.S. 963, 964 (1991) (declining to transmit proposed Rules Civil Procedure); see also 507 U.S. 1089, 1093 (1993) (statement of Justice White) (“Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference.”).

110. See 507 U.S. 1089, 1096 (1993) (Scalia, J., dissenting). For a collection of the transmissions to Congress, including dissents, see Wright & Miller, et al., 12A FED. PRAC. & PROC. CIV. APP. B (2018 ed.) (stating the Orders of the Supreme Court of the United States Adopting and Amending Rules).

111. See, e.g., Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587, 617 (1963) (Black and Douglas, J., dissenting):

We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in law suits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. [. . .] Even were there not this constitutional limitation, the authorizing statute itself qualifies this Court's power by imposing upon it a solemn responsibility not to submit rules that “abridge, enlarge or modify any substantive right” and by specifically charging the Court with the duty to “preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.” Our chief objections to the rules relate essentially to the fact that many of their provisions do “abridge, enlarge or modify” substantive rights and do not “preserve the right to trial by jury” but actually encroach upon it.

112. See, e.g., 368 U.S. 1009, 1012 (1961) (Douglas, J.) (dissenting from amendment to Rule 25 on substitution of parties as “unwise.”).

explanation or comment. The most recent order adopting and transmitting amendments, for example, reads as follows:

Ordered:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 5, 23, 62, and 65.1. . . .
2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.
3. That The Chief Justice be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.<sup>113</sup>

The Advisory Committee Notes provide a better stocked pond in which to fish. The Committee does not often or even regularly comment upon the relationship between state law and the Rules, but it has done so on occasion. Most of the Advisory Committee Notes are explanatory as to the intended operation of the rule, describing the problem the rule is attempting to fix or the ambiguity it is attempting to clarify.<sup>114</sup> But a small number of them do address the interaction of the Rules with other law and in particular with state law.

The Advisory Committee from time to time asserts its role as a preeminent rulemaker as against other potential sources of rules. This occurs most often in the context of the Committee acting against local rules. For example, in the 1991 amendments the Advisory Committee

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113. See Journal of the Supreme Court of the United States October 2017 Term at 700 (April 26, 2018). This is the standard form of the transmittal. For other examples across time, see Journal of the Supreme Court of the United States October 2016 Term at 701–02; 559 U.S. 1140, 1141 (2010); 329 U.S. 843 (1946).

114. See, e.g., FED. R. CIV. P. 33 (advisory committee’s note to 1970 amendment):

There are numerous and conflicting decisions on the question whether and to what extent interrogatories are limited to matters “of fact,” or may elicit opinions, contentions, and legal conclusions. . . . Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact.

See also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1112–13 (2002) (“A survey of Notes to amendments promulgated since 1988 shows that the Advisory Committee currently uses the Notes to indicate an amendment’s purpose, guide future interpretations, discuss the amendment’s relation to surrounding law, and provide practice tips for lawyers and judges.”).

proposed restricting the power of court clerks to “refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice.”<sup>115</sup> The Committee asserted that enforcing local rules in this way “is not a suitable role for the office of the clerk” and that this is instead “a role for a judicial officer.”<sup>116</sup> Likewise, in 1995 the Committee acted to effectuate a “requirement that local rules be consistent not only with the national rules but also with Acts of Congress.”<sup>117</sup> That year the Committee also recommended protecting parties from a “loss of rights in the enforcement of local rules relating to matters of form.”<sup>118</sup> One should not, for example, lose a right to a jury trial by failing to follow a local rule requiring jury trial demands to be placed in the caption of the case in the pleadings.<sup>119</sup> While these amendments do not involve a tension between the rules and state law, they do show the Committee exercising its authority to supersede other rulemaking authority and they provide examples of rule commentary explaining the relationship of the rules to other sources of law.

On other occasions, the Advisory Committee has carefully delineated the interaction between state law and the rules. The Advisory Committee Notes for the 1963 amendments address service of process under Rule 4. Rule 4(c) at that time provided that “[s]ervice of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose. . . .”<sup>120</sup> Rule 4(d)(7) provided for service “in the manner prescribed by the law of the state in which the service is made.”<sup>121</sup> When state law provided for service via a state official, lower courts held that the state official had to receive a federal appointment under Rule 4(c) to satisfy the “who” requirement of Rule 4(c).<sup>122</sup> Even worse, when state law authorized mail service, that perhaps could not be used under Rule 4 since the mailing would not involve a United States marshal or deputy or someone specially appointed by the court as Rule 4(c) seemed to require.

The committee notes rejected that construction, citing with approval a case holding that: “service in the manner prescribed by the law of the

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115. See FED. R. CIV. P. 5 (advisory committee’s note to 1991 amendment).

116. See *id.*

117. See FED. R. CIV. P. 83 (advisory committee’s note to 1995 amendment).

118. See *id.*

119. See *id.*

120. *Farr & Co. v. Cia. Intercontinental De Navegacion De Cuba, S. A.*, 243 F.2d 342, 349 n.15 (2d Cir. 1957).

121. See *id.* at 347 n.9.

122. See *Wright & Miller, et al.*, 4A FED. PRAC. & PROC. CIV. § 1092 (4th ed.).

state . . . is not limited by subdivision (c) requiring that service of all process be made by certain designated persons.”<sup>123</sup> The note concluded that the “salutary results of these cases are intended to be preserved.”<sup>124</sup> The note thus provided guidance as to how the rulemakers intended state and federal law to interact. The Advisory Committee returned to this issue in the 1980 amendments in which they clarified that when service is made under state law, the persons identified in Rule 4(c) need not be involved in the service.<sup>125</sup> The former Rule had the troublesome ambiguity noted above.<sup>126</sup> To solve this, the Advisory Committee recommended amending Rule 4(c) to explicitly “authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made.”<sup>127</sup>

There is a similar discussion by the Advisory Committee of the role of state law in matters of evidence. The original Federal Rule 43 provided that:

[E]vidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.<sup>128</sup>

Thus, in the absence of a federal evidentiary statute the federal courts were to borrow (outside of equity cases) state law. Eventually, Congress ratified the Federal Rules of Evidence.<sup>129</sup> But long before that, the 1946 notes to Rule 43 made the argument for a set of uniform federal rules to replace the reliance on state law: a “comprehensive and detailed set of rules of evidence seems very desirable.”<sup>130</sup> The Advisory Committee was thus opining that federal rules should be created to displace state law.

To be clear, these are not instances of the Advisory Committee stating whether a federal rule is intended to preempt state law. The question addressed under Rule 4 was how two parts of federal law are to be read together, one of which incorporates state law. And as to Rule 43,

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123. See FED. R. CIV. P. 4(c) (advisory committee’s note to 1963 amendment) (internal citations omitted).

124. See *id.*

125. See Wright & Miller, *supra* note 122.

126. See FED. R. CIV. P. 4(c) (advisory committee’s note to 1980 amendment).

127. See *id.*

128. See Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 663, 718 (1939).

129. See PL 93–595, January 2, 1975, 88 Stat 1926.

130. See FED. R. CIV. P. 43 (advisory committee’s note to 1946 amendment).

the discussion was of the desirability of a uniform, state-law-preempting set of federal rules of evidence. They are nonetheless suggestive of what the Advisory Committee could do in cases of potential conflict between state and federal law. Why not make a statement in such a situation that federal law is (or is not) intended to displace state law? This is little different from the Advisory Committee stating that Rule 4(c)'s list of persons who are proper process servers does not displace the incorporated state law concerning the method of service or from the Committee pining for a set of federal rules that once created would displace state law.

On several occasions the Advisory Committee has addressed the question of the validity of a rule in light of the powers granted and withheld in the Rules Enabling Act.<sup>131</sup> Indeed, such discussions appear in 1937, at the very beginning of the federal rules. Federal Rule 3 provided then and now that a “civil action is commenced by filing a complaint with the court.”<sup>132</sup> In its 1937 notes, the Advisory Committee raised the issue of how this provision interacts with a state statute of limitations:

When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on *whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations.*<sup>133</sup>

The rulemakers did not answer the questions they posed—whether Rule 3 applied to toll a state (or federal) statute of limitations and whether Rule 3 thusly interpreted would violate the restrictions of the Enabling Act. The Supreme Court later had to resolve the issue of the relationship of Rule 3 to state law in *Ragan v. Merchants Transfer & Warehouse Co.*<sup>134</sup> and *Walker v. Armco Steel Corp.*<sup>135</sup> It is odd for a rulemaker to provide commentary raising an important issue and then neglect to answer it. The rulemakers did not say that they were declining to answer the interpretative and validity questions out of deference to the Supreme Court later deciding the matter, but that is the practical effect of what it

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131. See generally 28 U.S.C. § 2072 (2012).

132. Compare FED. R. CIV. P. 3., with Civil Procedure for the District Courts of the United States, 308 U.S. 645, 664 (1939) (original rule).

133. FED. R. CIV. P. 3 (advisory committee's note to 1937 amendment) (emphasis added).

134. 337 U.S. 530 (1949).

135. 446 U.S. 740 (1980).

did. This commentary thus can be taken as an instance of the Advisory Committee consciously avoiding a role of addressing a question of a rule's validity.

A similar approach seems to be reflected in the 1993 amendments to Rule 4(k). That rule was amended in that year to “enable[] district courts to exercise jurisdiction, if permissible under the Constitution and not precluded by statute, when a federal claim is made against a defendant not subject to the jurisdiction of any single state.”<sup>136</sup> The drafters of the rule were apparently concerned that it might transgress the Enabling Act, and so added this “Special Note”: “Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule. . . .”<sup>137</sup> The Advisory Committee provided a little gloss on its Enabling Act concerns, noting that the new rule would not apply in diversity cases: “This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law.”<sup>138</sup> But the notes do not explain why as a matter of policy the rule would apply only in federal question cases. An earlier version of the Advisory Committee Notes, however, was more transparent. The “Special Note” in this version did not refer to the Enabling Act at all and was in that way less informative.<sup>139</sup> But the commentary said, “[t]his narrow extension of the federal reach is inapplicable to cases in which federal jurisdiction rests on the diversity of citizenship of the parties. This is perhaps a necessary application of the principle of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).”<sup>140</sup>

Taken together, the earlier draft of the Advisory Committee Notes specifically flagged an *Erie* issue by name and suggested that the proposed rule might be rejected. The final draft of the commentary seemed to soften the warning. It was specific in mentioning the Enabling

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136. FED. R. CIV. P. 4 (advisory committee's note to 1993 amendment); *see also* Fed. R. Civ. P. 4(k)(2).

137. *See* Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 557–58 (1993).

138. FED. R. CIV. P. 4 (advisory committee's note to 1993 amendment).

139. The September 1990 report of the Advisory Committee to the Standing Committee stated as follows: “Special Note: If paragraph (k)(2) of the proposed revision of Rule 4 is disapproved by the Congress, it is nevertheless recommended that the rule be approved with the deletion of the paragraph, which is separable from the revised rule. . . .” *Summary of the Report of the Judicial Conference Committee on the Rules of Practice and Procedure*, 41, USCOURTS.GOV [http://www.uscourts.gov/sites/default/files/fr\\_import/ST09-1990.pdf](http://www.uscourts.gov/sites/default/files/fr_import/ST09-1990.pdf) [https://perma.cc/28DS-RMAG].

140. *Id.* at 62.



Act as a concern, but it deleted the reference to the *Erie* doctrine. Once again, we see the Advisory Committee raising but not answering an *Erie* issue (one of validity) in the commentary. And its apparent softening of its stated concern by deleting the reference to *Erie* might be taken as another indicator that it believed it should leave the issue open for the Court to later decide.

There are two other instances of the Advisory Committee discussing the validity of a federal rule. The 1993 amendments to Rule 11 added a provision for monetary sanctions against a represented party but provided that a monetary sanction against a client could not be imposed for frivolous contentions of law. Here, the Advisory Committee very explicitly offered its opinion on the Enabling Act question: “With this limitation, the rule should not be subject to attack under the Rules Enabling Act.”<sup>141</sup> Similarly, in the original notes on Rule 35 (which provides for court-ordered physical examinations) the Advisory Committee noted that prior caselaw had upheld the constitutionality of examination orders, provided that there was statutory authority. The Enabling Act, the Advisory Committee said, provided the necessary authority.<sup>142</sup> In contrast to its diffidence when presenting Rule 4(k)(2), the Advisory Committee in these instances unabashedly made an explicit endorsement of a rule’s validity.

Finally, there are a few instances where the Advisory Committee has directly addressed the question of a federal rule’s displacement of state law. Rule 49 in its original form (and today as well) allows a court to use a special verdict form.<sup>143</sup> The original Advisory Committee comments tersely state that the “Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories.”<sup>144</sup> On its face, this is a direct answer to a question of the operation of the federal rule as against state law, which sounds like an *Erie* question. But the Advisory Committee was not answering an *Erie* question. *Erie* was decided in 1938<sup>145</sup> and the Advisory Committee Note dates to 1937. The Advisory Committee was relying on cases decided under the Conformity Act, which generally directed that federal courts use the procedure of the state courts of the state in which

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141. FED. R. CIV. P. 11 (advisory committee’s note to 1993 amendment).

142. FED. R. CIV. P. 35 (advisory committee’s note to 1937 amendment).

143. See Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 663, 724 (1939); FED. R. CIV. P. 49.

144. FED. R. CIV. P. 49 (advisory committee’s note to 1937 amendment).

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

they sat.<sup>146</sup> But that Act was not interpreted to require federal courts to conform to the manner of returning a jury verdict.<sup>147</sup> Cases under the Conformity Act may be thought of as pre-*Erie*, inside-out *Erie* cases, because they were decided before *Erie* and operated under a command to use *state procedural law* while preserving some autonomy to federal law, a reversal of the normal *Erie* context. As the Supreme Court put it in a pre-*Erie* case, “the function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the ‘Rules of Decision’ Act.”<sup>148</sup> The Conformity Act and *Erie* questions are structurally identical, differing only in their reversed polarity. And thus the comment about Rule 49 and state law can be taken as an authoritative pronouncement by the Advisory Committee on the preeminence of a federal rule over state law when the two conflict.

The 1946 amendments to Rule 23 provide the clearest example of the Advisory Committee addressing whether a federal rule displaces state law.<sup>149</sup> At that time, Rule 23 provided that in derivative actions the plaintiff must have been a “shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law.” The Advisory Committee then noted that as “a result of the decision in *Erie R. Co. v. Tompkins*, a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure.” The solution of the Advisory Committee was to let the *Erie* question be settled in the courts, contenting itself with providing a long explanation of the issue. After reviewing the caselaw, the commentary concluded that “the question is a debatable one . . . [with a] recent trend towards the view that Rule 23(b)(1) is procedural.” The Advisory Committee thus avoided giving its opinion on the question of validity. It’s reticence perhaps was motivated by a concern that an official comment that spoke of the rule’s validity would be binding in later litigation were the Supreme Court to adopt the rule with that self-validating commentary. Instead, the Advisory Committee thought the question was “one which *should not be decided by the Supreme Court ex parte*, but left to *await a judicial decision in a litigated case*. . . .”<sup>150</sup> This

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146. See Act of June 1, 1872, c. 255, § 5, 17 Stat. 197; see Wright & Miller et al., *History of Federal Procedure Under Statute*, 4 FED. PROC. & PROC. CIV. § 1002 (4th ed.).

147. FED. R. CIV. P. 49 (advisory committee’s note to 1937 amendment).

148. See *Herron v. S. Pac. Co.*, 283 U.S. 91, 94 (1931).

149. See FED. R. CIV. P. 23 (advisory committee’s note to 1946 amendment).

150. FED. R. CIV. P. 23 (advisory committee’s note to 1937 amendment) (emphasis added).

is an exact example of what I am considering here: the Advisory Committee opining on an *Erie*, state law displacement issue. But the Advisory Committee sidled up to expressing an opinion only to recoil from doing so. It was preferable, the Advisory Committee believed, for the Court to decide the matter in the course of litigation rather than in the isolation of a rulemaking body.

The pattern to be drawn from the Advisory Committee Notes is one of caution. The Advisory Committee has ultimately refrained from stating its opinion on whether a federal rule displaces state law. It has been more open in asserting the validity of its rules under the Enabling Act, but that should not be a surprise: the Advisory Committee can hardly pass along a recommendation for a rule it believes is invalid, and saying explicitly that it believes the rule to be valid is not giving away too much of the plot. But when the question is whether the rule displaces state law, the rulemakers are more reticent. This is informative for our purposes and will be considered later.<sup>151</sup>

#### IV. ADVANTAGES OF FRONT-LOADING THE *ERIE* ISSUE

The case for front-loading the *Erie* question is relatively straightforward. The issue would be decided *ex ante* as a part of the rulemaking process. Parties would know where they stand. The federal judicial system would benefit from an increase in efficiency by lessening parasitic litigation about litigation. States would also benefit in their attempts to promote substantive policies in instances in which the rulemakers decline to displace state law. And the entire *Erie* enterprise would become more coherent.

##### A. *Private Benefits to the Parties*

Addressing the *Erie* issue of whether a federal rule is to displace state law at the point of promulgation would be helpful to private parties. In general, legal uncertainty interferes with one's ability to privately order commercial and other relationships and to adhere to regulatory requirements.<sup>152</sup> One way in which the law can be uncertain is in its scope

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151. See *infra* notes 251, 243, 255–57 and accompanying text.

152. See William J. Woodward, Jr., *Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause*, 89 CHI.-KENT L. REV. 197 (2014) (“The most obvious activity threatened by legal uncertainty is planning, an activity that requires at least some ability to predict the future consequences of today’s actions.”); Stephen G. Gilles, *The Supreme Court and Legal Uncertainty*, 60 DEPAUL L. REV. 311 (2011).

of application. Even if parties know with mathematical certainty the content of all the law in the world on a given topic, if they do not know which of those laws will apply to them, they are left as unprepared as if the substance of the law itself was indeterminate. In fact, this very uncertainty in the law to be applied (state or federal) was one of the rationales underlying *Erie*.<sup>153</sup>

The case history of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,<sup>154</sup> is illustrative. The case was originally filed on April 20, 2006 in the United States District Court for the Eastern District of New York.<sup>155</sup> In July 2006 Allstate moved to dismiss the case,<sup>156</sup> arguing that a New York statute that provided that “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action”<sup>157</sup> applied to prevent class certification even if the requirements of Federal Rule 23 were met. The District Court granted the motion on December 15, 2006, ruling that New York law applied despite Federal Rule 23.<sup>158</sup> On November 19, 2008, the Second Circuit affirmed.<sup>159</sup> The Supreme Court reversed on March 31, 2010, holding that Federal Rule 23, not New York law, governed class certification.<sup>160</sup> The case was remanded back to the District Court and

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153. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938):

Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects. . . . Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

154. 559 U.S. 393 (2010).

155. See Class Action Complaint, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 559 U.S. 393 (2010), and *vacated and remanded*, 380 Fed. Appx. 96 (2d Cir. 2010) (No. CV 06 1842).

156. See Memorandum of Law in Support of Defendant Allstate Insurance Company’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), *Shady Grove Orthopedic Assocs., P.A.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006) (No. CV 06 1842).

157. See N.Y. C.P.L.R. 901(b) (McKinney 1975).

158. *Shady Grove Orthopedic Assocs., P.A.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006). Without class certification, the small claim plaintiff would not satisfy the amount in controversy requirement of 28 U.S.C. § 1332. See *id.* at 475. Were class certification available, then the claim aggregation rule of 28 U.S.C. § 1332(d) would have granted jurisdiction. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 & n.3 (2010).

159. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 559 U.S. 393 (2010).

160. Parts of the opinion were a plurality, but a majority of Justices joined part I(A), which concluded that the New York rule against class certification “cannot apply in diversity suits unless Rule 23 is ultra vires.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010).

eventually settled in August 2014.<sup>161</sup> Thus, from filing to resolution a little over eight years passed. Of course, any case that involves a trip to the Supreme Court and back will have a long chronology. But the length of this particular litigation was due precisely to the uncertainty of the applicability of Rule 23. Once the Supreme Court decided that issue, the class was certified and the case soon settled,<sup>162</sup> as is often the case with class actions.<sup>163</sup> Had the applicability of Rule 23 been known in advance, years would have been shaved off the litigation.

Uncertainty about the applicability of a federal rule can also lead to enhanced forum-shopping. And the term “enhanced” is not intended as a mere throwaway adjective. It denotes an additional level of forum-shopping. In the *Erie* context, we normally worry about forum-shopping between federal and state court. When uncertainty exists as to whether a federal rule applies in diversity cases,<sup>164</sup> parties may shop *among federal courts*, choosing between one that applies state law and one that applies federal law. This would be, then, forum-shopping to gain an advantage in forum-shopping.

A hypothetical based on *Stewart Organization, Inc. v. Ricoh Corp.*<sup>165</sup> illustrates the point. The parties in that case had negotiated a forum-selection clause exclusively choosing Manhattan as a forum.<sup>166</sup> Despite that, the plaintiff sued in Alabama. Alabama law looked unfavorably on forum-selection clauses.<sup>167</sup> The *Erie* question was whether Alabama law controlled (viewing the validity of the forum-selection clause as simply a

161. See Docket 1:06-CV-01842, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 559 U.S. 393 (2010), and *vacated and remanded*, 380 Fed. Appx. 96 (2d Cir. 2010) (No. CV 06 1842), ECF No. 126.

162. The docket sheet shows that the District Court certified the class on August 7, 2013. The stipulation of settlement was filed on December 20, 2013. *Id.*

163. It is generally understood that class certification often leads to a settlement of the case. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 2424 n.7 (2014) (referring to the “substantial in terrorem settlement pressures brought to bear by certification”) (Thomas, J., concurring); George Rutherglen, *The Way Forward After Wal-Mart*, 88 NOTRE DAME L. REV. 871, 895 (2012) (“[C]ertification itself affects the probability of settlement. Cases that are not certified are likely to be dropped, resulting in no significant settlement for the class, while cases that are certified usually proceed immediately to serious settlement negotiations.”).

164. For an example of such a split among the federal courts, see *Stinnett v. United States*, 891 F. Supp. 2d 858, 866 n.9 (M.D. Tenn. 2012) (noting courts are “split on whether state law medical malpractice certificate pleading requirements constitute (a) substantive state law that federal courts must enforce, or (b) procedural requirements that are trumped by the Federal Rules of Civil Procedure, particularly Rule 8.”).

165. 487 U.S. 22 (1988).

166. See *id.* at 24.

167. See *id.*

matter of Alabama contract law) or federal law (28 U.S.C. § 1404, the transfer of venue statute) applied. If federal law applied, the case would be litigated in New York; if state law applied, the litigation would stay where the case was filed, in Alabama. The Eleventh Circuit held that federal law applied and that the case should be transferred;<sup>168</sup> a result ultimately upheld by the Supreme Court.<sup>169</sup> But suppose that the defendant had been subject to personal jurisdiction in a number of circuits and those circuits had split on whether a state law antipathy to forum-selections clauses survives the contrary impulse of § 1404. A plaintiff, to whom avoiding a Manhattan forum was very important, would then have the opportunity to shop among federal courts to obtain favorable law on whether state or federal law applies, a multi-layered exercise in forum-shopping.

Or consider the requirement of some states that a medical malpractice complaint be accompanied by an affidavit of probable cause from a person qualified as an expert. There is a split on whether such requirements are applicable in diversity or whether Rule 8's short plain statement requirement displaces them.<sup>170</sup> Again assuming that the defendant is subject to personal jurisdiction in more than one circuit and that these circuits have split on this question, the plaintiff would have an opportunity to shop for a forum in the circuit which holds that Rule 8 does displace such state law requirements.<sup>171</sup> The possibility of such forum-shopping destabilizes the certainty and expectations that the parties otherwise could have enjoyed.

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168. See *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (en banc), *aff'd and remanded*, 487 U.S. 22 (1988).

169. See *Stewart*, 487 U.S. at 32.

170. See *Jones v. Corr. Med. Servs., Inc.*, 845 F. Supp. 2d 824, 853–54 & n.11 (W.D. Mich. 2012) (noting the split and collecting cases); Meryl J. Thomas, *The Merits of Procedure vs. Substance: Erie, Iqbal, and Affidavits of Merit As Medmal Reform*, 52 ARIZ. L. REV. 1135, 1137 (2010); Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 227 (2010); Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1298 (2010) (“[I]ndeterminacies in the application of law are costly: it is hard for people to act and plan when they do not know the precise legal consequences of their actions.”).

171. It is possible that each of the states from among which the plaintiff is shopping has such a statute. Alternatively, such a statute existing at the place the malpractice action arose could be regarded as substantive for horizontal (state-to-state) choice of law purposes—being designed to lower medical costs by reducing malpractice litigation—and thus, applicable even in actions filed in other state or federal courts.

### B. *Public Benefits to the Judicial System*

Declaring the displacing effect of a federal rule at the time of promulgation would also benefit the legal system. Uncertainty costs the courts as well as litigants. All litigation consumes resources. Since courts are funded by the public, litigation consumes not just private but public resources. The cost of litigation may be viewed as necessary to the functioning of a society governed by a rule of law. No one wants litigation, but it is both inevitable and preferable to the alternative of self-help. But litigation does not create new social wealth, it merely redistributes slices of the existing pie. For these reasons, the cost of litigation should be kept as low as possible consistent with the competing requirements of procedural fairness and accuracy of decision making.

Some litigation, however, is especially unproductive. Our system of justice requires us to sometimes litigate not about the merits of the case but about preliminary matters, such as pleading or jurisdiction. These are instances of litigation about litigation. As the Supreme Court said in the context of subject-matter jurisdiction, “[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful.”<sup>172</sup> Litigation over where litigation is to occur (i.e. jurisdiction) requires “the courts and the parties [to] expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case.”<sup>173</sup> The same is true of litigation about what procedures are to be used. The examples discussed above are examples of such unproductive litigation over litigation (forum-selection clauses or pleading). A system that could lessen the presentation of such questions would benefit the judicial system as a whole.

A second public cost of *Erie* uncertainty is interference with a state’s ability to implement its desired social policy. *Gasperini v. Center for Humanities, Inc.*,<sup>174</sup> illustrates the problem. As a part of tort reform, in 1986, New York enacted a new, more rigorous, standard for review of the size of jury verdicts. If the jury award “deviates materially from what would be reasonable compensation,” the appellate court was empowered to set aside the judgment.<sup>175</sup> Right or wrong, New York had decided that

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172. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 582 (2004).

173. *See United States v. Sisson*, 399 U.S. 267, 307 (1970).

174. 518 U.S. 415 (1996).

175. *See id.* at 423.

greater surveillance<sup>176</sup> of jury awards was necessary as a matter of policy.<sup>177</sup> Thus the “State’s objective [was] manifestly substantive.”<sup>178</sup> But that policy could easily be circumvented if a plaintiff in a diversity case could go to federal court and receive the benefit of the more forgiving *shock the conscience* test for reviewing the size of verdicts.<sup>179</sup> In the fullness of time, the Supreme Court decided that in diversity cases federal courts must indeed apply the *deviates materially* standard,<sup>180</sup> but this took about 10 years to work out. In the meantime, New York’s policy objectives—the very substantive one of lowering malpractice premiums<sup>181</sup>—suffered. The same harm to state interests can occur in other contexts when lower courts erroneously deny effect to state laws that eventually are deemed not displaced by federal rules.

### C. *The Process of Deciding the Erie Issue Would be Improved*

The *Hanna* wing of the *Erie* doctrine is currently beset by several thorny problems. Is the federal rule in question sufficiently broad to control the issue?<sup>182</sup> Is there a direct collision between the rule and state law?<sup>183</sup> Was it intended that the rule apply to the situation at all?<sup>184</sup> Is this latter question a matter of textual rule interpretation or do *Erie* policies, such as a regard for state substantive interests, play a role?<sup>185</sup> If the *Erie* issue of state law displacement were front-loaded into rule promulgation, this side of the *Erie* analytical machine would run much more smoothly.

Under our current *Erie* practice, when a federal rule is offered up against state law *Hanna* directs that the federal rule applies so long as it

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176. *See id.* at 424.

177. *See* Brief for Respondent, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (No. 95-719), 1996 WL 143322 at \*44, (characterizing the case as presenting “fundamental policy judgments by the state concerning the nature and extent of compensation available to injured persons. . .”).

178. *See Gasperini*, 518 U.S. at 429.

179. *See id.* at 422. The “shock the conscience” standard insulates a jury award from challenges to its size unless “the proceedings have been tainted by appeals to prejudice or if the verdict, in the light of the evidence, is so unreasonable that it would be unconscionable to permit it to stand.” *Wright & Miller et al.*, 11 FED. PRAC. & PROC. CIV. § 2807 (3d ed.).

180. *See id.* at 430. The New York standard “authorized much greater judicial control over the verdict” than the federal “shocks the conscience” standard. *Wright & Miller et al.*, 11 FED. PRAC. & PROC. § 2802 (3d ed.).

181. *See id.* at 423 n.3.

182. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

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

184. *See supra* notes 30–39 and accompanying text.

185. *See supra* notes 45–53 and accompanying text.



is pertinent (intended to govern the situation at hand)<sup>186</sup> and valid (within the grant of the Rules Enabling Act).<sup>187</sup> The validity check is all but meaningless. The Rules Enabling Act grants authority to the Supreme Court to “prescribe general rules of practice and procedure,” but provides that such “rules shall not abridge, enlarge or modify any substantive right.”<sup>188</sup> Under the prevailing test, first set out in *Sibbach v. Wilson & Co.*,<sup>189</sup> a rule is valid as within the Enabling Act if it really regulates procedure.<sup>190</sup> This test has been much criticized<sup>191</sup> and provides almost no restriction on the validity of a rule.<sup>192</sup> Its error is in assuming that procedure and substance are binary and mutually exclusive categories.<sup>193</sup> If a rule is procedural, it falls within the grant of power to prescribe rules of procedure and, it follows from this binary approach, the rule also does not transgress the prohibition of altering substantive rights.

The problem cases under *Hanna* are those in which an ostensibly pertinent federal rule is held to be nonapplicable in a diversity case. *Walker v. Armco Steel Corp.*<sup>194</sup> and *Gasperini v. Center for Humanities*,

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186. See Robert J. Condlin, “A Formstone of Our Federalism”: *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 508–09 (2005) (*Hanna* establishes that if there is “a Federal Rule . . . pertinent to the issue before the federal court . . . [t]he court must apply the Federal Rule.”).

187. See *supra* notes 13–16 and accompanying text.

188. 28 U.S.C. § 2072 (2012).

189. 312 U.S. 1, 14 (1941).

190. See *id.*

191. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 412–13 (2010) (Scalia, J.) (plurality opinion) (“*Sibbach*’s exclusive focus on the challenged Federal Rule . . . is hard to square with § 2072(b)’s terms”) *id.* at 422; Jeffrey O. Cooper, *Summary Judgment in the Shadow of Erie*, 43 AKRON L. REV. 1245, 1251 (2010) (referring to the “broad (and rather unhelpful) language of *Sibbach v. Wilson*”); Doernberg, *supra* note 15, at 1178 (“There is voluminous commentary on REA. Much of it criticizes *Sibbach* and the Court’s repetition of the *Sibbach* test in *Hanna*.”); The *Sibbach* test “is no test at all” but instead “little more than a statement that a matter is procedural if, by revelation, it is procedural.” Wright & Miller et al., 19 FED. PRAC. & PROC. JURIS. § 4509 (3d ed.); Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2297 (1998).

192. See Gregory Gelfand Howard, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 1005 (1988) (explaining the statutory limitation again abridging or enlarging substantive rights “was read to mean absolutely nothing.”).

193. See Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 37 (2008) (“When the original Rules Enabling Act was promulgated into law in 1934, many of its supporters believed that procedure and substance were indeed mutually exclusive”); *Sibbach* ignored “the possibility that a Rule could fairly be labeled procedural and at the same time abridge or modify substantive rights.” Ely, *supra* note 4, at 719.

194. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980) (quoting *Hanna v. Plumer*, 380 U.S. 460, 470 (1965)).

*Inc.*,<sup>195</sup> are examples. In such cases, “the Court minimized the damage of *Sibbach’s* wooden . . . interpretation of the Enabling Act primarily by interpreting Federal Rules not to govern the matter in issue.”<sup>196</sup> The federalism concern of interference with state substantive policy was attended to, despite *Sibbach* and *Hanna’s* categorical rigor, by “examining the state policy purpose underlying the law being displaced, and by using creative interpretive approaches to avoid applying particular Rules.”<sup>197</sup> But the problem with such an approach is its lack of predictability. There is a mismatch between the Court’s motive (protecting state interests) and its stated methods (interpreting a rule as being not intended to apply).<sup>198</sup> The Court does not reveal its inner analytical processes. Indeed, it has sometimes been affirmatively misleading<sup>199</sup> in its use of rule interpretation as a means of deciding rule applicability in diversity cases. One is left trying to psychoanalyze the Court, trying to deduce its inner mental life from its outer behavior. In short, the Court has been using the wrong tool for the job—using a rule intent and rule interpretation analysis—when it is really addressing the proper exercise of power under the Enabling Act. Reading the *Hanna* line of cases is like watching someone use a garden shear to slice a pizza (or trim a hedge with a pizza slicer). One can do it, but neither the process nor the end result is pleasing.

Were the rulemakers to opine on the displacement of state law, the *Erie-Hanna* analytical scheme would be much more straightforward. According to the caselaw, the displacement of state law by a federal rule turns on some conception of the drafters’ intent as to the applicability of the rule—rules intended to apply to the matter at hand trump state law under the Supremacy Clause.<sup>200</sup> This may be a quest for the actual historical intent of the drafters. More likely, the characterization of the drafters’ intent is shaped underlying *Erie* polices. Under this view, the

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195. 518 U.S. 415, 422–23 (1996); see *supra* note 40 for a discussion of *Gasperini*.

196. Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 31 (2010).

197. See Thomas, *supra* note 15, at 207.

198. See Rensberger, *supra* note 15, at 1603 (“[T]he only possible conclusion is that the Court is employing some canon of construction to decide not that a federal rule is invalid but instead that it was not intended to apply”).

199. See *Walker*, 446 U.S. at 750 n.9 (“[S]tating that the federal rules are not ‘to be narrowly construed in order to avoid a ‘direct collision’ with state law’ and that they should ‘be given their plain meaning.’”).

200. See *id.* at 750 (“[T]here is no indication that the Rule was intended” to apply to the matter at hand); Cf. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (pertaining to the federal procedural statute, if “Congress intended to reach the issue before the District Court . . . that is the end of the matter.”).

Supreme Court manipulates the intent inquiry to reach a result it finds conformable to its sense of the appropriate balance between state and federal law.<sup>201</sup> If we are concerned with actual intent, a statement from the drafters of the rule would seem dispositive.<sup>202</sup> Consider how Rule 3 would have been analyzed as an *Erie* issue in *Walker v. Armco Steel Corp.*<sup>203</sup> had the Advisory Committee stated in the notes that the rule was “intended to displace state law on tolling” or that it was not so intended. The *Erie* issue as the Court addressed it (analyzing the intent of the Rule) would have been effectively decided.

Even if the Court is, on the other hand, using a fictive construct of intent, that is in reality a product of analyzing the play of the *Erie* policies, such a statement from the drafters would still be hard to surmount. In the face of an Advisory Committee Note saying that the rule is intended to apply over state law in diversity cases, it is hard to see how the Court could say with any plausibility that the rule was not intended to apply. Of course, it may be that the Court *should be* deciding that a federal rule displaces state law only after engaging in an *Erie* policy analysis. If one takes that position, one might be troubled that the Court, being hemmed in by the Advisory Committee Notes, is left without the option of deeming a federal rule inapplicable as against state law. But there is a relief valve if the Court believes that a rule should not apply based on concerns of forum-shopping or interference with state substantive interests. The Court could find the rule invalid under the Enabling Act.

The scheme I am proposing would shift the Court’s supervision of the federal rules’ interaction with state law *from applicability to validity*. This would be a reversal of current practice in which validity is assured by a lax test and all the decision making on displacing state law is done under the heading of applicability. Forcing the Supreme Court to address *Erie* concerns at the level of validity would serve the ends of transparency. When the Court says, in a case like *Walker*, that a rule was not intended to apply, it really is thinking, I believe, that the rule should not apply in diversity cases because of *Erie* policies. It would be better for all of us—lawyers, judges, and academics—if the Court could speak the language of

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201. See *supra* notes 44–53 and accompanying text.

202. For a discussion of the role of the Advisory Committee Notes in interpreting the rules, see Catherine T. Struve, *supra* note 114, at 1152–69. Since under *Hanna* the question posed by the legal test is one of intent of the drafters, not the meaning of the words, presumably even Justice Scalia at his textualist apogee would agree to resort to the notes. Compare *Tome v. United States*, 513 U.S. 150, 167–68 (1995) (Scalia, J., concurring) (“[T]he promulgated Rule says what it says, regardless of the intent of its drafters.”).

203. See *Walker*, 446 U.S. at 750 (quoting *Hanna v. Plumer*, 380 U.S. 460, 470 (1965)).

its thoughts. It has made a tentative move in the direction of transparency by admitting that “Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies,”<sup>204</sup> but this still leaves all the heavy lifting on the side of interpretation, where it does not belong. We are left, for example, with Rule 3 being interpreted as not intended to apply to the question of tolling for statutes of limitations in diversity cases but being so intended in cases based on federal law.<sup>205</sup> This is needlessly inscrutable. It would be better for the rule drafters to say either that the rule is intended to apply only in federal question cases (and thus avoid the problem) or say that it is intended to apply to all cases, in which case the Supreme Court must decide whether such interference with state statutes of limitations violates the Enabling Act. When addressing that question, the Court in litigation might accord some deference—the mild *Skidmore* deference<sup>206</sup>—to the rulemakers’ analysis of a need to displace state law. But ultimately the matter of validity would be for the Court to decide.

Shifting the Court’s *Erie* supervision from applicability to validity would require overruling *Sibbach* and *Hanna*. The court would be unable to protect state interests or limit forum-shopping if it retained the low bar of validity set out in *Sibbach*. But the departure of *Sibbach* would be lamented by few and pleasing to many.<sup>207</sup> In *Shady Grove*, Justice Stevens moved in the direction I am proposing. After explaining the first step of deciding the scope of the rule,<sup>208</sup> Justice Stevens moved to the validity step. If the rule “appears to abridge, enlarge, or modify a substantive right,” a court should “consider whether the rule can reasonably be interpreted to avoid that impermissible result.”<sup>209</sup> But if such an interpretation is not reasonably available “and the rule would violate the Enabling Act, federal courts cannot apply the rule.”<sup>210</sup> And to be valid, federal rules must not only satisfy the first part of the Enabling Act (they must regulate procedure) they also must not violate its second limitation (not altering substantive rights). The error of *Sibbach*, Justice Stevens said, is that “it ignores the second limitation that such rules also ‘not

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204. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

205. See *supra* notes 38–39 and accompanying text.

206. See *supra* notes 102–08 and accompanying text.

207. See *supra* notes 191–93 and accompanying text.

208. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 421 (2010) (Stevens, J., concurring) (“The court must first determine whether the scope of the federal rule is ‘sufficiently broad’ to ‘control the issue’ before the court . . .”).

209. See *id.* at 422–23.

210. See *id.* at 423.

abridge, enlarge or modify any substantive right.”<sup>211</sup> Thus a federal rule is invalid if it “would displace a state law that is . . . so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”<sup>212</sup>

Having the rulemakers offer preemption statements would completely eliminate some *Erie-Hanna* problems. If the Advisory Committee truly did not intend to displace state law, it could say so in its notes. Even better, if it wants to assure the satisfaction of textualists, it could put the non-displacement in the rule itself.<sup>213</sup> In fact, the drafters have done this on occasion; relation back of amended pleadings under Federal Rule 15 is proper if the test set forth in rule 15(c) is satisfied or when “the law that provides the applicable statute of limitations allows relation back.”<sup>214</sup> Thus in a diversity case, where state law provides the statute of limitations, if relation back is permitted by state law it is also allowed under Rule 15, even if the test otherwise set forth in Rule 15 is not satisfied. There is no *Erie* issue under a federal rule such as this. The rule drafters have taken it off the table by saying that the federal standard need not be satisfied if the state standard is. A similar example is found in Federal Rule of Evidence 50; it provides that “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”<sup>215</sup> The drafters of Rule 501 directly addressed the decision not to displace state law: “The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason.”<sup>216</sup>

The Advisory Committee could have made similar statements for Rule 3 on the tolling of the statute of limitations. Had Rule 3 (or its notes) said that the Rule was not intended to be used for tolling a state statute of limitations, the Court would not have needed to decide *Walker* and *Ragan*. There is a parallel to the elimination of possible preemption in administrative law. As noted above, agency statements of preemption are given some weight by the Court.<sup>217</sup> But when an agency states an opinion of *no preemption*, that is decisive. The court will lock in the agency non-preemption opinion under *Chevron* deference.<sup>218</sup>

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211. *Id.* at 424.

212. *See id.* at 423.

213. *See supra* note 202 & accompanying text.

214. FED. R. CIV. P. 15.

215. FED. R. EVID. 501.

216. FED. R. EVID. 501 (advisory committee’s notes to 1974 enactment).

217. *See supra* notes 101–08 and accompanying text.

218. *See Funk, supra* note 86, at 1253.

Finally, any concern that such scheme would lead to overreach by the Advisory Committee or the Supreme Court is alleviated by the review Congress provides. Although seldom exercised,<sup>219</sup> Congress does have the power to decline to adopt a proposed rule.<sup>220</sup> Congress used this power to reject and alter proposed Federal Rules of Evidence. It acted out of a concern that proposed rules on privilege “were likely to have an effect on the substantive rights of individual citizens”<sup>221</sup> and that “the proposed Rules were too substantive to be promulgated by the Court and . . . violated the federalism principles set out in *Erie*.”<sup>222</sup> Congress can similarly police the Federal Rules of Civil Procedure for federalism concerns. Indeed, having the Advisory Committee comment on the displacement of state law and having the Supreme Court in litigated cases transparently address validity issues rather than hide behind a smokescreen of rule interpretation would aid Congress in overseeing the creation of the rules.

The most difficult problem with having the Advisory Committee make preemption (or non-preemption) statements is that federal rules do not operate in opposition to a uniform body of state law. Each state’s law is potentially different. One argument for not displacing state law is concern that the state law in question is tied up with substantive rights. But one conflicting state law may have substantive motivations, and another may not. For example, in *Shady Grove Orthopedic Associates*,

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When an agency expresses an opinion that a regulation does not have preemptive effect, courts are much more likely to afford *Chevron* deference to that opinion. For example, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, although Congress had not explicitly provided the FDA with any authority to make preemption determinations regarding the federal regulation of biological products, the Court gave *Chevron* deference to the agency’s statement in the preamble that the regulation would not preempt state law. Thus, there is an asymmetry between judicial consideration of an agency’s opinion that a statute or regulation does preempt state law and an agency’s opinion that a statute or regulation does not preempt state law.

219. For a discussion of Congressional rejections of proposed rules, see Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1053–60 (1993).

220. See 28 U.S.C. § 2074 (2012):

[T]he Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

221. Alan Nichols, *Gatekeeping the Gatekeeper: Judicial Rulemaking Authority in Several States*, 48 U. TOL. L. REV. 585, 607 (2017); see also David P. Leonard, *Introduction*, 38 LOY. L.A. L. REV. 515, 515–16 (2004) (“[T]he issue of privileges became contentious when Congress took up the proposed rules, and threatened to sink the entire enterprise of codifying federal evidence law.”).

222. See Kelleher, *supra* note 99, at 55.

*P.A. v. Allstate Insurance Co.*<sup>223</sup> the Court considered the interplay between Federal Rule 23, which sets out the criteria for class actions, and a New York state law that forbade class action treatment of actions based on a statutory penalty.<sup>224</sup> There was a cogent argument, cogent enough to convince four Justices in dissent, that this state law was based on a “a manifestly substantive end” of “[l]imiting a defendant’s liability in a single lawsuit in order to prevent the exorbitant inflation of penalties. . . .”<sup>225</sup> But other state laws might have standards for class certification varying from Rule 23 only for procedural reasons. As Justice Scalia recognized, Justice Ginsburg’s position would result in the Rule being “valid in some jurisdictions and invalid in others . . . depending upon whether its effect is to frustrate a state substantive.”<sup>226</sup>

How can the rulemakers consider whether a federal rule should displace state law when state law is varied? Whether to displace is a state-law-by-state-law question.<sup>227</sup> One cannot decide that all of (or none of) the state laws that parallel a federal rule are displaced.<sup>228</sup> The Advisory Committee needs before it, it would appear, a particular state law in order to assess the federal rule. But I believe such concerns are surmountable. In considering Rule 23 on class actions, for example, the rulemakers could certainly imagine state laws like the one in *Shady Grove* that are substantive in that they intend to reduce litigation and create a more favorable business environment. Armed with that imagination, they might address preemption of state laws that fall within that class. Or consider a federal rule amendment recently adopted and transmitted to Congress that prohibits payment “in connection with . . . forgoing or withdrawing an objection” to a proposed class action settlement absent court approval.<sup>229</sup> Since the proposed Rule would seem to make void a contractual agreement, it does not take great imagination to see that this provision could perhaps impact some substantive state interests. To be clear, I doubt that a state would have a *substantive* policy protecting payments for

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223. 559 U.S. 393 (2010).

224. *See id.* at 396.

225. *See id.* at 445 (Ginsburg, J., dissenting).

226. *See id.* at 409.

227. *See Rensberger, supra* note 15, at 1637 (arguing the *Erie* question requires a state-by-state approach).

228. *See* Roosevelt III, *supra* note 3, at 38 (“*Hanna*’s invocation of the Advisory Committee, Congress, and the Court begs the question. None of those entities is in a position to decide whether applying the rule in a particular case will modify a substantive right, for the obvious reason that they have no way to foresee that case.”).

229. *See* 324 F.R.D. 904, 908 (April 26, 2018) (proposed amendment to Rule 23(e)(5)(B)).

withdrawing objections, but given the nature of the federal rule, one can see the need to think about it. Or consider the current version of Rule 15(c) on relation back. It provides a federal test for relation back and also provides that relation back is additionally allowed if it is permitted by “the law that provides the applicable statute of limitations.”<sup>230</sup> But what if state law in a diversity *forbids* relation back while the federal standard would allow it. This is an obvious and foreseeable *Erie* issue.<sup>231</sup> Why not address the rulemakers’ intent about displacing state law in the Rule or its commentary?

Contrast the foregoing with the currently proposed amendments to Rule 5, which address electronic service of process by using a court’s electronic-filing system.<sup>232</sup> It can scarce be imagined that this rule would not displace state law. State substantive interests would not be implicated by this rule, nor would it induce forum-shopping. Moreover, in non-*Erie* (i.e. substantive) preemption cases, it is not unusual for Congress to write a preemption clause that preempts only some state laws, depending upon their content.<sup>233</sup> Thus, rulemakers in other contexts have shown an ability to make tailored, state-by-state preemption expressions.

Finally, it must be admitted, my proposal to use the Rules Enabling Act’s prohibition of affecting substantive rights as a check on state law displacement is ahistorical. It has been persuasively demonstrated that this prohibition was meant to restrict the Supreme Court as a rulemaker as against Congress, not the states.<sup>234</sup> But the current scheme under *Sibbach*

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230. See FED. R. CIV. P. 15(c).

231. There is, in fact, a caselaw split on this issue. See Wright & Miller, et al., 6A FED. PRAC. & PROC. CIV. § 1503 (3d ed.) (“When the federal rule is more liberal than the state rule, the clear weight of authority is that Rule 15(c) governs, although there are some cases to the contrary.”).

232. See 324 F.R.D. 904 (proposed Rule 5(b)(2)(E)).

233. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 500 (1996) (“[Federal preemption provisions] require a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations.”).

234. For the major work on this point see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (“[T]he procedure/substance dichotomy in the [Rules Enabling Act] was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress”) *Id.* at 1106. (“[T]he preservation of state law, as such, was not a primary concern when the [Enabling] Act was formulated. . . .”) *Id.* at 1109; see also Redish & Murashko, *supra* note 196, at 56 (explaining that the extensive research of Professor Burbank convincingly revealed that the Enabling Act’s restrictions were an attempt to allocate power between Congress and the Supreme Court); Kelleher, *supra* note 99, at 92 (explaining the “myth” that “in limiting the Court’s rulemaking authority in the Rules Enabling Act, Congress was primarily concerned with preventing the inappropriate displacement of state substantive law by a Federal Rule was exploded by Professor Burbank.”); Carrington, *supra* note 99, at 283 (“The concern expressed in Congress was that an expansive reading might be given to the statutory term ‘procedure’ to enable a court rule to override political decisions made by Congress.”).



and *Hanna* is equally to be faulted as atextual, ignoring the substantive limitation in the Enabling Act.<sup>235</sup> The suggested approach has, if nothing else, the virtue of making our garbled law easier to apply. It fails to rebuild the tangled roadway of *Erie*, but it offers the hope of marking the lanes a little more clearly.

#### D. *What Entity Should Make Preemption Statements?*

Thus far, I have not addressed the issue of who would make preemption statements. If one concludes that the *Erie* apparatus (on the *Hanna* side) would run better if statements about displacement of state law were made at the point of promulgation, the next question is what entity should make such a statement, the Supreme Court as the transmitter of the rules to Congress or the Judicial Conference's rulemaking apparatus (the Advisory Committee or the Standing Committee). For a variety of reasons, I believe that the Supreme Court should not be announcer of state law displacement. Rather, the Advisory Committee, if anyone, should.

First, as noted above, there is no tradition of comment on the rules by the Supreme Court.<sup>236</sup> The absence of a prior practice by the Court does not make impossible the creation of a future one, but it is suggestive. The best indicator of the future is often the past. Why the court has not commented cannot be known. But one can imagine several plausible reasons. Collectively these arguments from past practice counsel against a change.

First, the court may feel limited in its competence. Justice White spoke to this issue in 1993. Based on the observation that the Court "hardly ever refused to transmit the rules submitted by the Judicial Conference and . . . that . . . it has been quite rare for any Justice to dissent," he concluded that "a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process."<sup>237</sup> He agreed with prior statements of Justice Douglas that given the expertise of the Judicial Conference and Advisory Committees, Congress should bypass the Court altogether and simply receive proposed rules from the Conference.<sup>238</sup> Even though Congress did not do so, Justice White concluded that Congress did not intend for the Court to "provide another layer of review

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235. See *supra* notes 189–93 and accompanying text.

236. See *supra* notes 109–113 and accompanying text.

237. See 146 F.R.D. 401, 502–503.

238. See *id.* at 503.

equivalent to that of the . . . Judicial Conference.”<sup>239</sup> He based this view on the impracticalities of such an in-depth review—the inordinate amount of time it would demand of the Court—and the fact that the judges and lawyers who comprise the Judicial Conference and Advisory Committees “are in a far better position to make a practical judgment upon [the proposed rules’] utility or inutility than we.”<sup>240</sup> Thus, “the Court’s role . . . is to transmit the Judicial Conference’s recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity.”<sup>241</sup>

This concern of consuming the scarce time of the Court has some, albeit limited, validity in this context. The competence concern is less compelling. Taking the latter first, the proposed role of the Court here is not to pass upon the merits of a rule—its utility or inutility—but as to how it operates as against state law. This *Erie* question is not one upon which lower court judges or practicing lawyers have any special expertise. Whether a federal rule should preempt state law is not a question that one becomes more capable of answering by trying cases. Thus, the only real impediment here is time, and that is not to be discounted. Although the productivity of the Court as measured by signed opinions has fallen greatly over the last several decades,<sup>242</sup> the number of pages per opinion has increased. The median word count in opinions has increased “from 2000 words in the late 1950s, to over 8200 by 2009.”<sup>243</sup> Likewise, the number of certiorari petitions has increased.<sup>244</sup> Nonetheless, the days are long gone when the Chief Justice was speaking publicly of a caseload

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239. *See id.* at 504.

240. *See id.*

241. *See id.* at 505.

242. *See* Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 567 (2018) (“[The] Supreme Court only hears about seventy-five cases a year, which is less than one percent of all cases in state and federal courts.”); Glenn Harlan Reynolds, *Looking Ahead: October Term 2016*, CATO SUP. CT. REV. 313, 326 (2015-2016); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006) (providing numbers showing that “the number of cases coming before the Supreme Court grew steadily since 1925, while the number of cases the Court decides has been in steady decline.”).

243. *See* Michael Gentithes, *Check the Invitation: The Trouble with Appeals Invited by Supreme Court Justices*, 82 MO. L. REV. 339, 353 (2017).

244. *See* The Supreme Court, *The Supreme Court at Work*, SUPREMECOURT.GOV <https://www.supremecourt.gov/about/courtatwork.aspx> [<https://perma.cc/HUN5-SFAZ>]:

Each Term, approximately 7,000-8,000 new cases are filed in the Supreme Court. This is a substantially larger volume of cases than was presented to the Court in the last century. In the 1950 Term, for example, the Court received only 1,195 new cases, and even as recently as the 1975 Term it received only 3,940.

crisis<sup>245</sup> or the Federal Judicial Center's Study Group on the Supreme Court's caseload opined that the Court's volume of work prevented "the conditions essential for the performance of the Court's mission . . . [and] the appropriate fulfillment of [the court's] historic and essential functions."<sup>246</sup> But even in this new age of a Court with fewer opinions the proposal would add a significant new burden to the Court, not unlike adding several *Erie* cases to its docket with each set of amendments to the federal rules.

Of even greater concern to me is the relatively poor institutional infrastructure of the Court to render informed decisions in a rulemaking context. The question of whether a federal rule should displace state law would come before the Court with no briefing, no appellate argument, and no adversarial presentation. Those are the informational inputs the Court customarily relies upon. It does not have mechanisms in place to take testimony, commission studies, or consult experts. It is not a legislature by constitutional role and consequently has not built up the framework to operate as one. The Judicial Conference, the Standing Committee on Rules, and the Advisory Committees are much broader institutions, having more participants from more backgrounds. The Civil Rules Advisory Committee, for example, in 2017, had 17 members made up of seven district court judges, one circuit court judge, a justice of a state supreme court, three law professors, four practitioners, and a representative from the Justice Department.<sup>247</sup> The Standing Committee has 19 members and has as similarly diverse membership.<sup>248</sup>

Finally, the Supreme Court operates as a reviewing court. Having it articulate the preemptive effect of federal rules upon state law would give it both the first and the last word on the matter. If preemption statements were made by the Judicial Conference or the Advisory Committee, in contrast, the Supreme Court would be available for later review and correction. It could reject the preemption analysis of those bodies by refusing to transmit a rule. Or, as suggested above, it could in litigation—where it has all the informational inputs it is accustomed to operate with—find a rule invalid as intruding upon substantive rights. Thus, it would be

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245. See David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 782 (1997).

246. See Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 581 (1972).

247. See *Committees on Rules of Practice and Procedure Chairs and Reporters*, USCOURTS.GOV (Oct. 1, 2016), [http://www.uscourts.gov/sites/default/files/2016\\_committee\\_roster\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016_committee_roster_0.pdf) [https://perma.cc/S3MG-G639].

248. See *id.*

more sensible, were this proposal to be adopted at all, for the Advisory Committee to make the preemption statement. As noted above, they have the institutional structure capable of making such a judgment. They can study and debate an issue in the abstract. Indeed, that is exactly what they do in drafting the rules.

On the other hand, there is once again the counsel of history. As shown above,<sup>249</sup> the Advisory Committee has generally refrained from opining on the displacement of state law by a federal rule. In the clearest example of addressing the issue, the Advisory Committee backed away from making a pronouncement, stating that the matter would be better decided in a judicial decision in a litigated case.<sup>250</sup> At first blush, this restraint makes little sense. Under the *Hanna* orthodoxy, once the low hurdle of validity is cleared, the only further barrier to a federal rule displacing state law is intent. Was the rule intended to reach the issue?<sup>251</sup> State law applies if there is no indication that the rule was intended to apply.<sup>252</sup> If it were truly a matter of intent, then we could and should have guidance on intent from the Advisory Committee. The Advisory Committee, by declining to shoulder this responsibly over the years, suggests perhaps that they know the mechanistic *Hanna* formula (intent + validity = federal law applies) is an oversimplification. Moreover, the expressed preference in the comments to the 1946 amendments to Rule 23 for the *Erie* question of state law displacement to be made in litigation, not *ex parte*, reveals an attitude about the judicial role (or roles).

Whether the Advisory Committee opines on the *Erie* question or the federal courts and the Supreme Court do so later in litigation, the decision on *Erie* will have been made by a federal judge.<sup>253</sup> The only difference is whether the judges are speaking as judges in litigation or as rulemakers (in an administrative capacity). There are good reasons for thinking that this *Erie* question as to *validity* should be left to litigation.<sup>254</sup> But none of this explains why the rulemakers cannot *remove* a potential *Erie* problem by disavowing a preemptive intent. And it does not explain why the rulemakers cannot as a matter of policy choose to attempt to override state

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249. FED. R. CIV. P. 23 (advisory committee's note to 1946 amendment).

250. *Id.*

251. *See* *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988).

252. *See* *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980).

253. While federal judges compose the vast majority of the persons involved in making the federal rules, others—law professors and lawyers—are also involved. *See supra* note 247.

254. I have argued elsewhere that because parties receive greater protections in litigation than in agency rulemaking, the courts should not defer to Advisory Committee's decisions on the validity of a federal rule. *See* Jeffrey L. Rensberger, *Of Hats and Robes: Judicial Review of Nonadjudicative Article III Functions*, 53 U. RICH. L. REV. 623 (2019)

law in the pursuit of federal interests, an assessment of rule efficiency or fairness, or other federal policies.

## V. CONCLUSION

The current structure of our analysis of the *Erie* issue in the context of a federal rule delays consideration of the displacement of state law until litigation, long after the rule has been drafted and adopted. But we need not have such a system. The Advisory Committee could, similarly to administrative agencies, state in commentary or in the text of a rule whether the rule is intended to displace parallel or conflicting state law in diversity cases. Entire *Erie* issues can be avoided by the rulemakers' forswearing an intent to displace state law. When, on the other hand, the rulemakers desire to displace state law, the federal courts in litigation, and in particular the Supreme Court, can act as a check on undue imposition upon the states by providing a meaningful enforcement of the limitations of the Rules Enabling Act. That is, if the Supreme Court believes that a rule unduly infringes on state substantive policies, it should declare the rule invalid rather than (as it currently does) declare the rule valid but inapplicable as not intended to apply. Such an approach would make this wing of the *Erie* doctrine much more comprehensible and predictable.