NOTES

ERIE AND THE FIRST AMENDMENT: STATE ANTI-SLAPP LAWS IN FEDERAL COURT AFTER *SHADY GROVE*

*Colin Quinlan**

An increasing number of states have passed laws aimed at preventing the costs of litigation from burdening legitimate petitioning activity. These laws frequently include procedural protections, such as a special motion to dismiss. When state law claims are instead brought in federal court, these laws and their procedural protections implicate the Erie *doctrine and the Rules of Decision Act, which has led some federal courts not to apply these laws, or to apply them only in part. This Note concludes that federal courts, interpreting the Rules Enabling Act consistent with principles of federalism and the First Amendment, should apply in full state laws protecting the right to petition the government.*

INTRODUCTION

When citizens petition their government or engage in public debate, such activity embodies the ideal of participatory self-government at the heart of the First Amendment. Certain lawsuits—often called "strategic lawsuits against public participation," or "SLAPPs"[1]—not only impose burdens on the First Amendment rights of their targets,[2] but also threaten to chill citizen participation in government.[3]

States have enacted anti-SLAPP legislation to strike a balance between the need for robust protection of First Amendment rights and the

* J.D. Candidate 2014, Columbia Law School.

1. Professors George W. Pring and Penelope Canan coined the term "SLAPP" while collaborating on the Political Litigation Project at the University of Denver. George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 2–3 (1996) [hereinafter Pring & Canan, SLAPPs]; see also George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders, 12 U. Bridgeport L. Rev. 937, 939 n.3 (1992) [hereinafter Pring & Canan, Introduction] (collecting citations to publications of Pring and Canan's University of Denver Political Litigation Project relating to SLAPPs).

2. This Note follows Pring and Canan's terminology by referring to relevant parties as SLAPP "filers" and "targets" rather than "plaintiffs" and "defendants." While SLAPP filers are often plaintiffs, a defendant's counterclaim qualifies as a SLAPP if it burdens a plaintiff's attempt to bring a legitimate suit to procure government action or force a change in policy. Pring & Canan, SLAPPs, supra note 1, at 87.

3. See id. at 8 ("[SLAPPs] happen when people participate in government, and they effectively reduce future public participation. . . . [B]oth the cause and effect . . . should concern us.").

interest in remedying private injuries under state tort law.[4] By protecting citizens not only from the threat of liability but also from the burdens of protracted litigation, anti-SLAPP laws have the potential to minimize the time SLAPP targets must self-censor, alleviate the pressure on targets to settle meritless claims, and mitigate the chill on all citizens' legitimate petitioning activity.[5]

Most anti-SLAPP laws rely on procedural mechanisms to protect substantive rights and thus pose a quandary for federal courts hearing state law claims: On the one hand, under *Erie Railroad Co. v. Tompkins*, federal courts must apply the rules of decision defined by state law;[6] on the other hand, the Federal Rules of Civil Procedure ("Federal Rules" or "Rules") apply to "all civil actions and proceedings" in federal court.[7] In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[8] a fractured Supreme Court articulated different approaches for resolving a conflict between a Federal Rule and state law.[9] While five Justices voted to apply the Federal Rule and displace the state law at issue, no single opinion was supported in full by a majority of the Justices. Moreover, five members of the Court—Justice Stevens in concurrence and the four Justices in dissent—agreed that a state law could be "procedural" and yet so important in defining the scope of substantive rights that the Federal Rules could not displace it.[10] The division among the Justices in *Shady Grove* has led to differing evaluations of the opinions' precedential

---

4. A majority of states, the District of Columbia, and the territory of Guam have such laws; a few other states have similar protections by virtue of judicial decisions. This Note will generally refer to such protections for legitimate petitioning activity as "anti-SLAPP laws," whether adopted by legislature or judiciary. See infra note 52 (collecting statutes); see also infra notes 46–50 and accompanying text (discussing handling of SLAPPs by state high courts).

5. Throughout this Note, "legitimate petitioning activity" refers to First Amendment activity that seeks to influence public officials or force the government to act—whether in the form of a formal petition, a public interest lawsuit, or political advocacy. Such activity receives strong protection from liability under First Amendment doctrine and is generally immune from suit under state anti-SLAPP statutes.

6. 304 U.S. 64, 78 (1938); see also Rules of Decision Act, 28 U.S.C. § 1652 (2012) (stating state law governs rules of decision for civil actions in federal court in cases where such law applies). See infra Part I.B for a discussion of *Erie* and its progeny.

7. Fed. R. Civ. P. 1. The Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Supreme Court "to prescribe general rules of practice and procedure" for federal courts, id. § 2072(a), subject to the prohibition that they not "abridge, enlarge or modify any substantive right," id. § 2072(b). Conflicts between state law and the Federal Rules are analyzed under the Enabling Act rather than the Rules of Decision Act. See infra Part I.B.2 (discussing framework of *Hanna v. Plumer*).

8. 130 S. Ct. 1431 (2010).

9. See infra Part II.B (discussing *Shady Grove*).

10. See infra notes 119–120 and accompanying text (arguing Justice Stevens's concurrence has precedential value to extent its approach is supported by four Justices who dissented in *Shady Grove*).

value,[11] which in turn has led to differential treatment of state anti-SLAPP laws.[12]

This Note analyzes the treatment of state anti-SLAPP laws in federal court in light of *Shady Grove* and offers two complementary arguments in support of their application by federal courts: first, that state anti-SLAPP laws should not be deemed to conflict with the Federal Rules of Civil Procedure; and second, that even nominally procedural provisions of state anti-SLAPP laws should be applied in federal court because they are—in the language of Justice Stevens's concurrence—"so bound up" with state-created rights and remedies that they "define[] [their] scope."[13] Part I discusses SLAPPs and anti-SLAPP laws, and surveys *Erie* doctrine cases relevant to analyzing conflicts between state law and the Federal Rules. Part II discusses the treatment of anti-SLAPP laws in federal court before *Shady Grove*, examines *Shady Grove* itself, and reviews federal court decisions since *Shady Grove* that have considered the application of state anti-SLAPP laws. Part III argues that federal courts should apply state anti-SLAPP laws, then briefly discusses possible federal legislation that could broaden protection against SLAPPs. This Note concludes by urging federal courts to seize the opportunity presented by the Court's decision in *Shady Grove* to apply anti-SLAPP laws in full, thereby vindicating not only the federalism principles underlying the *Erie* doctrine, but also the mutual state and federal interest in preserving necessary breathing space for public participation in government.

I. ANTI-SLAPP LAWS AND THE *ERIE* DOCTRINE

This Part introduces anti-SLAPP laws and considers how federal courts analyzed conflicts between state law and the Federal Rules before *Shady Grove*. Part I.A discusses SLAPPs and anti-SLAPP laws. Part I.B surveys the *Erie* doctrine, including decisions laying out the framework for determining when the Federal Rules displace state law.

A. *SLAPPs and Anti-SLAPP Laws*

Professors Pring and Canan coined the term "SLAPP" to bring attention to a particular kind of litigation: lawsuits targeting the exercise of rights protected by the Petition Clause of the First Amendment.[14] When SLAPP filers recast their targets' petitioning activity in terms of legal in-

---

11. For an overview of judicial and scholarly appraisals of *Shady Grove*'s precedential value, see infra Part II.B.2.

12. See infra Part II.C (comparing federal courts' approaches to anti-SLAPP laws since *Shady Grove*).

13. *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring in part and concurring in the judgment).

14. Pring & Canan, SLAPPs, supra note 1, at 2–3; see also U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

jury, they transform "a public, political controversy into a private, legalistic one."[15] The burden of such litigation inhibits the exercise of First Amendment rights, because even targets who persevere and eventually prevail on the merits must spend substantial time and money to do so, and the experience deters them from speaking out in the future.[16] Worse yet, Pring and Canan found that targets who fail to secure swift dismissal of a SLAPP frequently decide to settle in order to avoid the expense and uncertainty of litigation, and such settlements invariably require targets to stop their political opposition.[17]

SLAPPs occur in diverse areas of public activity: from criticism of public officials to advocacy for environmental protection, animal rights, and consumer protection.[18] The nature of the targeted activity is rarely identified on the face of the complaint and can be as innocuous as circulating petitions or being a named party in a public-interest lawsuit.[19] Rather, such claims "come 'camouflaged' as" any number of an array of different civil tort claims, including defamation, tortious interference with business expectations—even claims of unlawful discrimination—which "contributes to many parties', attorneys', and judges' inability to recognize them and handle them appropriately."[20]

Pring and Canan have identified several predispositions that lead courts to unwittingly enable SLAPPs to succeed.[21] The most important of these is the "fact quagmire": a legal standard—such as the "actual malice" standard governing liability for defamation of public figures[22]—that re-

15. Pring & Canan, SLAPPs, supra note 1, at 149.

16. See id. at 29 ("Filers seldom win a legal victory—the normal litigation goal—yet often achieve their goals in the real world. Targets rarely lose court judgments, and yet many are devastated, drop their political involvement, and swear never again to take part in American political life."); see also Victor J. Cosentino, Comment, Strategic Lawsuits Against Public Participation: An Analysis of the Solutions, 27 Cal. W. L. Rev. 399, 408 (1991) (referring to "chilling effect" as "the most insidious and perhaps the most damaging aspect of SLAPPs" because it "reduces the odds that other citizens will become activists . . . reducing public participation, and in turn, reducing the effectiveness of our representational form of government"). But see Joseph W. Beatty, Note, The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!," 9 U. Fla. J.L. & Pub. Pol'y 85, 90–91 (1997) (questioning Pring and Canan's methodology and conclusions regarding chilling effect of litigation labeled as "SLAPP" suits).

17. Pring & Canan, SLAPPs, supra note 1, at 166. Settlement is "a complete victory for filers" because they have "succeeded in punishing past opposition, preventing future opposition, and insulating [themselves] from retaliation—all without risking a bad court outcome, bad publicity, or a bad precedent." Id.

18. Pring & Canan, Introduction, supra note 1, at 947.

19. Id. at 938.

20. Id. at 947.

21. Pring & Canan, SLAPPs, supra note 1, at 158–61.

22. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring public officials bringing libel claim to prove defamatory statement was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); see also Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657,

quires resolution of a subjective issue of fact, leading to claims that are "very easy to allege" yet "very difficult to prove *or disprove*."[23] Even when such standards are themselves intended to protect First Amendment values by making claims harder to establish, they can be self-defeating, because it is "extremely difficult for defendants (press or petitioners) to win pretrial dismissal, stop the chill, and protect their constitutional rights."[24]

State anti-SLAPP statutes[25] provide a detailed framework under which courts can—indeed, must—analyze putative SLAPP claims and dismiss those claims that are found to target protected activity. Yet even before the first anti-SLAPP statute was passed, federal and state courts had already begun to recognize some of the problems posed by lawsuits targeting legitimate petitioning activity. For example, the first procedural protection against SLAPPs was adopted by the Colorado Supreme Court.[26] Yet the inspiration for that decision, and for anti-SLAPP laws generally, can be found in an antitrust doctrine created by the Supreme Court of the United States.

1. *The Petition Clause and the* Noerr-Pennington *Doctrine.* — The Supreme Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights,"[27] implicit in "[t]he very idea of a government, republican in form."[28] Yet, in *McDonald v. Smith*—a case decided under the Petition Clause—the Court allowed a defamation suit to proceed against a citizen who wrote letters to government officials opposing the appointment of a candidate for U.S. Attorney.[29] Such communications are classic petitioning activity, and yet

---

659 (1989) (noting *New York Times* standard also applies to statements about "public figures" (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in the result))).

23. Pring & Canan, SLAPPs, supra note 1, at 23 (emphasis added). Subjective issues of fact—generally requiring evidence regarding a target's state of mind—allow filers to argue that there is a disputed factual issue that should prevent their suit from being dismissed. Cf. id. at 161 ("Even if the filer has no interest in trial, the fact quagmire is still an attractive chill-prolonging tactic."). Thus Pring and Canan argue that effective anti-SLAPP laws must provide for immunity to be determined early in the litigation by reference to objective criteria. See id. at 189 ("[An anti-SLAPP law] must set out an effective early review for filed SLAPPs, shifting the burden of proof to the filer . . . .").

24. Id. at 23.

25. See infra Part I.A.3 (discussing anti-SLAPP legislation).

26. See infra note 50 and accompanying text (discussing Colorado Supreme Court's *POME* decision); see also Pring & Canan, SLAPPs, supra note 1, at 42–43 (discussing *POME* approvingly).

27. United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

28. United States v. Cruikshank, 92 U.S. 542, 552 (1876); see also, e.g., Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495 (2011) ("The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . .").

29. 472 U.S. 479, 480–82 (1985). The activity at issue in *McDonald* is similar to that in the earliest reported SLAPP suit: In 1802, the Vermont Supreme Court overturned a jury verdict against citizens who made defamatory comments in a petition to the Vermont

the Court held that the citizen was entitled to no greater protection than that offered by the "actual malice" standard first articulated in *New York Times Co. v. Sullivan*.[30] Thus *McDonald* imposed heavy litigation burdens on defendants accused of defamation for communicating their opinions to public officials, despite the high value placed on such citizen communication.[31] Though a recent Supreme Court decision appears to have limited *McDonald* to its facts,[32] the potential burden on defendants created by applying the "actual malice" standard to citizen communications has not yet been eliminated.

The Supreme Court has been far more protective of legitimate petitioning activity in cases decided under the *Noerr-Pennington* doctrine.[33] In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court held that the "mere solicitation of governmental action with respect to

---

legislature opposing the plaintiff's reappointment. Harris v. Huntington, 2 Tyl. 129, 146 (Vt. 1802). The court held that it was "indispensible" that citizens petitioning the government be granted "absolute and unqualified" immunity from suit; not only would it "be an absurd mockery" for a government to grant the right to petition and then punish its exercise, but "it would be equally destructive" for courts to allow "actions of defamation grounded on such petitions." Id. at 139–40.

30. See *McDonald*, 472 U.S. at 485 (1985) ("First Amendment rights are inseparable and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." (citing Thomas v. Collins, 323 U.S. 516, 530 (1945))). But see *Guarnieri*, 131 S. Ct. at 2494–95 ("This Court has said that the right to speak and the right to petition are 'cognate rights.' . . . [But the] rights of speech and petition are 'not identical.'" (quoting *Thomas*, 323 U.S. at 530)).

31. Pring and Canan criticize this approach to the right to petition for ignoring two considerations: "First, to be competent, government needs all the input it can get; second, if it is competent, government can sort the wheat from the chaff without the help of court censorship." Pring & Canan, SLAPPs, supra note 1, at 23–24. See generally id. at 16–19 & n.20 (discussing history and theory behind protections for right to petition).

For further discussion of how application of the subjective "actual malice" standard threatens targets' continued right to petition by preventing speedy dismissal of groundless claims, see Thomas A. Waldman, SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation, 39 UCLA L. Rev. 979, 1016–18 (1992).

32. In *Borough of Duryea v. Guarnieri*, the Court limited *McDonald* by reading its holding to be "only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition." 131 S. Ct. at 2495. The *Guarnieri* Court also offered a thoughtful and encouraging exposition on the relation between the Speech and Petition Clauses of the First Amendment, stating that "[i]nterpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right," and that, if a case arises "where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis," then "the rules and principles that define the two rights might differ in emphasis and formulation." Id. In short, "[c]ourts should not presume there is always an essential equivalence in the two Clauses." Id.

33. The *Noerr-Pennington* doctrine is named for two of the three cases that defined the doctrine's initial contours, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965). The third foundational case in the *Noerr-Pennington* line is California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

the passage and enforcement of laws" could not violate the Sherman Antitrust Act.[34] The Court reaffirmed *Noerr* in *United Mine Workers v. Pennington*, emphasizing that immunity for petitioning activity does not depend on purpose or intent.[35] Then, in *California Motor Transport Co. v. Trucking Unlimited*, the Court declared that the right to petition encompasses not only attempts to influence legislative or executive action but also the use of the adjudicatory process.[36] At the same time, the Court—noting that administrative and judicial processes are subject to abuse in a way that participation in the political arena is not[37]—articulated an exception to *Noerr-Pennington* immunity for "sham" litigation. This "sham exception" precludes litigants from claiming the benefit of *Noerr-Pennington* immunity when they do not seek "'to influence public officials,'" but rather merely to harass their competitors by instituting repetitive, baseless actions.[38]

The Court clarified and refined the sham exception in *City of Columbia v. Omni Outdoor Advertising, Inc.*[39] The Court held that *Noerr-Pennington* immunity does not protect litigants who "use the governmental *process*," rather than "the *outcome* of that process," as a weapon;[40] however, motive is otherwise irrelevant in determining *Noerr-Pennington* immunity.[41] The Court reaffirmed *Omni*'s outcome-process test in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (*PRE*), outlining a two-part inquiry for its application.[42] The *PRE* Court

---

34. *Noerr*, 365 U.S. at 137–40. In *Noerr*, the defendant railroads had successfully campaigned for the adoption and enforcement of laws that would disadvantage their major competitor, the trucking industry. Id. at 129–30. Though the Court described the railroads' methods as "fall[ing] far short of the ethical standards generally approved in this country," id. at 140, it declared that difficulties "would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws," id. at 137. Thus the Court held that "insofar as [such campaigns are] directed toward obtaining governmental action," immunity from antitrust liability is "not at all affected by any anticompetitive purpose." Id. at 139–40.

35. See *Pennington*, 381 U.S. at 670 ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

36. 404 U.S. at 510 (stating philosophy of *Noerr* and *Pennington* "extends to all departments of the Government").

37. Id. at 512–13 (noting "unethical" conduct and tactics are tolerated in political arena yet in other settings are "illegal and reprehensible practice[s] which may corrupt the administrative or judicial processes").

38. Id. The *Noerr* Court had alluded to the possibility of such a "sham exception." See *Noerr*, 365 U.S. at 144 ("There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham . . . .").

39. 499 U.S. 365 (1991).

40. Id. at 380.

41. Id. (reaffirming motive is irrelevant in political arena as "'*Noerr* shields . . . effort[s] to influence public officials regardless of intent or purpose'" (quoting United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965))).

42. 508 U.S. 49, 60 (1993) (requiring threshold inquiry into whether petitioning litigation is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and holding courts may examine litigants' subjective

recognized that meaningful protection for legitimate petitioning activity requires granting targets an objective basis for establishing petitioning immunity.[43]

Though *Noerr-Pennington* emerged from antitrust cases, the doctrine has from the beginning been motivated by the right to petition and its importance to representative democracy.[44] Lower federal courts, invoking the doctrine's Petition Clause roots, have occasionally applied *Noerr-Pennington* immunity as an anti-SLAPP doctrine.[45] And, notably, *Noerr-Pennington* inspired state judicial and legislative measures confronting the problem of strategic lawsuits against public participation in government.

2. *State Courts and Colorado's* POME *Rule.* — State courts have built on the *Noerr-Pennington* doctrine, granting increased protection to legitimate petitioning activity.[46] For example, the West Virginia Supreme Court of Appeals looked to the *Noerr-Pennington* doctrine for inspiration in *Webb v. Fury*.[47] A coal company had sued Rick Webb for defamation after he discussed the environmental impact of the company's strip mining operations in a newsletter and filed complaints with federal agencies. West Virginia's high court not only recognized that the underlying dispute was "more properly within the political arena than in the courthouse,"[48] but also that anything short of pretrial dismissal would be "manifestly inade-

---

motivation "[o]nly if challenged litigation is objectively meritless"). Pring and Canan are optimistic about *PRE*'s restatement of *Omni*'s "outcome-process" test. See Pring & Canan, SLAPPs, supra note 1, at 232 n.90 ("[F]ew SLAPPs will get past the first or 'objective' test and move on to the potential 'fact quagmire' of the 'subjective' test.").

43. *PRE*, 508 U.S. at 59 ("[C]hallenges to allegedly sham petitioning activity must be resolved according to objective criteria." (citing *Omni*, 499 U.S. 365)); id. at 60 (rejecting "purely subjective" criteria for sham exception as such would "undermine, if not vitiate, *Noerr*"); cf. supra notes 21–24 and accompanying text (identifying subjective standards as "fact quagmires" that enable SLAPP claims to survive).

44. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961) ("In a representative democracy such as this, [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."). Indeed, the Court has alluded to the extension of *Noerr-Pennington* beyond antitrust. See *PRE*, 508 U.S. at 59 (referring to Court both "applying *Noerr* as an antitrust doctrine" and "invoking it in other contexts").

45. See infra notes 164–169 and accompanying text (discussing federal courts' application of *Noerr-Pennington* to SLAPPs).

46. See generally Carson Hilary Barylak, Note, Reducing Uncertainty in Anti-SLAPP Protection, 71 Ohio St. L.J. 845, 859–64 (2010) (discussing state court approaches to SLAPPs).

47. 282 S.E.2d 28, 34–36 (W. Va. 1981) ("The clear import of the *Noerr-Pennington* doctrine is to immunize . . . persons who attempt to induce the passage or enforcement of law or to solicit governmental action even though the result of such activities may indirectly cause injury to others."), overruled in part by Harris v. Adkins, 432 S.E.2d 549, 552 (W. Va. 1993). For more on the litigation in *Webb v. Fury*, see Pring & Canan, SLAPPs, supra note 1, at 90–92.

48. *Webb*, 282 S.E.2d at 43.

quate to protect against the chilling effect" of such litigation.[49] Similarly, in *Protect Our Mountain Environment, Inc. v. District Court* (*POME*), the Supreme Court of Colorado, after reviewing the *Noerr-Pennington* doctrine, addressed the problem of SLAPPs by articulating a burden-shifting test that resembles modern anti-SLAPP statutes.[50]

3. *Anti-SLAPP Legislation.* — Since the first anti-SLAPP statute was passed in 1989,[51] a majority of states and the District of Columbia have enacted anti-SLAPP legislation.[52] While anti-SLAPP laws take many different forms,[53] most anti-SLAPP laws provide SLAPP targets with an early

---

49. Id. at 34 (citing Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1082–83 (9th Cir. 1976)).

50. 677 P.2d 1361, 1368 (Colo. 1984) ("[S]uits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances." (citing Note, Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions, 74 Mich. L. Rev. 106, 110–11 (1975))). Pring and Canan praise *POME* as "one of the strongest anti-SLAPP precedents in the country." Pring & Canan, SLAPPs, supra note 1, at 42–43. See generally id. at 5–6, 42–44 (discussing litigation in *POME*).

51. See Pring & Canan, SLAPPs, supra note 1, at 130–33 (discussing passage of Washington State's anti-SLAPP statute); id. at 191–93 (discussing statute itself).

52. Ariz. Rev. Stat. Ann. §§ 12-751 to 12-752 (Supp. 2012); Ark. Code Ann. §§ 16-63-501 to 16-63-508 (2005); Cal. Civ. Proc. Code §§ 425.16–425.18 (West 2004 & Supp. 2013); Del. Code Ann. tit. 10, §§ 8136–8138 (1999); D.C. Code §§ 16-5501 to 16-5505 (Supp. 2013); Fla. Stat. Ann. §§ 720.304, 768.295 (West 2011); Ga. Code Ann. § 9-11-11.1 (2006); Haw. Rev. Stat. Ann. §§ 634F-1 to 634F-4 (LexisNexis 2012); 735 Ill. Comp. Stat. Ann. 110/1–110/99 (West 2011); Ind. Code Ann. §§ 34-7-7-1 to 34-7-7-10 (LexisNexis 2008); La. Code Civ. Proc. Ann. art. 971 (Supp. 2013); Me. Rev. Stat. Ann. tit. 14, § 556 (Supp. 2012); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (LexisNexis 2013); Mass. Ann. Laws ch. 231, § 59H (LexisNexis 2009); Minn. Stat. Ann. §§ 554.01–554.05 (West 2010); Mo. Ann. Stat. § 537.528 (West Supp. 2013); Neb. Rev. Stat. §§ 25-21,241 to 25-21,246 (2008); Nev. Rev. Stat. Ann. §§ 41.635–41.670 (LexisNexis 2012), amended by Act of May 27, 2013, 2013 Nev. Stat. 622, 622–24, available at http://www.leg.state.nv.us/Statutes/77th2013/Stats201304.html (on file with the *Columbia Law Review*); N.M. Stat. Ann. §§ 38-2-9.1 to 38-2-9.2 (Supp. 2012); N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney 2009); Okla. Stat. Ann. tit. 12, § 1443.1 (West 2010); Or. Rev. Stat. §§ 31.150–31.155 (2011); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8305 (West 2009); R.I. Gen. Laws §§ 9-33-1 to 9-33-4 (2012); Tenn. Code Ann. §§ 4-21-1001 to 4-21-1004 (2011); Tex. Civ. Prac. & Rem. Code Ann. § 27.001–27.011 (West Supp. 2013); Utah Code Ann. §§ 78B-6-1401 to 78B-6-1405 (LexisNexis 2012); Vt. Stat. Ann. tit. 12, § 1041 (Supp. 2013); Wash. Rev. Code Ann. §§ 4.24.500–4.24.525 (West 2005 & Supp. 2013). Guam, a U.S. territory, also has an anti-SLAPP statute. 7 Guam Code Ann. §§ 17101–17109 (2012), available at http://www.guamcourts.org/CompilerofLaws/GCA/07gca/7gc017.pdf (on file with the *Columbia Law Review*).

The Public Participation Project keeps an up-to-date list of states with anti-SLAPP laws on its website. State Anti-SLAPP Laws, Pub. Participation Project, http://www.anti-SLAPP.org/your-states-free-speech-protection/ (on file with the *Columbia Law Review*) (last visited Jan. 29, 2014).

53. See generally Shannon Hartzler, Note, Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 Val. U. L. Rev. 1235, 1248–70 (2007) (categorizing anti-SLAPP statutes by scope). Pring and Canan argue that the immunity granted by an anti-SLAPP law should cover "all public advocacy and communications to government" by citizens, regardless of what form such petitioning activity takes or which

opportunity to invoke immunity for their legitimate petitioning activity, thereby facilitating the swift and efficient dismissal of many SLAPP claims.[54]

While many acknowledge the existence of SLAPPs and the problems they pose, some have criticized Pring and Canan's conclusions and their suggested remedies, emphasizing the potential for anti-SLAPP laws to impair plaintiffs' ability to recover against tortfeasors.[55] While even the unsuccessful invocation of an anti-SLAPP statute can burden a meritorious suit, that only highlights the presence of interests on both sides of the equation. The goal of anti-SLAPP laws thus should be to balance the need to allow legitimate recovery for legal injury with the proper protection for the exercise of the right to petition. This Note considers whether the states will strike that balance in all cases brought under their laws, or whether instead the federal courts will alter that balance in some cases under the aegis of the Federal Rules—a question implicating the very federalism principles underlying the *Erie* doctrine.

Together, *Noerr-Pennington* and state anti-SLAPP laws show that federal and state law alike are concerned with addressing the threat posed by the intrusion of litigation into matters best left in the political arena. From the *POME* rule to anti-SLAPP legislation, states have built upon *Noerr-Pennington*, granting meaningful protection to legitimate petitioning activity by creating innovative procedural mechanisms to allow for the swift resolution of SLAPPs. The development of these innovations embodies the ideal of the states as laboratories of democracy.[56] Yet states have no control over whether their anti-SLAPP laws will be applied to claims arising under their law when those claims are brought in federal court. In such cases, the fate of anti-SLAPP protections depends on fed-

---

government entity it is directed toward or seeks to influence—including attempts to persuade the electorate. Pring & Canan, SLAPPs, supra note 1, at 189. Some argue that SLAPP coverage should extend to even more First Amendment activity. See Hartzler, supra, at 1237–38 (advocating anti-SLAPP protections for media defendants).

54. Pring and Canan outline a number of procedural safeguards they deem necessary for an effective anti-SLAPP law, including, among others: a special motion under the statute that must be given priority on a court's calendar; the right to appeal immediately if such motion is delayed or denied; and the stay of discovery pending resolution of the motion. See Pring & Canan, SLAPPs, supra note 1, at 201–05 (presenting model anti-SLAPP legislation containing these provisions and more).

In operation, such mechanisms operate much like determinations of absolute or qualified immunity. See infra Part III.A.2 (discussing Supreme Court cases regarding immunity from suit).

55. See, e.g., Beatty, supra note 16, at 88–95 (criticizing Pring and Canan's methodology and arguing their terminology risks "severely prejudicing" rights of defamation plaintiffs).

56. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

eral courts' application of the *Erie* doctrine and cases governing when the Federal Rules of Civil Procedure displace state law.

B. The Erie *Doctrine Before* Shady Grove

When federal courts adjudicate claims arising under state law, they look to the *Erie* doctrine to determine which state laws they must apply. First, a federal court asks if state and federal law conflict. Where they do not, courts must apply state law—at least if failure to do so would substantially affect the outcome of litigation[57]—unless there is an overriding interest in adhering to federal practice.[58] Where application of state law appears to conflict with the Federal Rules of Civil Procedure, a court's analysis is guided by a framework first articulated in *Hanna v. Plumer*.[59]

1. Erie *and the Rules of Decision Act.* — In *Erie Railroad Co. v. Tompkins*, the Supreme Court declared that federal courts must look to state law for the rules of decision governing adjudication of state law claims.[60] The *Erie* Court found its prior construction of the Rules of Decision Act,[61] under which federal courts had independently decided questions of "general" common law, to be both unwise[62] and unconstitutional.[63] In *Guaranty Trust Co. v. York*, the Court acknowledged that the labels "substance" and "procedure" are inapposite for purposes of the *Erie* doctrine[64] and de-

57. See Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[T]he outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court.").

58. See Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–38 (1958) ("[T]here is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.").

59. 380 U.S. 460 (1965). For a discussion of cases involving potential conflicts between state law and federal procedure, see infra Part I.B.2.

60. 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.").

61. 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."). Before *Erie*, federal courts, under the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie*, 304 U.S. 64, were bound to apply only the written law of a state. See *Erie*, 304 U.S. at 71–73 (discussing doctrine of *Swift v. Tyson*). See generally Erwin Chemerinsky, Federal Jurisdiction § 5.3.5, at 335–37 (6th ed. 2012) (discussing *Swift v. Tyson* and criticisms of doctrine).

62. The *Erie* Court noted that the doctrine of *Swift v. Tyson* had led to "mischievous results," allowing noncitizen plaintiffs to affect the enforcement of state law rights through their choice of forum, thereby "render[ing] impossible equal protection of the law." *Erie*, 304 U.S. at 74–75. In *Hanna v. Plumer*, the Court re-articulated these concerns—"discouragement of forum-shopping and avoidance of inequitable administration of the laws"—as "the twin aims of the *Erie* rule." 380 U.S. at 468 & n.9.

63. See *Erie*, 304 U.S. at 77–78 (holding Constitution grants neither Congress nor federal courts "power to declare substantive rules of common law applicable in a State").

64. 326 U.S. 99, 108 (1945) ("Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem

cleared that avoiding disregard of state law—"[a] policy so important to our federalism"—demanded that the doctrine's application "be kept free from entanglements with analytical or terminological niceties."[65] *York* states that when a federal court adjudicates a state law claim, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[66]

The Court subsequently found many state law provisions to be *Erie*-substantive[67] under the *York* outcome determinative test.[68] Yet in *Byrd v.*

---

for which it is used."); cf. *Hanna*, 380 U.S. at 465–66 ("[*York*] made it clear that *Erie*-type problems [are] not to be solved by reference to any traditional or common-sense substance-procedure distinction . . . ."). See generally John Hart Ely, The Irrepressible Myth of *Erie*, 87 Harv. L. Rev. 693, 735 (1974) (describing Court prior to *York* as "still operating on the assumption that the Rules of Decision Act divided legal problems into two separate piles marked 'substance' and 'procedure'").

Because substance-procedure dichotomies are used in analyzing many distinct legal questions, the line between "substance" and "procedure" varies with context. Cf. Edmund M. Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 154 (1944) ("[C]ommentators have . . . point[ed] out that the same matter is, and should be, treated as substance in some legal situations and as procedure in others, so that the dichotomy is illusory."). In the *Erie* context, the legal question at issue is "the proper distribution of judicial power between State and federal courts." *York*, 326 U.S. at 109. See generally Lehan Kent Tunks, Categorization and Federalism: "Substance" and "Procedure" After *Erie Railroad v. Tompkins*, 34 Ill. L. Rev. 271, 274–77 (1939) (contrasting purposes of *Erie* doctrine with considerations relevant to other legal questions that involve determining whether laws are "procedural").

65. *York*, 326 U.S. at 110. Unfortunately, federal courts continue to label state laws that apply in federal court under *Erie* as "substantive," which may in turn lead them to dismiss application of any state law that appears in any way procedural. Cf. John A. Lynch, Jr., Federal Procedure and *Erie*: Saving State Litigation Reform Through Comparative Impairment, 30 Whittier L. Rev. 283, 320 (2008) ("In cases in which a federal court has declined to follow state law in favor of a Federal Rule, it has disregarded a provision that is procedural in form but substantive in its objective.").

66. *York*, 326 U.S. at 109. This gloss on the *Erie* analysis is referred to as the "outcome determinative" test.

67. This Note uses the term "*Erie*-substantive" to refer to issues governed by state law in federal courts. For discussion of the disparate uses of the "substantive" label, see sources cited supra notes 64–65.

In *York*, the Court held that statutes of limitations are substantive for purposes of the *Erie* doctrine, 326 U.S. at 111–12, and noted other legal issues that had previously been ruled *Erie*-substantive. See, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (conflict of laws); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939) (burdens of proof); see also Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4–5 (1975) (per curiam) (reaffirming *Klaxon*).

68. See Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202–04 (1956) (state law governing enforceability of arbitration provisions); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555–56 (1949) (statute requiring security bond to maintain stockholder derivative action); Woods v. Interstate Realty Co., 337 U.S. 535, 535–38 (1949) (statute affecting which corporations may bring state law claims); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532–34 (1949) (provision regarding tolling of statute of limitations); see also Walker v. Armco Steel Corp., 446 U.S. 740, 751–53 (1980) (reaffirming *Ragan*).

Blue Ridge Electric Cooperative, Inc., the Court stated that certain aspects of the federal system need not "yield to the state rule in the interest of uniformity of outcome."[69] In *Byrd*, the Court held that the allocation of the factfinding role between judge and jury is one such aspect of the federal system that controls even when adjudicating a state law issue.[70]

Where federal practice and procedure is codified—whether in a congressional statute or in the Federal Rules—federal courts do not simply apply the *York* outcome determinative test; instead, they first engage in a separate analysis under the Rules Enabling Act to determine whether codified federal procedure displaces a conflicting state law.

2. *The Rules Enabling Act and the* Hanna *Framework.* — The Federal Rules are promulgated under the Rules Enabling Act of 1934,[71] which authorizes the Supreme Court "to prescribe general rules of practice and procedure"[72] with the restriction that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[73] The framework under which putative conflicts between state laws and the Federal Rules are analyzed was announced in *Hanna v. Plumer*.[74] First, a court must determine

---

In *Cohen*, the Court observed that even if a state law were deemed procedural, that "would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure." 337 U.S. at 555.

69. Byrd v. Blue Ridge Rural Elec. Coop, Inc., 356 U.S. 525, 540 (1958). The Seventh Amendment—also at issue in *Gasperini*, see discussion infra notes 79–82 and accompanying text—is one of the few provisions of the Bill of Rights that applies to federal but not state courts. See generally McDonald v. City of Chicago, 130 S. Ct. 3020, 3093–95 (2010) (reviewing selective incorporation doctrine).

70. 356 U.S. at 537–38 ("[U]nder the influence—if not the command—of the Seventh Amendment, [the federal system] assigns the decisions of disputed questions of fact to the jury. . . . [T]here is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." (footnote omitted)). Compare Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952) (holding jury-trial right "too substantial a part of the rights accorded by the [Federal Employers' Liability] Act to permit it to be classified as a mere 'local rule of procedure'" and thereby denied to plaintiffs in state court), with *Byrd*, 356 U.S. at 536 (declaring state rule at issue "merely a form and mode of enforcing [a state law] immunity, and not a rule intended to be bound up with the definition of the rights and obligations of the parties" (citing *York*, 326 U.S. at 108)).

71. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2012)). The Enabling Act was passed several years prior to the decision in *Erie*, but the Rules were not promulgated until months after it was handed down; *Erie* itself mentions neither the Enabling Act nor the Federal Rules.

72. 28 U.S.C. § 2072(a).

73. Id. § 2072(b).

74. 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if . . . the Rule in question transgresses [either] the terms of the Enabling Act [or] constitutional restrictions."). The *Hanna* Court described cases decided under the Rules Enabling Act as "separate" from those decided under *Erie* and *York*. Id. at 470–71. The leading pre-*Hanna* decision under the Enabling Act is *Sibbach v. Wilson & Co.*, wherein the Court stated that the test of a Rule's validity is whether it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly

whether an actual, direct conflict exists; if there is no true conflict, the court's *Erie* analysis proceeds as it would otherwise.[75] If, however, a state law cannot be applied side-by-side with the Federal Rules, the court must determine whether the Federal Rule is valid under the Constitution[76] and the terms of the Rules Enabling Act.[77] If valid, a Federal Rule displaces contrary state law; if a Rule does not comply with constitutional and statutory limits, state law applies.

Separate from its analysis under the Rules Enabling Act, the *Hanna* Court cautioned that the *York* outcome determinative test must be understood in the context of what it dubbed the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[78]

The last major case on the interplay between state law and the Federal Rules prior to *Shady Grove* was *Gasperini v. Center for Humanities, Inc.*, where the Court noted the importance of interpreting the Federal Rules "with sensitivity to important state interests and regulatory policies."[79] Contemplating, as it had in *Byrd*, a potential conflict between state law and an aspect of federal practice implicating the Seventh Amendment,[80] the Court began by stating that *Erie*'s twin aims counsel

---

administering remedy and redress for disregard or infraction of them." 312 U.S. 1, 14 (1941).

When *Sibbach* was decided, just three years after *Erie*, substance and procedure were still believed to represent distinct categories. See Ely, supra note 64, at 735 ("With *York* four years in the future, the Court was still operating on the assumption that the Rules of Decision Act divided legal problems into two separate piles marked 'substance' and 'procedure' . . . ."); see also supra notes 64–65 (discussing multifarious substance-procedure dichotomies).

75. Cf. Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980) ("Application of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law." (quoting *Hanna*, 380 U.S. at 472)).

76. Congress's constitutional power to regulate practice and procedure in the federal system extends to "matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.'" Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) (quoting *Hanna*, 380 U.S. at 472).

77. The Enabling Act's command that Federal Rules "not 'abridge, enlarge or modify any substantive right'" is "an additional requirement." Id. (quoting 28 U.S.C. § 2072 (1982)). Yet the Court has stated that the interest in "a uniform and consistent system of rules" supports the validity of Rules "incidentally affect[ing] litigants' substantive rights" if such Rules are deemed "reasonably necessary" to the integrity of the federal system of practice and procedure. Id.

78. *Hanna*, 380 U.S. at 468–69 & n.9; cf. Ely, supra note 64, at 717 ("[A] difference between the federal and state rules . . . that will not alter outcome for, or otherwise materially affect, litigants who comply with the forum's rules is hard to condemn as unfair.").

79. 518 U.S. 415, 427 n.7 (1996).

80. The conflict in *Gasperini* concerned appellate review of jury damage awards. Compare N.Y. C.P.L.R. 5501(c) (McKinney Supp. 2013) ("[T]he appellate division shall determine that an award is excessive . . . if it deviates materially from what would be reasonable compensation."), with *Gasperini*, 518 U.S. at 435–39 (approving federal

that federal courts should give deference to state procedural measures intended to control the scope of substantive rights.[81] The Court held that, in the case at hand, "the principal state and federal interests" could both be accommodated by applying the substantive content of state law in a manner consistent with the federal system.[82]

In practice, the application of the *Hanna* framework often leads to displacing state laws that can be characterized as "arguably procedural."[83] Yet the Supreme Court is attentive to state prerogatives, at least in theory, and accomplished in *Gasperini* a nuanced accommodation, displacing state law no more than necessary to harmonize it with the essential characteristics of the federal system.[84]

II. ANTI-SLAPP LAWS IN FEDERAL COURT

This Part examines the treatment of anti-SLAPP laws in federal court before and after *Shady Grove*. Part II.A summarizes the treatment of state anti-SLAPP laws by federal courts before *Shady Grove*. Part II.B then discusses the various opinions in *Shady Grove* and their precedential value. Finally, Part II.C surveys federal courts' treatment of state anti-SLAPP laws since *Shady Grove*.

---

appellate review of trial judge's denial of motion to set aside jury verdict, but only under "abuse of discretion" standard). According to the Court, this New York law is "both 'substantive' and 'procedural'"—"substantive" because its "standard [for review of the jury award] controls how much a plaintiff can be awarded," yet "procedural" in that it assigns such review to an appellate court. Id. at 426.

81. See *Gasperini*, 518 U.S. at 429–31 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."); see also id. at 430 n.12 ("For rights that are state created, state law governs . . . .").

82. Id. at 436–37 ("In *Byrd*, the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice. In the case before us, a choice of that order is not required . . . ." (footnote omitted)). For a discussion of *Byrd*, see supra notes 69–70 and accompanying text.

By assigning the role of reviewing jury awards to federal trial judges, the Court accommodated the state's "dominant interest"—application of the state law standard—"without disrupting the federal system." *Gasperini*, 518 U.S. at 437. At the same time, federal appellate courts are to review such determinations for "abuse of discretion," id. at 438, consistent with federal practice.

83. Justice Harlan used the phrase "arguably procedural," disparagingly, in his *Hanna* concurrence. See *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) ("Whereas the unadulterated outcome and forum-shopping tests may err too far toward honoring state rules, I submit that the Court's 'arguably procedural, *ergo* constitutional' test moves too fast and far in the other direction.").

More recently, Professor Lynch observed that *Gasperini* does not seem to have "altered the way most circuits view the command of *Hanna* that the Federal Rules of Civil Procedure must trump state rules and policies." Lynch, supra note 65, at 301.

84. See Lynch, supra note 65, at 298 ("The choice made by the Court in *Gasperini* to apply New York law demonstrates how far it will go to give effect to state substantive policy in an *Erie* case—even when that policy is implemented through a procedural device.").

A. *Anti-SLAPP Laws in Federal Court Before* Shady Grove

The ability of a state to insulate legitimate petitioning activity from the burdens of litigation depends in part on whether anti-SLAPP protection is consistently available against state law claims, including those brought in federal court. Should federal courts refuse to apply anti-SLAPP laws—or key provisions thereof—the availability of a federal forum will allow filers to bypass anti-SLAPP protections by way of federal diversity or pendent jurisdiction.[85] Furthermore, states' ability to guarantee breathing space for legitimate petitioning activity can be thwarted when potential targets are uncertain whether federal courts will be willing to apply anti-SLAPP protections.[86]

Before *Shady Grove*, state anti-SLAPP laws received varied treatment in federal court. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, the Ninth Circuit concluded that the provisions of California's anti-SLAPP statute concerning a special motion to strike[87] and availability of fees and costs[88] could apply in federal court, declaring that "these provisions and Rules 8, 12, and 56 'can exist side by side.'"[89] The *Newsham* court noted that a target could bring a special motion under the anti-SLAPP law and still bring motions under the Federal Rules.[90] Likewise, the court rejected the contention that any direct collision was created by the commonality of purpose between these Rules and the anti-SLAPP

---

85. Cf. id. at 285 ("[E]fforts by states to regulate matters within their powers under our federal system have been thwarted by lower federal courts hewing to what they have regarded as *Hanna*'s unyielding command to follow Federal Rules to the contrary."); id. at 320 ("[S]tate anti-SLAPP laws have enjoyed varying degrees of success in competing with Federal Rules in *Erie* cases.").

86. See Barylak, supra note 46, at 849 ("If individuals and groups are unsure whether their petitioning activities will be protected by an anti-SLAPP measure, its ability to mitigate the suits' chilling effect on public participation will be negligible."). This is true even of targets who prevail on the merits after unsuccessfully invoking an anti-SLAPP law's protection, as they often become so disheartened by the experience that they are dissuaded from participating in public life ever again. See Pring & Canan, SLAPPs, supra note 1, at 29 ("Targets rarely lose court judgments, and yet many are devastated, drop their political involvement, and swear never again to take part in American political life.").

87. See Cal. Civ. Proc. Code § 425.16(b) (West Supp. 2013) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike . . . .").

88. See id. § 425.16(c) ("[A] prevailing [target] on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.").

89. United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).

90. See id. ("We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56."); see also Fed. R. Civ. P. 8(a) (governing pleadings standard); Fed. R. Civ. P. 12(b)(6) (governing motions to dismiss for failure to state claim); Fed. R. Civ. P. 12(f) (governing motions to strike); Fed. R. Civ. P. 56 (governing motions for summary judgment).

law,[91] noting that California's statute "is crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"[92] Finally, the court found that failure to apply the anti-SLAPP statute would "run squarely against the 'twin aims' of the *Erie* doctrine," as California's special motion to strike is "an additional, unique weapon [in] the pretrial arsenal."[93] Thus, if anti-SLAPP protections were available only in state court, SLAPP filers would have "a significant incentive to shop for a federal forum," and targets, who are "otherwise entitled to the protections of the Anti-SLAPP statute," would be at a disadvantage in federal court relative to targets sued in state court.[94] Federal courts both in and outside of the Ninth Circuit have since followed *Newsham*'s reasoning.[95]

Other anti-SLAPP provisions have not fared as well in the Ninth Circuit, including those limiting discovery and mandating dismissal with prejudice, both of which are important in minimizing the burden imposed by SLAPPs.[96] In *Rogers v. Home Shopping Network, Inc.*, a federal district court refused to apply the discovery-staying provision of California's anti-SLAPP statute,[97] finding it to be in direct conflict with Rule 56;[98] the Ninth Circuit subsequently endorsed *Rogers* in *Metabolife International, Inc. v. Wornick*.[99] Then, in *Verizon Delaware, Inc. v. Covad Communications Co.*,

---

91. See *Newsham*, 190 F.3d at 972 (finding "no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims" (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949))).

92. Id. at 973 (quoting Cal. Civ. Proc. Code § 425.16(a)).

93. Id.

94. Id.

95. See, e.g., Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168–69 (5th Cir. 2009) ("Louisiana law, including the nominally-procedural [anti-SLAPP law], governs this diversity case."); Card v. Pipes, 398 F. Supp. 2d 1126, 1136–37 (D. Or. 2004) (granting motion to strike under Oregon's anti-SLAPP statute); Buckley v. DIRECTV, Inc., 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) ("Plaintiffs assert in passing, without any argument, that the anti-SLAPP statute does not apply in federal court. This contention is without merit.").

96. Cf. Pring & Canan, SLAPPs, supra note 1, at 201–05 (discussing procedural safeguards necessary to effective anti-SLAPP laws).

97. See Cal. Civ. Proc. Code § 425.16(g) (providing for stay of discovery proceedings while special motion to strike is pending but stating "court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision").

98. Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999) (ruling "discovery-limiting aspects" of California's anti-SLAPP law "collide with the discovery-allowing aspects of Rule 56"); see also Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . (2) allow time to obtain affidavits or declaration or to take discovery . . . .").

99. 264 F.3d 832, 850 (9th Cir. 2001). Federal district courts in California have managed to apply *Metabolife* with nuance. See, e.g., Price v. Stossel, 590 F. Supp. 2d 1262,

the Ninth Circuit held that granting a special motion to strike without giving plaintiffs an opportunity to amend their initial complaint "would directly collide with [Rule] 15(a)'s policy favoring liberal amendment."[100] The failure to apply critical provisions of state anti-SLAPP laws undermines their effectiveness in achieving the swift dismissal of SLAPPs with minimal burden on the target.[101]

District courts in the Seventh Circuit have also applied state anti-SLAPP laws in diversity cases. For example, a court in the Southern District of Indiana described an anti-SLAPP law as having "a distinctly substantive flavor."[102] The court went on to analyze an alleged conflict with Rule 56, finding that the summary judgment standard could "easily be reconciled" with a provision directing courts to grant anti-SLAPP motions if the moving party proves by a preponderance of the evidence that targeted activity meets the statutory criteria for immunity.[103]

By contrast, before *Shady Grove*, district courts in the First Circuit refused to apply state anti-SLAPP laws. One court found that Massachusetts's anti-SLAPP law was "predominantly procedural in nature" and therefore the Federal Rules "supplant[ed] the state Anti-

---

1266 (C.D. Cal. 2008) ("Under California law, the party opposing a special motion to strike is not guaranteed an automatic right to discovery. . . . Subsection (g)'s good cause standard is considered an important element of the anti-SLAPP statute . . . ."); Four Navy Seals v. Associated Press, 413 F. Supp. 2d 1136, 1149 (S.D. Cal. 2005) (distinguishing *Rogers* and *Metabolife* to rule that "[b]ecause discovery is not essential in this case in order to respond to the motion to strike, the burden of establishing a probability of prevailing on a claim still falls upon Plaintiffs").

100. 377 F.3d 1081, 1091 (9th Cir. 2004); see Cal. Civ. Proc. Code § 425.16(f) (requiring hearing on special motion "not more than 30 days after service unless the docket conditions of the court require a later hearing"). Pring and Canan argue that permitting voluntary amendment helps SLAPPs succeed, because allowing a filer to submit "an 'amended' complaint [attempting] to cure defects" referenced in an anti-SLAPP motion requires targets to spend time and money filing a revised motion. Pring & Canan, SLAPPs, supra note 1, at 160.

101. For discussion of the concerns raised by uncertainty in application of anti-SLAPP laws, see supra notes 85–86 and accompanying text.

102. Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26, 2009) (Hamilton, C.J.). Compare this description of an anti-SLAPP law's "distinctly substantive flavor" with the Fifth Circuit's labeling of Louisiana's anti-SLAPP law as (only) "nominally" procedural in Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168–69 (5th Cir. 2009) ("Louisiana law, including the nominally-procedural [anti-SLAPP law], governs this diversity case.").

103. *Containment Techs.*, 2009 WL 838549, at *8 n.2 (observing either motion demands courts "be aware of which party must prove which matters by which standard of proof" and framing issue to be decided under Indiana anti-SLAPP statute as "whether the undisputed facts show no genuine issue of material fact on the constitutional defense" (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252–54 (1986))). *Liberty Lobby* declared that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the *substantive evidentiary burden*." 477 U.S. at 254 (emphasis added).

SLAPP procedures."[104] Likewise, a federal trial judge in Maine followed the Massachusetts district court in declining to apply Maine's anti-SLAPP law.[105]

In sum, federal courts have a varied record regarding state anti-SLAPP laws. Even the Ninth Circuit, which has the most extensive record of applying anti-SLAPP laws, has potentially compromised their efficacy by ruling that certain anti-SLAPP provisions are displaced by the Federal Rules. Notably, district courts in the First Circuit gave short shrift to their forum state's anti-SLAPP laws. *Shady Grove* may offer the lower courts further—if somewhat conflicted—guidance on when state law should apply in federal court.

B. *Enter* Shady Grove

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court—in a fractured set of opinions—held that plaintiffs had a procedural entitlement under Rule 26 to pursue their claims as class actions,[106] despite a New York law to the contrary.[107] While five justices found a direct conflict and agreed that the Federal Rule displaced the state law,[108] Justice Stevens disagreed with the other four members of the majority as to *why* the Federal Rule displaced state law.[109]

---

104. Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003); accord Baker v. Coxe, 940 F. Supp. 409, 417 (D. Mass. 1996) (ruling additional procedures imposed by anti-SLAPP statute did not "trump" Rule 12(b)(6) and refusing to apply "hybrid statutory procedure," which court found to be "more akin to a summary judgment motion").

105. Godin v. Sch. Union 134, No. 09-77-B-W, 2009 WL 1686910, at *5 (D. Me. June 16, 2009) (following *Stuborn* and *Baker*), rev'd sub nom. Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010).

106. 130 S. Ct. 1431, 1437 (2010) ("By its terms [Rule 23(b)] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."); see also Fed. R. Civ. P. 23(b) (stating suit "may be maintained" as class action if certain criteria are satisfied).

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

108. *Shady Grove*, 130 S. Ct. at 1441–42 (majority opinion); see also id. at 1437 (finding New York law at issue "attempts to answer the same question" as Rule 23 because former "states that Shady Grove's suit 'may *not* be maintained as a class action'" and thus could not "apply in diversity suits unless Rule 23 is ultra vires" (emphasis added by *Shady Grove*)).

109. Compare id. at 1444 (plurality opinion) (contending compliance with Enabling Act should be judged with reference to Rule, "not its effects in individual applications," because "it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule"), with id. at 1450 (Stevens, J., concurring in part and concurring in the judgment) ("When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.").

1. *The* Shady Grove *Opinions.* — Justice Scalia, writing for a plurality, would have held that where a Federal Rule "'really regulates procedure,'" it is valid in all cases, "regardless of its incidental effect upon state-created rights."[110] By contrast, Justice Stevens argued that the Federal Rules "must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,'" and that federal courts should apply the Rules to state law claims "against the background of Congress' command that such rules not alter substantive rights."[111] Under Justice Stevens's approach, if a federal court determines that a Federal Rule directly collides with state law but that application of the Rule "appears to abridge, enlarge, or modify a substantive right," that court must then consider whether the Rule "can reasonably be interpreted to avoid that impermissible result."[112] If conflict is unavoidable, Justice Stevens would nevertheless apply a state procedural rule that is "sufficiently interwoven with the scope of a substantive right or remedy."[113]

2. *The Precedential Value of* Shady Grove. — *Shady Grove* produced a fractured court: Justice Scalia wrote the lead opinion; Justice Stevens concurred in part and in the judgment, writing separately to explain how he reached the same conclusion by different reasoning; and Justice

---

110. Id. at 1444–45 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)); see also id. at 1442 ("What matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." (alterations in *Shady Grove*) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946))).

111. Id. at 1449 (Stevens, J., concurring in part and concurring in the judgment) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)). Justice Stevens argued that the plurality was insufficiently attentive to both the Rules Enabling Act and principles of federalism, contending that "an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates" the Enabling Act, and while "Congress may have the constitutional power 'to supplant state law,'" the Court "should generally presume that it has not done so." Id. at 1451 (citing Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009)).

112. Id. at 1452 (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (construing Rule 41(b) so as to avoid interpretation that "would arguably violate" Enabling Act)); see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 842, 845 (1999) (adopting "limiting construction" of Rule 23 in part to "minimize[] potential conflict with the Rules Enabling Act"). Justice Stevens asserted that a Federal Rule "cannot govern a particular case" where it would displace a state law that functions to define the scope of state-created rights, regardless of whether such law "is procedural in the ordinary use of the term." *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment). Thus, under Justice Stevens's approach, the second step of the Enabling Act inquiry "may well bleed back into the first." Id. In other words, a court may—or rather, must—reinterpret the scope of the Rule to avoid conflict, if possible.

113. *Shady Grove*, 130 S. Ct. at 1456 (Stevens, J., concurring in part and concurring in the judgment); see also id. at 1450 ("A 'state procedural rule, though undeniably "procedural" in the ordinary sense of the term,' may exist 'to influence substantive outcomes,' and may in some instances become so bound up with the state-created right or remedy that it defines [its] scope . . . ." (quoting S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995) (Posner, C.J.))).

Ginsburg wrote a dissent for four justices. This breakdown has led lower federal courts to various determinations regarding which parts of *Shady Grove* are controlling.[114]

The guidepost for analyzing the precedential scope of plurality decisions is the *Marks* "narrowest grounds" doctrine.[115] There are two major approaches to the doctrine.[116] Under the "majoritarian" approach, an opinion, to be controlling, must enjoy the implicit support of a majority of the justices concurring in the judgment—thus ignoring the preferences of dissenting justices.[117] Under this approach, there would appear to be no controlling opinion in *Shady Grove* regarding any issue on which Justices Stevens and the plurality diverge. By contrast, Justice Stevens's concurrence could be considered controlling under the "social choice theory" approach, which seeks to derive the "consensus position"—also called the "dominant opinion"—within a divided decision by identifying

---

114. See generally 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction § 4509, at 247–48 nn.109–111 (2d ed. Supp. 2013) (collecting cases).

115. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case . . . 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.))).

In *Marks*, the Court determined that the plurality decision in Memoirs v. Massachusetts, 383 U.S. 413 (1966), had indeed changed the law regarding the standard for obscenity relative to the previous standard announced in Roth v. United States, 354 U.S. 476 (1957). *Marks*, 430 U.S. at 194. Therefore the holding in Miller v. California, 413 U.S. 15 (1973)—which was handed down after the defendant's conduct occurred—represented "'[a]n unforeseeable judicial enlargement of a criminal statute,'" *Marks*, 430 U.S. at 192 (quoting Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964)), and thus its harsher standard could not "be applied retroactively to the potential detriment of a defendant in a criminal case," id. at 189.

Justice Powell's reasoning in *Marks* turned on the fact that Justices Black and Douglas had concurred in the judgment in *Memoirs* on grounds broader than the three-justice plurality. See id. at 193–94 ("*Memoirs* therefore was the law. *Miller* did not simply clarify *Roth*; it marked a significant departure from *Memoirs*. . . . Clearly it was thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.").

116. See generally Joseph M. Cacace, Note, Plurality Decisions in the Supreme Court of the United States: A Reexamination of the *Marks* Doctrine After *Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 110–21 (2007) (comparing conventional and social choice theory approaches to *Marks* doctrine).

117. See, e.g., Andrews J. Kazakes, Comment, Relatively Unguided: Examining the Precedential Value of the Plurality Decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, and Its Effects on Class Action Litigation, 44 Loy. L.A. L. Rev. 1049, 1062 (2011) ("Dissenting opinions are excluded from consideration . . . because there is no logical nexus between a dissenting opinion and the disposition of the case. . . . [T]he narrowest ground must be the logical subset of another broader plurality opinion, so that each fits into the other 'like Russian dolls.'" (quoting Cacace, supra note 116, at 111)).

the opinion that is both consistent with the outcome and closest to the preferences of a majority of all nine Justices.[118]

Though he concurred in the judgment, Justice Stevens agreed with the four dissenters that conflicts between state law and the Federal Rules could be resolved in favor of a state procedural law with substantive character.[119] Because the dissenters would go even further in applying state laws in federal court than would Justice Stevens, five Justices appear to agree that federal courts should apply any state law that satisfies Justice Stevens's criteria.[120] Thus his concurrence arguably represents the dominant opinion on the second step of the Rules Enabling Act analysis.

While a few courts have applied Justice Scalia's opinion,[121] many courts have found Justice Stevens's *Shady Grove* concurrence to be controlling,[122] with some courts even ruling that to construe the Rules as displacing state law in a given case would violate the Rules Enabling Act.[123]

---

118. Maxwell L. Stearns, The Case for Including *Marks v. United States* in the Canon of Constitutional Law, 17 Const. Comment. 321, 327–29 (2000). This theory proceeds on "the premise that if forced to choose among each of the remaining opinions," Justices "would most prefer the [opinion] closest to" their own reasoning. Id. at 328. Because "plurality" is "simply the designation given to the opinion consistent with the outcome that obtains the largest number of votes," such an opinion "does not necessarily state the holding" and "might not have doctrinal significance." Id. at 329. At the same time, "an opinion concurring in the judgment can potentially hold [precedential] status." Id.

119. Compare Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1456 (2010) (Stevens, J., concurring in part and concurring in the judgment) ("[I]f a federal rule displaces a state rule . . . sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way."), with id. at 1473 (Ginsburg, J., dissenting) (arguing for approaching *Erie* questions "mindful of the purposes underlying the Rules of Decision Act and the Rules Enabling Act, faithful to precedent, and respectful of important state interests").

120. Cf. id. at 1464 n.2 (Ginsburg, J., dissenting) ("[A] majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns.").

121. See, e.g., Jones v. United Parcel Serv., Inc., 674 F.3d 1187, 1206 (10th Cir. 2012) ("[T]he purpose of the state law, even if substantive, is immaterial to our analysis." (citing *Shady Grove*, 130 S. Ct. at 1441–42)). See generally Mark P. Gaber, Maintaining Uniform Federal Rules: Why the *Shady Grove* Plurality Was Right, 44 Akron L. Rev. 979, 995–96 (2011) (arguing Justice Scalia's plurality is narrower approach).

122. See, e.g., James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1217 (10th Cir. 2011) (concluding Justice Stevens's opinion controls Rules Enabling Act questions because it relies on narrower grounds than plurality); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 800 F. Supp. 2d 328, 331 (D. Me. 2011) (finding concurrence controlling because Justice Stevens "cast the tie-breaking vote in *Shady Grove*"); In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010) (finding Justice Stevens's approach forms "'narrowest grounds' in *Shady Grove*" because it "called for an analysis of the state's substantive rights and remedies that was consistent with [the] approach of the four members of the dissent").

123. See, e.g., Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 980, 984–85 (10th Cir. 2010) ("This case, like *Shady Grove*, 'turns on whether the state law actually is part of a State's framework of substantive rights or remedies.' Permitting the federal rules

C. *Anti-SLAPP Laws in Federal Court After* Shady Grove

Several federal courts have ruled on the applicability of state anti-SLAPP laws since *Shady Grove* was decided. For example, the First Circuit determined that Maine's anti-SLAPP law should apply in federal court,[124] while a federal district court in the District of Columbia rejected application of D.C.'s recently enacted anti-SLAPP law.[125] Other federal courts have generally found anti-SLAPP laws applicable, although some have done so with little or no acknowledgement of the decision in *Shady Grove*.

1. *The First Circuit's* Godin v. Schencks *Opinion*. — Before *Shady Grove*, district courts in the First Circuit had declined to apply state anti-SLAPP laws.[126] In *Godin v. Schencks*, the First Circuit considered, as a matter of first impression, whether Maine's anti-SLAPP law applies to state law claims in federal court, and concluded that it does.[127] The court framed the issue at hand—whether Federal Rules 12(b)(6)[128] and 56[129] preclude the anti-SLAPP law from applying in federal court—as one that fell "into the special category concerning the relationship between the Federal Rules of Civil Procedure and a state statute that governs both procedure and substance in the state courts."[130] Considering the *Shady Grove* decision, the *Godin* court noted that the four dissenters agreed with Justice Stevens to the extent that he framed the inquiry as being whether the state law is part of the framework defining substantive rights or remedies, rather than focusing on the traditional substance-procedure dichotomy.[131]

---

to trump substantive Wyoming law would 'abridge, enlarge, or modify' the litigants' rights in violation of the Rules Enabling Act." (quoting *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in the judgment))); *In re Wellbutrin*, 756 F. Supp. 2d at 675 ("A majority of the Court . . . rejected Justice Scalia's Rules Enabling Act analysis that only examines the Federal Rule on its own in favor of an analysis that considers important state interests.").

124. Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010).

125. 3M Co. v. Boulter (*Boulter II*), No. 11-cv-1527 (RLW), 2012 WL 5245458 (D.D.C. Oct. 24, 2012); 3M Co. v. Boulter (*Boulter I*), 842 F. Supp. 2d 85 (D.D.C. 2012).

126. See supra notes 104–105 and accompanying text (discussing cases). Even after *Godin*, one district court in Maine seemed to follow *Godin* only begrudgingly. See Lynch v. Christie, 815 F. Supp. 2d 341, 346 & n.5 (D. Me. 2011) (stating court would "follow the First Circuit's teachings in *Godin* that [Maine's anti-SLAPP law] governs federal proceedings," yet found "[a]pplying it is not without difficulty").

127. See 629 F.3d at 81 ("This question . . . is one of first impression for this court . . . . We hold the Maine anti-SLAPP statute must be applied.").

128. Fed. R. Civ. P. 12(b)(6) (allowing motion to dismiss for "failure to state a claim upon which relief can be granted").

129. Fed. R. Civ. P. 56 (allowing motion for summary judgment).

130. *Godin*, 629 F.3d at 86.

131. See id. at 87 (noting Justice Stevens framed "critical question" as "not 'whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural,' but rather 'whether the state law actually is part of a State's framework of substantive rights or remedies'" (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate

Conducting the first step of the Enabling Act analysis, the *Godin* court analyzed the substantive and procedural aspects of Maine's anti-SLAPP law and the scope of Rules 12(b)(6) and 56.[132] The court concluded that neither Rule precluded the application of Maine's anti-SLAPP law.[133] Rather, the anti-SLAPP law and the Federal Rules were "addressed to different (but related) subject-matters"; while the latter were general procedures and governed all cases, Maine's anti-SLAPP law addressed only "special" procedures and applied to a limited category of cases, namely, state law claims targeting legitimate petitioning activity.[134]

Though it had concluded that the anti-SLAPP law did not conflict with the Federal Rules, the *Godin* court went on to address some of the alleged conflicts in more detail.[135] In particular, the court determined that "[t]he limiting effect that [Maine's anti-SLAPP law] has on discovery is not materially different from" that of Federal Rules 12 and 56.[136]

Ins. Co., 130 S. Ct. 1431, 1449 (2010) (Stevens, J., concurring in part and concurring in the judgment))).

132. See id. at 89 ("[Maine's anti-SLAPP law] provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail. It is not the province of either Rule 12 or Rule 56 to supply substantive defenses or the elements of plaintiffs' proof to causes of action, either state or federal.").

133. Id. at 86; see also id. at 91 (finding Rules 12 and 56 do not "purport to be so broad as to preclude additional mechanisms meant to curtail rights-dampening litigation").

134. Id. at 88. Contrasting Maine's anti-SLAPP law with the New York law at issue in *Shady Grove*, the court noted that the former "does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function." Id. Furthermore, "Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights." Id.

Illustrating an analogous point with regard to California's anti-SLAPP law, the Ninth Circuit noted that "neither the denial nor the grant of an anti-SLAPP motion 'necessarily resolves' a motion to dismiss regarding the same claim," because it is possible to hold that an anti-SLAPP motion "should be granted or denied without thereby dictating the result of a motion" under the Federal Rules. Hilton v. Hallmark Cards, 599 F.3d 894, 902 (9th Cir. 2010) (citation omitted) (quoting Batzel v. Smith, 333 F.3d 1018, 1023 (9th Cir. 2003)).

135. See *Godin*, 629 F.3d at 90 (acknowledging district court's "concern about some differences in the mechanics, particularly as to the record on which the motion is evaluated"). The court noted, "Godin emphasizes that [Maine's anti-SLAPP law] has the potential in a particular case to give the individual defendants a dispositive ruling without affording discovery." Id.

136. Id. at 91; cf. First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 265 (1968) (declaring Rule 56 "provides for comparatively limited discovery for the purpose of showing facts sufficient to withstand a summary judgment motion"). The *Godin* court rejected the contention that "the potential in a particular case to give the individual defendants a dispositive ruling without affording discovery" brought Maine's anti-SLAPP law into conflict with the Federal Rules, stating that the anti-SLAPP law, "in imposing on the opponent of the motion the burden of justifying discovery, is consistent with the allocation of burdens under [Rule 56]." *Godin*, 629 F.3d at 90. The court harmonized the anti-SLAPP law with the Federal Rules by concluding that "[i]f a federal court would allow discovery under [Rule 56] then, in our view, that would constitute good cause under the Maine statute." Id. at 90–91.

Turning to the *Erie* analysis, *Godin* declared that declining to apply Maine's anti-SLAPP law would promote the inequitable administration of the laws by depriving targets of its protection solely because they are in federal court, and thus held that "[s]uch an outcome would directly contravene *Erie*'s aims."[137] Notably, the *Godin* court also ruled that Maine's anti-SLAPP law "is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created right,'" suggesting that the Rules' validity under the Enabling Act might be called into question were they thought to displace it completely.[138]

2. 3M Co. v. Boulter. — The sharpest contrast to the First Circuit's approach in *Godin* is provided by *3M Co. v. Boulter*,[139] a case in which the United States District Court for the District of Columbia considered D.C.'s recently enacted anti-SLAPP law[140] and held that it did not apply in federal court.[141] The court considered whether D.C.'s Anti-SLAPP Act—allowing a judge to dismiss a claim with prejudice early in litigation based on whether the alleged SLAPP filer can show a likelihood of success on the merits[142]—should apply in federal court.[143] Though the *Boulter* court never cited the *Shady Grove* plurality, its failure to undertake a separate analysis of the Enabling Act's second restriction,[144] together

---

137. *Godin*, 629 F.3d at 92.

138. Id. at 89–90 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring in part and concurring in the judgment)).

139. *Boulter II*, No. 11-cv-1527 (RLW), 2012 WL 5245458 (D.D.C. Oct. 24, 2012); *Boulter I*, 842 F. Supp. 2d 85 (D.D.C. 2012).

140. Anti-SLAPP Act of 2010, D.C. Act No. 18-701, 58 D.C. Reg. 741 (Jan. 19, 2011) (codified as amended at D.C. Code §§ 16-5501 to 16-5505 (Supp. 2013)). As the Act was passed in 2011, no federal court had considered its application before the decision in *Shady Grove*.

141. *Boulter I*, 842 F. Supp. 2d at 111.

142. The D.C. Anti-SLAPP Act reads in part:

> If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502(b). The Act offers protections to a range of direct petitioning activity, as well as advocacy incident to petitioning activity. Id. § 16-5501(1), (3).

143. *Boulter I*, 842 F. Supp. 2d at 96 ("The question in dispute is whether this Court may dismiss 3M's claims with prejudice on a preliminary basis based on the pleadings or on matters outside the pleadings merely because 3M has not 'demonstrate[d] that the claim is likely to succeed on the merits.'" (alteration in *Boulter I*) (quoting D.C. Code § 16-5502(b))).

144. The *Boulter* court relied on "the procedural characteristics of the [D.C. Anti-SLAPP] Act, and the presumptive validity of the Federal Rules of Civil Procedure" to determine that "Rules 12 and 56 do not abridge, enlarge or modify any substantive right in violation of the Rules Enabling Act." Id. at 111. The court also argued that the Act was "procedural" by pointing to the fact that it "is codified with procedural matters in the D.C. Code." Id. at 110–11. But see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130

with its explicit rejection of Justice Stevens's concurrence,[145] indicates that *Boulter* is in effect an application of Justice Scalia's plurality opinion.

The court declared that the motion under the Anti-SLAPP Act conflicted with Rules 12 and 56, then held that a target could only challenge the sufficiency of a claim through the procedures defined by Rules 12 and 56.[146] Alluding to *Shady Grove*, the court concluded that application of the Act would restrict "'the procedural right to maintain [an action].'"[147] The court also found a direct conflict between the Federal Rules and the Act's mandate that dismissal be with prejudice.[148] In a subsequent ruling, the *Boulter* court presented additional arguments against applying D.C.'s Anti-SLAPP Act in federal court—among them the contention that to do so would violate the Seventh Amendment.[149]

S. Ct. 1431, 1450 (2010) (Stevens, J., concurring in part and concurring in the judgment) ("In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take."); accord id. at 1464 (Ginsburg, J., dissenting) ("Our decisions instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute or a procedural rule—warrant our respectful consideration." (citations omitted)).

145. See *Boulter I*, 842 F. Supp. 2d at 95 n.7 ("Part II-A [of *Shady Grove*] enjoyed the assent of five justices, including Justice Stevens. . . . Part II-A was a majority opinion, and that majority opinion governs over a concurrence.").

146. Id. at 103.

147. Id. (alteration in *Boulter I*) (quoting *Shady Grove*, 130 S. Ct. at 1439 n.4). *Shady Grove*'s holding did not concern a plaintiff's procedural right to maintain *any* action, as the altered quotation might be read to imply. Cf. *Shady Grove*, 130 S. Ct. at 1437 ("[Rule 23] states that '[a] class action may be maintained' if two conditions are met . . . . [A] plaintiff whose suit meets the specified criteria [is entitled] to pursue his claim *as a class action*." (second alteration in *Shady Grove*) (emphasis added) (quoting Fed. R. Civ. P. 23(b))).

148. See *Boulter I*, 842 F. Supp. 2d at 105–06 & n.17 (noting "'choice made by the drafters of the Federal Rules in favor of a discretionary procedure'" (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987))). Compare D.C. Code § 16-5502(d) ("If the special motion to dismiss is granted, dismissal shall be with prejudice."), with Fed. R. Civ. P. 41(b) (declaring involuntary dismissals are with prejudice "[u]nless the dismissal order states otherwise").

149. See *Boulter II*, No. 11-cv-1527 (RLW), 2012 WL 5245458, at *1 (D.D.C. Oct. 24, 2012) ("The Supreme Court has made it quite clear that Rule 56 sets the outer boundary for dismissing claims on the merits based upon a pretrial evaluation of the evidence; to go further infringes upon the Seventh Amendment right to a jury trial." (citing Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 627–28 (1944))). For discussion of the relation between the Seventh Amendment and the issue of federal court application of anti-SLAPP laws, see infra Part III.B.2.

The court also argued that it was logically inconsistent for the Act both to be considered part of the definition of substantive rights and, at the same time, apply to causes of action, like those in the instant case, which arise under foreign law. *Boulter II*, 2012 WL 5245458, at *2 ("[I]t is blackletter law that if foreign law applies to define the scope of the tort, then the same foreign law also defines the scope of the defenses to that tort." (citing Restatement (Second) of Conflict of Laws § 161 (1971))).

Under *Klaxon*, a federal court applies the choice-of-law rules of the local courts of the jurisdiction in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Under D.C.'s choice-of-law rules, defendants' immunity may well be governed by a different jurisdiction's law than that which governs plaintiffs' cause of action. See

3. *Other Federal Courts Apply Anti-SLAPP Laws.* — Other federal district judges in D.C. have approached the District's Anti-SLAPP Act more favorably. First, in *Sherrod v. Breitbart*, one court stated that the Act was substantive.[150] Another court, quoting *Sherrod*, ruled that a filer's common law claims were barred both by the Anti-SLAPP Act[151] and the First Amendment.[152] Two other recent D.C. district court decisions granted motions to dismiss under the Act.[153]

District courts in other circuits have generally favored application of state anti-SLAPP laws in federal court since *Shady Grove*. In one case, a federal district court in the Seventh Circuit considered whether it should apply the Illinois Citizen Participation Act (ICPA).[154] After finding that the ICPA provides a substantive state law defense,[155] the court concluded

---

Restatement (Second) of Conflict of Laws § 145 cmt. d (1971) ("[Courts] are not bound to decide all issues under the local law of a single state. . . . [T]he local law of the state where the parties are domiciled . . . may be applied to determine whether one party is immune from tort liability . . . .").

In particular, where either the application of foreign law or failure to apply local law would violate public policy, a court will either apply local law or "decline to pass upon the merits, and leave the parties free to litigate the matter elsewhere." Morgan, supra note 64, at 157. Failing to apply D.C.'s Anti-SLAPP Act would arguably violate public policy as expressed in the Act itself. For more regarding various conflict-of-laws issues, see sources cited supra notes 64–65.

150. See 843 F. Supp. 2d 83, 85 (D.D.C. 2012) ("[T]he statute is substantive—or at the very least, has substantive consequences . . . ."), aff'd on other grounds, 720 F.3d 932 (D.C. Cir. 2013).

151. See Farah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 35–39 (D.D.C. 2012) ("The Act 'incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish the opponent or prevent the expression of opposing points of view.' This is just such a suit." (quoting *Sherrod*, 843 F. Supp. 2d at 85)).

152. Id. at 39–40 ("The rationale that applies to the motion to dismiss under the D.C. Anti-SLAPP Act also applies to Defendants' motion to dismiss for due to [sic] failure to state a claim. Because Defendants' speech is protected by the First Amendment, Plaintiffs cannot pursue their common law claims based on such speech.").

153. See Abbas v. Foreign Policy Grp., LLC, No. 12-1565 (EGS), 2013 WL 5410410, at *5 (D.D.C. Sept. 27, 2013) ("This Court is persuaded by those Circuits that have held that similar statutes do apply in federal court."); Boley v. Atl. Monthly Grp., No. 13-89(RBW), 2013 WL 3185154, at *2 (D.D.C. June 25, 2013) (concluding "*3M Co.* conflicts with the weight of authority" and adopting reasoning of federal circuit courts that "have deemed it necessary to enforce state anti-SLAPP laws in diversity actions").

154. See Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review (*Satkar IV*), No. 10 C 6682, 2011 WL 4431029, at *8 (N.D. Ill. Sept. 21, 2011) (granting defendant's motion under ICPA); Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review (*Satkar III*), No. 10 C 6682, 2011 WL 2182106, at *5 (N.D. Ill. June 2, 2011) (holding defendants may assert ICPA defense "via an appropriate procedural vehicle"); see also 735 Ill. Comp. Stat. Ann. 110/1–110/99 (West 2011) ("Illinois Citizen Participation Act"). "Citizen Participation Act" (or "Citizen Participation in Government Act") is the label given to some anti-SLAPP statutes. See, e.g., Ark. Code Ann. § 16-63-501 (2005) ("Citizen Participation in Government Act"); 735 Ill. Comp. Stat. Ann. 110/1 ("Citizen Participation Act").

155. See *Satkar III*, 2011 WL 2182106, at *4 (citing Chi v. Loyola Univ. Med. Ctr., 787 F. Supp. 2d 797, 808 (N.D. Ill. 2011)) ("[I]mmunity under the ICPA is a substantive state

that it applies in federal court.[156] Most other district courts have applied anti-SLAPP laws, either under their own circuit's precedent or under precedent from other circuits.[157] However, one court in the Northern District of Illinois, disagreeing with other courts in the same district, has applied the *Boulter* court's reasoning to hold that Washington State's Anti-SLAPP Act does not apply in federal court.[158]

The Ninth Circuit has maintained its approach to anti-SLAPP laws without reference to *Shady Grove* or reconsideration of its decisions in *Metabolife* or *Verizon*.[159] However, two judges on the Ninth Circuit recently called for reconsideration—and overruling—of the *Newsham* decision itself.[160] Meanwhile, some district courts have continued to grant at least

---

law defense."). The *Satkar* court cited approvingly the decision in *Chi v. Loyola University Medical Center*, which had ruled that the operative provisions of the ICPA "are not merely procedural in nature," in particular because "the ICPA created a new category of conditional legal immunity against claims premised on a person's '[a]cts in furtherance of' his First Amendment rights." 787 F. Supp. 2d at 808 (alteration in *Chi*) (quoting 735 Ill. Comp. Stat. Ann. 110/15).

156. *Satkar IV*, 2011 WL 4431029, at *8. At the same time, the court rejected a constitutional attack on the ICPA. Id. at *3 ("[T]he ICPA limits a plaintiff's prospect of success in court, not its access to the courts in the first instance.").

157. See Adelson v. Harris, No. 12 Civ. 6052(JPO), 2013 WL 5420973, at *20 n.21 (S.D.N.Y. Sept. 30, 2013) ("Nevada federal district courts, following [*Newsham*], have applied the statute in diversity actions. Numerous other federal courts have concluded that state anti-SLAPP laws are applicable in diversity actions." (citations omitted)); Brown v. Wimberly, No. 11-1169, 2011 WL 5438994, at *1 (E.D. La. Nov. 9, 2011) ("[T]he Fifth Circuit has recognized the validity of anti-SLAPP statutes in federal proceedings. The Fifth Circuit is joined by the First Circuit, as well as the Ninth Circuit, in its approval." (citations omitted)).

158. Intercon Solutions, Inc. v. Basel Action Network, No. 12 C 6814, 2013 WL 4552782, at *10 (N.D. Ill. Aug. 28, 2013).

159. See, e.g., Z.F. v. Ripon Unified Sch. Dist., 482 F. App'x 239, 240 (9th Cir. 2012) (citing Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 845 (9th Cir. 2001)) (noting "actual and potential conflicts between California's anti-SLAPP procedural provisions and the federal rules" and reaffirming "discovery must be permitted" before granting anti-SLAPP motion founded on factual challenge); Greensprings Baptist Christian Fellowship Trust v. Cilley, 629 F.3d 1064, 1065–66 & n.1 (9th Cir. 2010) (restating holding that granting anti-SLAPP motion to strike initial complaint without granting leave to amend "'would directly collide with [Rule] 15(a)'s policy favoring liberal amendment'" (quoting Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004))).

160. See Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273–74 (9th Cir. 2013) (Kozinski, C.J., concurring) ("*Newsham*'s mistake was that it engaged in conflict analysis without first determining whether the state rule is, in fact, substantive. It's not. The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights."); id. at 275–76 (Paez, J., concurring) ("I agree [with Chief Judge Kozinski] that California's anti-SLAPP statute is 'quintessentially procedural,' and its application in federal court has created a hybrid mess that now resembles neither the Federal Rules nor the original state statute."). But cf. *Adelson*, 2013 WL 5420973, at *20 n.21 ("[E]ven if the *procedural* elements of certain Anti-SLAPP statutes present problems under *Erie*, those problems are not presented . . . where the effects of the Anti-SLAPP law . . . are substantive." (citation omitted)).

some protection to SLAPP targets within the framework of the Ninth Circuit's precedent.[161]

In summary, federal courts have been inconsistent in their treatment of state anti-SLAPP laws. Some look askance at state attempts to use procedural protections to insulate their citizens' petitioning activity from strategic litigation. Others, while acknowledging that anti-SLAPP laws are largely substantive, nevertheless find that the Federal Rules displace certain anti-SLAPP provisions, compromising the protection offered by the laws. Yet a few courts appear to recognize that anti-SLAPP laws are a quintessential example of what Justice Stevens referred to as "those rare state rules that, although 'procedural' in the ordinary sense of the term, operate to define" the scope of substantive rights under state law.[162]

III. THE FEDERAL RULES, ANTI-SLAPP LAWS, AND THE FIRST AMENDMENT

This Part argues that courts can and should apply state anti-SLAPP laws to state law claims heard in federal court. Part III.A shows how the Federal Rules already are applied alongside Supreme Court doctrines that are analogous to anti-SLAPP laws. Part III.B addresses supposed conflicts with particular Federal Rules. Part III.C briefly discusses federal measures that could improve targets' access to anti-SLAPP protections in federal court. This Note concludes by calling on federal courts to endorse full application of the protections offered by state anti-SLAPP laws.[163]

A. *Analogous Federal Doctrines*

The various provisions of anti-SLAPP laws operate analogously to several federal doctrines that allow for the swift dismissal of certain claims, and these very doctrines operate alongside—and thus must be compatible with—the Federal Rules. The *Noerr-Pennington* doctrine has been extended beyond antitrust to protect legitimate petitioning activity from various SLAPPs. Moreover, Supreme Court jurisprudence provides immunity from suit in order to reduce the burdens of litigation on public officials by recognizing absolute and qualified immunities. Finally, the

---

161. See, e.g., Agnir v. Gryphon Solutions, LLC, No. 12-CV-04470-LHK, 2013 WL 4082974, at *16 (N.D. Cal. Aug. 9, 2013) ("[I]n this case, the Court's anti-SLAPP ruling is premised on the legal insufficiency of Agnir's pleadings. As a result, further facts would not alter the Court's analysis, much less prove 'essential to justify' Agnir's opposition, as required by Rule 56(d)."); see also Fed. R. Civ. P. 56(d) (allowing court to allow time for discovery "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition").

162. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1455 n.13 (2010) (Stevens, J., concurring in part and concurring in the judgment).

163. Professor John A. Lynch, Jr., makes the broader argument that all state litigation reform measures, including anti-SLAPP statutes, should be given greater weight by federal courts. Lynch, supra note 65, at 320–27.

Supreme Court has applied the Federal Rules with sensitivity to the need for judicial protection of First Amendment values.

1. Noerr-Pennington *as an Anti-SLAPP Doctrine.* — Several federal courts have compared *Noerr-Pennington* to state anti-SLAPP laws.[164] Indeed, anti-SLAPP laws were inspired by *Noerr-Pennington*—which has come to be recognized as not simply an interpretation of the Sherman Antitrust Act, but as a doctrine rooted in the First Amendment.[165] Notably, federal courts have applied *Noerr-Pennington* to protect petitioning activity against SLAPPs. Even the Supreme Court has applied *Noerr-Pennington* outside the area of antitrust: In *NAACP v. Claiborne Hardware Co.*, the Court reversed a verdict against the NAACP, rejecting liability premised on "a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[166]

Lower courts have been even more aggressive in dismissing SLAPPs under *Noerr-Pennington*. In *Sierra Club v. Butz*, a federal district court applied *Noerr-Pennington* to immunize legitimate petitioning activity against a state law counterclaim.[167] The court declined to limit the targets' protection to the "actual malice" standard announced in *New York Times Co. v. Sullivan*, instead declaring that "all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence

---

164. See, e.g., Select Portfolio Servicing v. Valentino, 875 F. Supp. 2d 975, 988 (N.D. Cal. 2012) ("The first part of the anti-SLAPP inquiry is substantially the same as the inquiry into whether the *Noerr-Pennington* doctrine applies."); Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178, 1181 n.3 (S.D. Cal. 2008) ("[T]he *Noerr-Pennington* doctrine is analogous to California's anti-SLAPP statute."); see also supra Part I.A.1 (discussing *Noerr-Pennington* doctrine and explaining its significance). Note, however, that *Noerr-Pennington* lacks the detailed procedural safeguards provided by a typical anti-SLAPP law. Cf. supra note 54 (discussing detailed procedural safeguards in anti-SLAPP statutes).

165. See, e.g., Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1522 (D. Colo. 1993) ("More than one court has held that the [*Noerr-Pennington*] doctrine 'is a principal [sic] of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, *regardless of the underlying cause of action asserted by the Plaintiffs.*'" (emphasis added by *Computer Assocs.*) (quoting Azzar v. Primebank, FSB, 499 N.W.2d 793, 796 (Mich. Ct. App. 1993)) (misquotation)). Compare Barylak, supra note 46, at 857–58 & nn.55–58 ("In the decades following *Noerr* and *Pennington*, the federal courts extended *Noerr*'s principle to cases outside of antitrust law . . . further reinforcing the protections granted to petitioning activities."), and Robert P. Faulkner, The Foundations of *Noerr-Pennington* and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a "Clear and Convincing" Standard, 28 U.S.F. L. Rev. 681, 683 (1994) ("*Noerr-Pennington* is a First Amendment doctrine and . . . as a result, the antitrust plaintiff should bear the burden of proving his or her allegations of sham activity by clear and convincing evidence."), with Beatty, supra note 16, at 101–05 (criticizing extension of *Noerr-Pennington* doctrine), and Robert A. Zauzmer, Note, The Misapplication of the *Noerr-Pennington* Doctrine in Non-Antitrust Right to Petition Cases, 36 Stan. L. Rev. 1243, 1262 (1984) (same).

166. 458 U.S. 886, 914 (1982).

167. 349 F. Supp. 934, 937–39 (N.D. Cal. 1972).

the government or its officials to adopt a new policy."[168] Similarly, in *Stevens v. Tillman*, the Seventh Circuit granted *Noerr-Pennington* immunity to citizens engaged in a campaign to influence local government bodies, holding that such "direct involvement in governance" is "classic political speech" entitled to full First Amendment protection.[169]

Noerr-Pennington immunity is similar to the substantive immunity provided by state anti-SLAPP laws. Yet beyond recognizing substantive immunity for legitimate petitioning activity, anti-SLAPP laws also provide mechanisms for safeguarding such activity from the burdens of litigation. These safeguards are analogous to Supreme Court doctrines governing absolute and qualified immunity.

2. *The Right Not to Stand Trial.* — Absolute and qualified immunity both constitute entitlements not to stand trial,[170] and both are justified as guarding the public interest by insulating public officials from the burdens of litigation. The primary difference between the two is the focus of the protection: Absolute immunity protects certain official functions, whereas qualified immunity protects public officials whose actions were reasonable under the circumstances. The former can be established through a showing that the claim is premised on the exercise of a protected function, whereas the latter requires a more complex inquiry.

Absolute immunity extends to public officials when they are carrying out functions essential either to the judicial process or to the American scheme of representative government.[171] Where it applies, absolute immunity "defeats a suit at the outset."[172] Where absolute immunity does not apply, public officials are afforded only qualified immunity, which strikes a balance between allowing actions for damages against government officials—which "may offer the only realistic avenue for vindication of constitutional guarantees"[173]—and minimizing the "risk

---

168. Id. at 938 ("[T]he malice standard invites intimidation of all who seek redress from the government . . . . [E]ven those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the 'breathing space' that First Amendment freedoms need to survive."); see also Pring & Canan, SLAPPs, supra note 1, at 85–86 (discussing litigation in *Sierra Club v. Butz*); supra notes 22–24 and accompanying text (discussing *New York Times* "actual malice" standard).

169. 855 F.2d 394, 403 (7th Cir. 1988) ("[T]he statements in question were either made at meetings of the Board of Education or were part of a campaign to influence the Board. . . . [Both] are equally protected." (citing *Claiborne*, 458 U.S. at 907–12)); see also Pring & Canan, SLAPPs, supra note 1, at 61–62 (discussing litigation in *Stevens v. Tillman*).

170. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (noting absolute and qualified immunity each represent "*immunity from suit* rather than a mere defense to liability" that is "effectively lost if a case is erroneously permitted to go to trial").

171. See id. at 521–22 (noting "judicial or 'quasi-judicial' tasks" have been "primary wellsprings of absolute immunities" because "judicial process is an arena of open conflict" presenting "obvious risks of entanglement in vexatious litigation"); id. at 521 (describing legislative immunity as "presupposition of our scheme of representative government").

172. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

173. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[174] Under *Harlow v. Fitzgerald*, courts are sensitive to the costs of imposing the burdens of litigation on government officials, especially those burdens associated with broad-reaching discovery.[175] Instead, the Court has held that discovery should not be allowed until immunity can be determined based on objective criteria.[176]

Anti-SLAPP protections resemble absolute and qualified immunity, as they provide immunity from suit rather than merely a defense to liability. Their purpose—to protect the public interest by minimizing the negative impact that could result if the threat of liability and burdens of litigation are imposed on persons engaged in a certain class of activity[177]—are closely parallel, if not identical, to the purposes motivating absolute and qualified immunity for public officials. Qualified and absolute immunity apply alongside the Federal Rules while allowing for the dismissal of claims early in litigation, including before discovery. Therefore anti-SLAPP laws—whose protections depend upon courts dismissing SLAPP claims at the earliest possible stage—should also be found compatible with the operation of the Federal Rules.

While anti-SLAPP laws and official immunity are motivated by similar concerns, they are justified on different grounds. Absolute and qualified immunity were created in order to ensure the ability of government officials to carry out the essential functions of government, while anti-SLAPP laws are justified by the need to protect First Amendment interests of citizens at large.[178] However, just as solicitude for protecting government officials has led to application of absolute and qualified immunity alongside the Federal Rules, the First Amendment has had its own influence on their application.

---

174. Anderson v. Creighton, 483 U.S. 635, 638 (1987) (citing *Harlow*, 457 U.S. at 814).

175. See 457 U.S. at 814 (noting claims against blameless officials impose social costs including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"). The Court also noted that such claims pose "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Id. (alteration in *Harlow*) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

176. Id. at 818.

177. See supra text accompanying note 54 (discussing purpose and operation of anti-SLAPP laws).

178. These purposes are not as dissimilar as they might appear; indeed, the Supreme Court has noted that "[t]he right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495 (2011); see also supra notes 27–28 and accompanying text (discussing Supreme Court cases recognizing link between Petition Clause and functioning of republican form of government).

3. *The First Amendment.* — When First Amendment values are at stake, even the plain meaning of the Federal Rules must yield to the Constitution. Time and again, the Supreme Court has declared that First Amendment values must be protected by independent appellate review of the whole record.[179] Under this "rule of independent review," judges—and the Supreme Court itself—have "a constitutional responsibility that *cannot be delegated to the trier of fact*,"[180] the Seventh Amendment notwithstanding.[181]

The rule of independent review heightens the duty of federal judges to protect First Amendment interests against the burdens of litigation: Whereas normally an appellate court would be required by Federal Rule 52(a) to defer to a trial court's factual findings,[182] this practice is superseded when First Amendment protections are at stake.[183] The Supreme Court's sensitive, even flexible approach to the Federal Rules in cases implicating First Amendment interests further counsels the application of state anti-SLAPP laws in federal court.

When taken together, *Noerr-Pennington*, public official immunity, and the influence of the First Amendment can be viewed as carving out protections parallel to those provided by state anti-SLAPP laws. Whether rooted in the Constitution[184] or the common law,[185] none of these doc-

---

179. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (noting Court "ha[s] repeatedly held" that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record'" to prevent "'forbidden intrusion on the field of free expression'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964))).

180. Id. at 501 (emphasis added); see also id. at 501 n.17 ("Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.").

181. Cf. id. at 508 n.27 ("[T]he limitation on appellate review of factual determinations under Rule 52(a) is no more stringent than the limitation on federal appellate review of a jury's factual determinations under the Seventh Amendment . . . .").

182. See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

183. See *Bose Corp.*, 466 U.S. at 514 (holding Rule 52(a)'s clearly erroneous standard "does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*"); cf. id. at 503 (noting Court's "role in marking out the limits of the [constitutionally provided] standard through the process of case-by-case adjudication . . . has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment").

184. See *Bose Corp.*, 466 U.S. at 510 ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law."); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961) (rejecting construction of Sherman Act that would deprive citizens "of their right to petition").

185. See Imbler v. Pachtman, 424 U.S. 409, 419 (1976) ("[T]he considerations underlying the nature of the immunity of [public] officials in suits at common law [has] led to essentially the same immunity under [42 U.S.C. § 1983].").

trines has been found in direct conflict with the Rules—and where doubts have arisen, First Amendment values have trumped rigid application of Rules. Thus federal courts should hesitate to find any irreconcilable conflict between anti-SLAPP laws and the Federal Rules. Moreover, allowing the Federal Rules to displace state anti-SLAPP laws would be inconsistent not only with First Amendment values, but also with principles of federalism—such as the policy embodied in the rule of *Erie*.[186] In sum, because the Federal Rules do not preclude the swift dismissal of certain claims, they should not be read to conflict with state laws intended to provide for the swift dismissal of claims burdening core First Amendment activity.

B. *From* Hanna *to* Shady Grove*—Finding, and Resolving, Conflict*

State anti-SLAPP laws should be considered *Erie*-substantive, and thus applied in full to state law claims heard in federal court. Even those provisions of state anti-SLAPP laws that appear procedural in form in fact represent more than mere procedural standards. While procedural standards—such as those governing pleadings, summary judgment, and discovery practice—could be seen as providing the questions a court must answer to decide a given motion, such questions cannot be answered without reference to the substantive law governing a given claim or defense.[187] Anti-SLAPP laws provide the substantive standards that guide the determination of when petitioning activity is entitled to immunity from suit; therefore, such laws should be understood as complementing—rather than conflicting with—the operation of the Federal Rules.

1. *Motions for Summary Judgment.* — The substantive law governing a particular claim or defense affects a summary judgment determination in several ways—in particular, by guiding the requisite materiality inquiry and by defining evidentiary standards. Under Rule 56, merely alleging some factual dispute is insufficient to defeat a motion for summary judgment where there is "no *genuine* issue of *material* fact," and substantive law "identif[ies] which facts are material."[188] The summary judgment determination also incorporates the evidentiary standard of proof defined by substantive law.[189] Notably, where the law allows for a

---

186. In *Guaranty Trust Co. v. York*, discussed supra notes 64–66, the Court referred to *Erie* as expressing "a policy so important to our federalism," 326 U.S. 99, 110 (1945), one "that touches vitally the proper distribution of judicial power between State and federal courts," id. at 109.

187. Cf., e.g., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (distinguishing between "flexible" evidentiary standards and "rigid" pleading standards).

188. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986).

189. See id. at 252 ("[T]he inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."). The Court noted that materiality is "independent of and separate from the question of the incorporation of the evidentiary standard into

prima facie showing to establish "a legally mandatory, rebuttable presumption,"[190] this represents "an evidentiary standard, not a pleading requirement."[191] Indeed, the Federal Rules of Evidence specifically provide that the effect of such presumptions is governed by state law.[192] Therefore, where a party is unable to rebut a prima facie showing establishing an entitlement to immunity under a state anti-SLAPP law, there can be no genuine issue of material fact to preclude the granting of a motion for summary judgment on a state law claim.

A court is also guided by evidentiary burdens when deciding between granting summary judgment or permitting further discovery. While the Federal Rules embody a general policy in favor of liberal discovery practice, the Supreme Court has recognized that some types of cases present a greater "potential for possible abuse."[193] Furthermore, whenever discovery permits a litigant to simply gain leverage toward a settlement, it represents "a social cost rather than a benefit."[194] Thus under circumstances where a party should prevail under the terms of a state anti-SLAPP law, no further discovery can be justified by the Rules' general policy of liberal discovery: State law defines which facts are material to the determination of what petitioning activity is immune from suit, and such immunity renders any other dispute immaterial.[195]

Procedural motions are guided by reference to substantive law. Anti-SLAPP laws allocate burdens of proof, define evidentiary presumptions, and identify facts material to determining what is to be protected as legitimate petitioning activity—and all these matters are governed by "sub-

---

the summary judgment determination"—the former is "a criterion for categorizing factual disputes in their relation to the legal elements of the claim," whereas the latter relates to "evaluating the evidentiary underpinnings of those disputes." Id. at 248.

190. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981); see also id. at 255 n.8 ("Usually, assessing the burden of production [created by a prima facie showing] helps the judge determine whether the litigants have created an issue of fact to be decided by the jury.").

191. *Swierkiewicz*, 534 U.S. at 510.

192. See Fed. R. Evid. 302 ("In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision."). The Federal Rules of Evidence are promulgated pursuant to the same statutory authorization as the Federal Rules of Civil Procedure. See 28 U.S.C. § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . . .").

193. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975).

194. Id.

195. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2725, at 93–95 (1983))).

stantive" law, not the Federal Rules.[196] Thus many if not all "procedural" provisions of anti-SLAPP laws are in fact *Erie*-substantive, and federal courts should therefore consider themselves bound to apply state anti-SLAPP laws to the fullest extent consistent with the operation of the federal system. Lastly, unlike the conflict at issue in *Shady Grove*, none of the Rules that allegedly conflict with anti-SLAPP laws have language explicitly conveying a right to maintain an action.[197]

2. *The Seventh Amendment.* — Anti-SLAPP protections are consistent with the Seventh Amendment. The main concern in *Byrd* and *Gasperini*—two *Erie* doctrine cases influenced by the Seventh Amendment—was the allocation of roles within the federal system. The *Byrd* Court looked to the allocation of the factfinding role between judge and jury,[198] while in *Gasperini* the Court examined the allocation of reviewing authority between trial and appellate courts.[199] However, role allocation—the question of who is charged with resolving disputed factual matters—is distinct from the question of whether there is a factual dispute to be resolved in the first place. It is true that in the federal system only a jury may make credibility determinations, weigh evidence, or draw "legitimate inferences from the facts."[200] Yet the summary judgment determination "turn[s] on whether a proper jury question [is] presented,"[201] which, in turn, is affected by substantive matters such as evidentiary burden, the effect of presumptions, and the materiality inquiry.[202] The Seventh Amendment is not implicated where the law declares that no claim premised on legitimate petitioning activity may proceed.

In sum, the Federal Rules do not conflict with, let alone displace, anti-SLAPP provisions governing matters that are *Erie*-substantive. Any doubts a federal court might have regarding other nominally procedural provisions should likewise be resolved in favor of applying state anti-SLAPP laws. Under Justice Stevens's *Shady Grove* concurrence, such provi-

---

196. Under *Erie*, federal law cannot define the elements of a state law cause of action or defense. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding federal government has no power to "declare substantive rules of common law applicable in a State"); see also Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20–21 (2000) (noting Court has long held burden of proof to be substantive "[g]iven its importance to the outcome of cases").

197. Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) ("[Rule 23] states that '[a] class action may be maintained' if [certain] conditions are met . . . . [T]his creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." (second alteration in original) (quoting Fed. R. Civ. P. 23(b))).

198. See supra notes 69–70 (discussing *Byrd*).

199. See supra notes 79–82 and accompanying text (discussing *Gasperini*).

200. *Liberty Lobby*, 477 U.S. at 255.

201. Id. at 249 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)).

202. Id. at 252–54 ("[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the *substantive evidentiary burden*." (emphasis added)).

sions are "procedural in the ordinary use of the term" but are nevertheless "so intertwined with a state right or remedy"—here, immunity from suit for legitimate petitioning activity—that they function to "define the scope of [that] right."[203] Principles of federalism and the First Amendment outweigh the generalized interest in uniformity of federal procedure, especially when such uniformity in procedure has the potential to create disuniformity in outcome by undermining state law protections for legitimate petitioning activity.

C. *Potential Federal Solutions*

Congress can address the problem of SLAPPs by way of two distinct but complementary measures: by amending the Rules Enabling Act to mandate the evenhanded treatment of state anti-SLAPP laws by federal courts, and by passing federal anti-SLAPP legislation.

1. *Amendment to the Rules Enabling Act.* — The most straightforward way to ensure that federal courts apply state anti-SLAPP laws in diversity suits is for Congress to amend the Rules Enabling Act to explicitly exempt state litigation reform from preemption.[204] Such legislative action is preferable to case-by-case (or even court-by-court) determination of whether particular anti-SLAPP laws conflict with the Federal Rules,[205] and avoids divergent treatment of similar state anti-SLAPP laws.[206] Moreover, such an approach shows greater regard for the states' role in the nation's federalist system.

---

203. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring in part and concurring in the judgment).

204. See Lynch, supra note 65, at 326 & n.279 (proposing Congress add language to Rules Enabling Act to direct federal courts hearing state law claims to apply state litigation reform measures).

205. See supra Part II.A, II.C (discussing varied treatment of anti-SLAPP laws in federal court).

206. State anti-SLAPP laws have received different treatment by federal courts based merely on superficial differences. For example, the *Boulter* court went so far as to argue that it could not apply the D.C. Anti-SLAPP Act "because the D.C. Council has clearly mandated [a] *procedure*" to enforce anti-SLAPP protections, and that "[t]he D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion." *Boulter I*, 842 F. Supp. 2d 85, 108 (D.D.C. 2012).

By contrast, other anti-SLAPP laws—such as the Illinois Citizen Participation Act—employ explicit immunity-granting language. See 735 Ill. Comp. Stat. Ann. 110/15 (West 2011) ("Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome."); see also *Satkar III*, No. 10 C 6682, 2011 WL 2182106, at *4 (N.D. Ill. June 2, 2011) (declaring "immunity under the ICPA is a substantive state law defense").

The presence or absence of such language should not affect federal court treatment of state law. Cf. *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring in part and concurring in the judgment) ("In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take.").

2. *Federal Anti-SLAPP Legislation.* — Currently, there is no federal equivalent to state anti-SLAPP statutes.[207] Even in states that have some form of protection from SLAPPs, the lack of a federal statute creates uncertainty for potential SLAPP targets.[208] And while some federal courts are willing to apply state anti-SLAPP laws to dismiss state law SLAPP claims, there is no similar legislative scheme protecting petitioning activity from federal causes of action.[209] A federal equivalent would complement state anti-SLAPP laws by preventing filers from bypassing state protections by pleading their SLAPP claims under federal law.[210] Yet even if such a federal statute were enacted, it might apply only to claims under

---

207. Federal anti-SLAPP legislation was proposed in Congress as recently as 2009. See Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009), 2009 CONG US HR 4364 (Westlaw) (seeking "[t]o protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called 'SLAPPs'"). For a generally positive assessment of the proposed Act, see Jesse J. O'Neill, Note, The Citizen Participation Act of 2009: Federal Legislation as an Effective Defense Against SLAPPs, 38 B.C. Envtl. Aff. L. Rev. 477, 500–07 (2011) (predicting Act would "largely succeed[]" in providing anti-SLAPP protection for acts of petitioning government but worrying that separate, weaker standard for other First Amendment activity would "weaken the Act's utility as a SLAPP defense"). Notably, the proposed legislation would extend its protections to targets sued in state court by allowing for removal of such claims to federal court. Id. at 505–06 (citing H.R. 4364 § 6(a), 2009 CONG US HR 4364 (Westlaw)).

208. Barylak, supra note 46, at 849 ("[U]ntil federal anti-SLAPP legislation is adopted, state legislatures will be left to respond to the central causes of uncertainty associated with anti-SLAPP law—availability, validity, applicability, and appealability."). The category of uncertainty most relevant to the issues discussed in this Note is "availability"—specifically, availability of immunity from SLAPPs in federal court. See id. at 849–64 (discussing uncertain availability of anti-SLAPP protections).

209. Cf., e.g., Hilton v. Hallmark Cards, 599 F.3d 894, 900–01 (9th Cir. 2010) ("[California's] anti-SLAPP statute does not apply to federal law causes of action."); Doctor's Data, Inc. v. Barrett, No. 10 C 03795, 2011 WL 5903508, at *2 (N.D. Ill. Nov. 22, 2011) (stating application of Illinois anti-SLAPP law to federal claims would violate Supremacy Clause by "permit[ting] state law to affect and alter the substance of federal claims").

However, at least one federal court has noted the similarity between the *Noerr-Pennington* doctrine and state anti-SLAPP laws. See Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178, 1181 & n.3 (S.D. Cal. 2008) (noting *Noerr-Pennington* doctrine derives from First Amendment guarantee of right to petition and "[t]hus . . . is analogous to California's anti-SLAPP statute"); cf. Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1522 n.3 (D. Colo. 1993) ("[T]he *Noerr-Pennington* doctrine has been advocated as a first-line defense to 'SLAPP' suits.").

210. Federal courts could deter would-be filers in the absence of a statute by protecting all legitimate petitioning activity through vigorous and consistent application of both the *Noerr-Pennington* doctrine and state anti-SLAPP laws. Yet a well-drafted statute would still have the added virtue of providing the framework of procedural protections conducive to effective protection against SLAPPs. Cf. Sean P. Trende, Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem, 44 Duq. L. Rev. 607, 639–44 (2006) ("A federal anti-SLAPP law would merely be a more stringent version of what already exists in federal court, commensurate with the importance of the First Amendment rights that it would protect."). For a discussion regarding effective design of an anti-SLAPP law, see supra notes 53–54.

federal law, just as state anti-SLAPP laws do not apply to federal claims.[211] If federal anti-SLAPP legislation were to pass, state anti-SLAPP laws would continue to have their place in "guid[ing] the special circumstances of [each] state and its courts."[212]

While the existence of a federal anti-SLAPP statute would implicitly reinforce the argument that the Federal Rules are compatible with state anti-SLAPP laws, Congress should explicitly provide for how federal provisions are to affect the application of state anti-SLAPP laws in federal court. It is unclear whether it is desirable for a potential federal statute to apply to state law claims—especially to the extent that state anti-SLAPP protections are more protective than provisions of federal law. In other words, if a federal statute were found to displace state anti-SLAPP laws in federal court, then filers would again have an incentive to shop for a federal forum to evade more-protective state anti-SLAPP laws. Therefore, any future federal anti-SLAPP legislation should have an explicit non-preemption provision.[213] Such a provision would also permit states to continue to play their role as the laboratories of American democracy, allowing Congress to learn from both the successes and pitfalls of various state anti-SLAPP regimes—with an eye toward not just the initial drafting of federal anti-SLAPP legislation, but improving it going forward.

CONCLUSION

Applying state anti-SLAPP laws in federal court will best serve *Erie*'s twin aims by removing the incentive for filers to shop for a federal forum in order to evade anti-SLAPP protections, and by preventing the inequitable treatment of targets' legitimate petitioning activity. Otherwise, if a federal court can serve as the forum for any action that would otherwise be dismissed pursuant to a state anti-SLAPP law, filers will have a strong reason to shop for a federal forum[214]—especially filers who are aware that their claims constitute SLAPPs under state law. At the same time, targets

---

211. See supra note 209 and accompanying text (discussing federal courts' treatment of suits with both federal and state claims). But see supra note 207 (discussing proposed Citizen Participation Act of 2009, which would have allowed for removal of SLAPPs from state court).

212. Pring & Canan, SLAPPs, supra note 1, at 190. At the same time, Pring and Canan believe that federal anti-SLAPP legislation "would be a great step forward, given the very uneven results [they] found from state to state." Id.

213. Such a provision could read: "The protections offered by this Act are in addition to, and should not be construed to displace, protections granted to First Amendment activity under state law." Cf. Lynch, supra note 65, at 326 n.279 (proposing amendment to Rules Enabling Act addressed to state litigation reform in general).

214. See Godin v. Schencks, 629 F.3d 79, 92 (1st Cir. 2010) (noting possibility of strong incentives to bring state law claims in federal forum to avoid state anti-SLAPP laws); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) ("Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum.").

who are sued in federal court will be denied protections granted to similarly situated targets sued in state court; only the latter will enjoy immunity from suit under state anti-SLAPP laws.

Noerr-Pennington has been applied by state and federal courts to dispose of suits targeting legitimate petitioning activity. A federal court should not displace a state anti-SLAPP law providing immunity to that same class of activity simply because such protection is embodied in state law rather than federal doctrine. To do so would not only contravene federalism principles underlying the *Erie* doctrine, but disserve First Amendment values as well.

Policies underlying the Federal Rules are well served by applying state procedures that enable swift termination of lawsuits that might burden legitimate petitioning activity.[215] Federal courts should look beyond state anti-SLAPP laws' procedural surface and recognize both their fundamental connection to Supreme Court doctrine as well as the mutual state and federal interests served by providing robust protection to legitimate petitioning activity against state law claims filed in federal court. Allowing states to experiment not only allows for anti-SLAPP laws tailored to the particular circumstances of each state and its court system, but also allows everyone to benefit from the experience that flows from diverse attempts to find this necessary balance. And for these laws to be effective, they must be applied with equal force whether the claim is heard in state or federal court.

215. See, e.g., Fed. R. Civ. P. 1 ("[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."); Deem v. Aero Mayflower Transit Co., 24 F.R.D. 16, 18 (S.D. Cal. 1959) ("The whole tenor of the Federal Rules of Civil Procedure is not to encourage unfounded litigation, but to bring it to an end."); Serv. Liquor Distribs. v. Calvert Distillers Corp., 16 F.R.D. 344, 347 (S.D.N.Y. 1954) ("A court must be particularly alert to prevent the liberal Federal procedure from being used for purposes other than those intended by the framers of the Rules.").