EVALUATING ANTI-SLAPP PROTECTION IN THE FEDERAL ARENA: AN INCOMPLETE PARADIGM OF CONFLICT

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INTRODUCTION

Imagine you are dreaming of success in the real estate market and you attend a real estate seminar purporting to teach "insider success secrets."[1] The real estate seminar is taught at Trump University, a for-profit entity, which television personality and real estate magnate Donald Trump founded because he has a "real passion for learning."[2] Trump University's three day Fast Track to Foreclosure Workshop begins with "slick productions featuring carefully choreographed presentations" and speakers blaring the theme song to one of Trump's hit reality television series.[3] Trump University representatives urge customers to raise their credit card limits to enable real estate transactions, while actually facilitating the purchase of the Trump Gold Elite Program, which many are persuaded to purchase despite the $34,995 price tag.[4] As the song and dance fades, customer expectations created by the seminar's aggressive advertisement claims are ultimately left unfulfilled.[5]

Now, consider Tarla Makaeff's situation, when she sought compensation for being victimized by deceptive business practices against Trump University, inevitably challenging the Trump empire.[6] In

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1 Makaeff v. Trump Univ., LLC, 715 F.3d 254, 258 (9th Cir. 2013).

2 *Id.*

3 *Id.* at 260.

4 *Id.*

5 *See id.* at 258 (stating that Trump University's mission is to "train, educate and mentor entrepreneurs on achieving financial independence through real estate investing").

6 *See id.* at 260 (claiming in a letter to the Better Business Bureau that Trump University engaged in "fraudulent business practices, deceptive business practices, illegal predatory high pressure closing tactics, personal financial information fraud, illegal bait and switch, brainwashing scheme[s], outright fraud, grand larceny, identity theft, unsolicited taking of personal

response to Makaeff's complaint alleging deceptive business practices, Trump University brought a swift counterclaim against Makaeff for defamation.[7] Notwithstanding the legitimacy of Makaeff's lawsuit or her precarious financial situation, meritless counterclaims can be strategically employed to abuse the procedural structure of the judicial system by dragging out lawsuits or suppressing complaints like that of Tarla Makaeff's altogether.[8] Accordingly, California law provides for the pretrial dismissal of meritless or frivolous lawsuits known as Strategic Lawsuits Against Public Participation, or "SLAPP" suits.[9]

SLAPP suits "masquerade as ordinary lawsuits" and are intended to deter people from exercising their political or legal rights or punish them for doing so.[10] As a result of similar meritless suits arising in courts, twenty-seven states, including the District of Columbia and Guam, have enacted anti-SLAPP laws with a common goal to protect the rights of litigants by creating a motion to dismiss action available for frivolous claims early in the litigation.[11] A SLAPP suit is characterized by its lack of merit, which may abuse one's economic advantage over another party by increasing the time and cost of litigation, weakening the defendant's ability to engage in petitioning activity undesirable to the plaintiff, and deterring future activity.[12] Anti-SLAPP statutes generally seek to protect those engaging in First Amendment activity and deter abusive lawsuits by providing for early termination of the suit and awarding the prevailing movant the fees incurred in achieving early dismissal of the SLAPP.[13]

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credit and trickery into [sic] opening credit cards, fraudulent business practices utilized for illegal material gain, felonious teachings, neurolinguistic programming and high pressure sales tactics based on the psychology of scarcity, unethical tactics, a gargantuan amount of misleading, fraudulent, and predatory behavior, and business practices that are criminal") (internal quotations omitted).

7 Makaeff v. Trump Univ., LLC, 715 F.3d 254, 260 (9th Cir. 2013).

8 *See id.* (claiming she "did not receive the value that I thought I would for such a large expenditure" for the Gold Elite Program).

9 *Id.* at 261.

10 *Id.* (citing Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)).

11 Benjamin Ernst, *Fighting Slapps in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181, 1182-83 (2015).

12 Steven J. André, *Anti-SLAPP Confabulation and the Government Speech Doctrine*, 44 GOLDEN GATE U. L. REV. 117, 119 (2014) (citing U.S. *ex rel*. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970-71 (9th Cir. 1999) (internal quotation marks omitted)).

13 *See, e.g.*, Kathryn W. Tate, *California's Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 801 (2000).

Historically, state anti-SLAPP laws achieve their substantive goals through a modified procedural motion adapted from the Federal Rules of Civil Procedure.[14] Because state anti-SLAPP laws include procedural and substantive elements, constitutional rights depend on a court's interpretation of the degree of conflict between clashing state and federal laws.[15] Requiring an interpretation of procedural and substantive privilege, circuit courts are divided in their determination of whether state anti-SLAPP laws apply in federal courts.[16] To complicate the divided circuit courts further, the Speak Free Act of 2015 was introduced in the House of Representatives in May of 2015, a bill which would establish a federal anti-SLAPP law.[17]

The ongoing circuit split revolves around differing interpretations concerning the substantive or procedural nature of claims involving anti-SLAPP statutes.[18] The differing court interpretations originate from the Erie doctrine, which established that federal courts sitting in diversity are to apply federal procedural law and substantive state law, but offered little guidance on how to accomplish that task.[19] In *Erie*, the Supreme Court rejected the natural law principles of *Swift v. Tyson*, which was a major shift affecting how the nature of law itself was viewed up until the *Erie* decision.[20] Moreover, the *Erie* court's paradigmatic rejection of the natural law principles in *Swift v. Tyson* reveal that the procedural form of state laws can supplement the Fed-

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14 *See* Ernst, *supra* note 11, at 1183-84 (citing Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010); Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168-69 (5th Cir. 2009); *Newsham*, 190 F.3d at 973).

15 *See* Ernst, *supra* note 11, at 1184.

16 *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1181 (9th Cir. 2013) (Wardlaw, J., concurring) (citing U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) (applying anti-SLAPP law in the Ninth Circuit); *see also Henry*, 566 F.3d at 168-69 (applying anti-SLAPP law in the Fifth Circuit). *Contra* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (holding that the District of Columbia's anti-SLAPP Act does not apply in federal court).

17 SPEAK FREE Act of 2015, H.R. 2304, 114th Congress (2015).

18 *Cf.* Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10136, 10138-39 (2015) ("The choice of law is less certain when a state substantive law implicates procedure . . . Given the hybrid nature (part substantive, part procedural) of state anti-SLAPP laws, federal courts have grappled with whether to apply state anti-SLAPP laws to cases founded on diversity jurisdiction.").

19 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("[F]ederal courts are to apply state substantive law and federal procedural law.").

20 *See Erie*, 304 U.S. at 91-92.

eral Rules without detracting from the value of their substantive character.[21] After the Supreme Court in *Shady Grove* reassessed the Erie doctrine in 2010, the Federal Rules of Civil Procedure take precedent whenever a conflict arises between state law and the Federal Rules if they "answer the question in dispute."[22]

This Comment argues that the inconsistent treatment of state anti-SLAPP laws in federal courts sitting in diversity can be reconciled by reassessing the precedential narratives that led to the circuit division in modern courts. Under the lens of legal positivism, this Comment explores the substantive and procedural dichotomy producing the varied interpretations and inconsistent applications of anti-SLAPP laws in federal courts sitting in diversity. Furthermore, this Comment argues that the ongoing division surrounding the interpretation of anti-SLAPP laws arising in federal courts is perpetuated by an incomplete paradigm of their conflicting elements stemming from the Erie Doctrine and culminating in *Shady Grove Orthopedic Associates, P.A. v. Allstate*. Lastly, this Comment argues that the circuit split surrounding anti-SLAPP laws can be resolved when their character and underlying purpose are interpreted in combination with their procedural form.

I. BACKGROUND OF ANTI-SLAPP LAWS AND THEIR TREATMENT IN FEDERAL COURT

Over the course of the last century, First Amendment jurisprudence grew to accept a marketplace of ideas paradigm distinguishing private speech and other First Amendment activity as critical to the functioning of the democratic process.[23] Professors George W. Pring and Penelope Canan coined the term "SLAPP" in an attempt to bring

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[21] *See id.*

[22] Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (plurality opinion); *See also* Donald L. Doernberg, *"The Tempest":* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.: The Rules Enabling Act Decision That Added to the Confusion-but Should Not Have*, 44 AKRON L. REV. 1147, 1208-09 (2011) (citing Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 417 (2010) (Stevens, J., concurring) ("It is a long-recognized principle that federal courts sitting in diversity apply state substantive law and federal procedural law.") (internal quotation marks omitted).

[23] Steven J. André, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of* Citizens United v. FEC, 44 J. MARSHALL L. REV. 69, 125-27 (2011) (recognizing the constraint that courts face by the limits of their own First Amendment doctrine from accepting the role of government as an equalizer of citizen speech).

attention to specific lawsuits that aimed to chill the exercise of a citizen's participation in government.[24] Thus, "Strategic Lawsuits Against Public Participation," or "SLAPP" suits, came to be known as a common description of meritless lawsuits that impose burdens on the First Amendment rights of their targets.[25]

SLAPP suits occur in diverse areas of public activity including criticism of public officials, advocacy for environmental protection, animal rights, and consumer protection.[26] Pring and Canan found that citizens were being sued for communicating their views to their government, circulating petitions for signatures, or being a named party in a nonmonetary, public-interest lawsuit.[27] Thus, SLAPP suits abuse the judicial process under the guise of different civil tort claims to impose liability, chill speech, and protract litigation.[28]

When SLAPP suits allege their targets' petitioning or commercial speech activity as the cause of their legal injury, they transform "a public, political dispute into a private, legal adjudication."[29] Significantly, Pring and Canan established that "[f]ilers 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."[30] Consequently, the experience can deter and even incentivize parties with valid claims from speaking out in the future, and result in a more sustainable victory for the party who could afford the litigation.[31]

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[24] *See* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 939 (1992) [hereinafter Pring & Canan].

[25] *Id.* at 938-39.

[26] *See id.* at 947.

[27] *See id.* at 938.

[28] *See* Colin Quinlan, Erie *and the First Amendment: State Anti-SLAPP Laws in Federal Court After* Shady Grove, 114 COLUM. L. REV. 367, 368-70 (2014).

[29] *See* Pring & Canan, *supra* note 24, at 941 (noting that SLAPPS shift both forum and issues to the disadvantage of the other side).

[30] GEORGE W. PRING AND PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 29 (1996).

[31] *See* Quinlan, *supra* note 28, at 370 (noting that Pring and Canan found targeted individuals who fail to secure swift dismissal of a SLAPP frequently decide to settle in order to avoid the expense and uncertainty of litigation).

A. *Current Anti-SLAPP Legislation*

Current forms of anti-SLAPP legislation employed by states present a broad configuration of procedural mechanisms intertwined with the general purpose of providing protections for defendants against meritless lawsuits.[32] Anti-SLAPP statutes generally seek to protect those engaging in First Amendment activity and deter abusive lawsuits by providing for early termination of the suit and an award of the target defendant's fees incurred in achieving early dismissal of the SLAPP.[33] Further, "[t]he importance of effective anti-SLAPP laws is highlighted by the lack of protections available through other common law and statutory solutions to the problem of SLAPP" suits.[34] State anti-SLAPP statutes provide a detailed framework under which courts can analyze SLAPP claims that have merit and dismiss claims that are found to frivolously target certain activity.[35]

The California anti-SLAPP statute provides litigants with a special motion to strike as a defense against retaliatory claims aiming to chill the valid exercise of the constitutional rights of free speech and petition for redress of grievances.[36] Under the California statute, the special motion to dismiss "will succeed unless the court finds that the plaintiff has established that there is a probability that [the plaintiff] will prevail on the merits."[37] Thus, if the anti-SLAPP statute is determined to apply to the defendant's claim, the burden of proof is effectively shifted to the plaintiff who has to show the case's merits to proceed with the litigation.[38] At this point, "filing an anti-SLAPP

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[32] *See* Tate, *supra* note 13, at 801.

[33] *Id.*

[34] *See* Ernst, *supra* note 11, at 1186 (citing John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 416 (1993); Richard J. Yurko & Shannon C. Choy, *Reconciling the Anti-SLAPP Statute with Abuse of Process and Other Litigation-Based Torts*, 51 BOS. B.J. 15 (2007)).

[35] *See* Quinlan, *supra* note 28, at 375-76 (noting that most anti-SLAPP laws provide SLAPP targets with an early opportunity to invoke immunity for their legitimate activity, thereby facilitating the swift and efficient dismissal of many SLAPP claims); *see also* Shannon Hartzler, *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).

[36] Jonathan Segal, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 639, 642 (2009); *see also* Cal. Civ. Proc. Code §§ 425.16(a)-(j) (West 2015).

[37] Segal, *supra* note 36 at 642 (citing § 425.16(b)(1)).

[38] *Id.* (quoting Taus v. Loftus, 151 P.3d 1185, 1204 (Cal. 2007) (stating that "[t]he plaintiff must then demonstrate that the complaint is 'both legally sufficient and supported by a prima

motion stays discovery until the motion is resolved, unless a court decides otherwise."[39] If the court finds that an anti-SLAPP motion has been made frivolously or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion.[40] Under § 904.1, an order granting or denying a special motion to strike remains appealable.[41]

Yet, anti-SLAPP statutes do not always protect a defendant from their alleged victimization.[42] In fact, the statute's operation provides equity to both parties because it hinges on the prima facie evidence provided by the plaintiff.[43] If the court determines that the evidence is sufficient and legally supported, as did the court in *Makeaff v. Trump Univ., LLC*, the counterclaim or SLAPP suit could proceed in the litigation, thereby also protecting the defendant's right to seek a remedy under the law.[44]

B. *The Inconsistent Application of Anti-SLAPP Laws in Federal Courts*

Several federal courts have applied state anti-SLAPP laws while others have denied their application.[45] The inconsistent application of state anti-SLAPP laws in federal courts sitting in diversity and the resulting circuit split centers on substantive and procedural descriptions and explanations.[46] The circuit split hinges on the court's inter-

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facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited'")); *see also* § 425.16(b)(1).

39 Segal, *supra* note 36, at 642-43 (citing Cal. Civ. Proc. Code § 425.16(g) (West 2008)).

40 Cal. Civ. Proc. Code § 425.16(c)(1).

41 Cal. Civ. Proc. Code § 904.1 (West 2008).

42 *See, e.g.*, Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (holding that the District of Columbia's anti-SLAPP Act does not apply in federal court).

43 *See Taus*, 151 P.3d at 1204-05.

44 *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1181-83 (9th Cir. 2013) (Wardlaw, J., concurring); *Taus*, 151 P.3d at 1204-05.

45 *Compare Makaeff*, 736 F.3d 1180 (9th Cir. 2013) (concluding that anti-SLAPP provisions apply in Ninth Circuit), Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010) (holding there was no conflict between the state anti-SLAPP law and Federal Rules), *and* Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164 (5th Cir. 2009) *(*allowing application of state anti-SLAPP law in Fifth Circuit), *with Abbas*, 783 F.3d at 1332 (holding that the District of Columbia's anti-SLAPP Act does not apply in federal court), *and* Intercon Solutions, Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1049 (N.D. Ill. 2013) (finding that Washington State's anti-SLAPP law did not apply in a federal diversity action).

46 Yando Peralta, *State Anti-Slapps and Erie: Murky, but Not Chilling*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 769, 786 (2016) (noting that with anti-SLAPP cases in federal courts, "[T]he federal landscape is divided. Other circuits [than the D.C. Circuit in *Abbas*] have

pretation of the conflicts between the anti-SLAPP law's special motion to dismiss procedure and Rules 12 and 56 of the Federal Rules of Civil Procedure.[47] "The special motion procedures of anti-SLAPP laws potentially conflict with these rules because they allow 'motions to strike' where the defendant can show that the statute protects his or her conduct and the plaintiff fails to establish a likelihood of their claim's success on the merits."[48]

The inconsistency of federal courts in applying state anti-SLAPP laws is not so much a problem consisting of an absence of uniformity; rather, it serves as an illustration of the various courts' differing analysis of substantive and procedural issues in making their decisions.[49] The Ninth Circuit's acceptance of California's anti-SLAPP statutes in *Makaeff* and the District of Columbia Circuit Court of Appeals' decision not to apply D.C.'s anti-SLAPP statute in *Abbas v. Foreign Policy Group* serve as differing applications of state anti-SLAPP laws as they enter the federal arena.[50] An analysis of these courts' divergent conclusions surrounding this issue reveal the difficulty in defining mechanisms like anti-SLAPP laws.[51] Moreover, these recent decisions reveal the ongoing struggle in understanding the Supreme Court's enigmatic, yet insightful arguments relating to the decision in *Shady Grove*.[52]

1. Makaeff v. Trump University

Without the same amount of resources available as Donald Trump, Makaeff made a claim that was overshadowed by the intimidating nature of Trump University's defamation counterclaim.[53]

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weighed in on whether anti-SLAPPs are substantive or procedural under Erie with a resultant split on either side.").

47 *See Godin*, 629 F.3d at 92 (analyzing the potential conflict between state anti-SLAPP statutes and Federal Rules 12(b)(6) and 56); *see also* John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 320 (2008) (surveying courts' different conclusions in anti-SLAPP cases and noting that "[t]he main reason for the different outcomes is the inclination, or not, *of the court* to find a conflict with the Federal Rules") (emphasis added).

48 Ernst, *supra* note 11, at 1197-98.

49 *See* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013). *But see Abbas*, 783 F.3d at 1332-35.

50 *Abbas*, 783 F.3d at 1332-35; *Makaeff*, 715 F.3d at 271-272.

51 *Abbas*, 783 F.3d at 1332-35; *Makaeff,* 715 F.3d at 271-272.

52 *Abbas*, 783 F.3d at 1332-35; *Makaeff*, 715 F.3d at 271-272*; see infra* Part II.C.

53 *Makaeff*, 715 F.3d at 260-63.

Makaeff filed a motion to strike the defamation claim under California's anti-SLAPP statute, but that motion was denied by the district court.[54] Despite the California district court's initial prohibition of the anti-SLAPP statute, the Ninth Circuit reversed and remanded the case, upholding Makaeff's motion to strike against Trump University's meritless counterclaim.[55] The Ninth Circuit's analysis illustrates the application and effectiveness of California's anti-SLAPP statute in a defamation proceeding that required fact intensive issues surrounding Makaeff's critical statements.[56]

The Ninth Circuit reasoned that California's anti-SLAPP statute, by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial, *supplements* rather than conflicts with Federal Rules 12 and 56.[57] Thus, the Ninth Circuit's acceptance of California's anti-SLAPP law remains controversial for upholding the position that no conflict exists between the anti-SLAPP motion to strike and the Federal Rules.[58]

The Ninth Circuit conclusion centers on Federal Rules 12 and 56.[59] Regarding Rule 12, the court reasoned that the dissent's contention that the California Code of Civil Procedure § 425.16 imposed a probability requirement at the pleading stage ignored the Supreme Court's reliance on textual analysis in *Shady Grove*.[60] In *Shady Grove*, the rule at issue in the case stated that "[a] class action may be maintained" provided that certain conditions are met, which amounted to a categorical rule, said the court.[61] In contrast, Judge Wardlaw in *Makaeff* highlighted the dissent's misinterpretation of California Supreme Court precedent, which he claimed distinguished

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54 *Id.* at 260-61.

55 *Id.* at 271-72 (holding the anti-SLAPP statute did apply in this case because Trump University had not demonstrated a reasonable probability of prevailing on the merits of its defamation claim).

56 *Id.*

57 Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1182 (9th Cir. 2013) (Wardlaw, J., concurring).

58 *See* Tate, *supra* note 13, at 849-50.

59 *Makaeff*, 736 F.3d at 1181.

60 *Id.* at 1182 ("The dissent's assertion that Rules 12 and 56 together define a cohesive system for weeding out meritless claims that is akin to Rule 23's categorical rule turns *Shady Grove*'s lens into a kaleidoscope.").

61 Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (plurality opinion) ("By [Rule 23's] terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.").

Federal Rules 12 and 56 by their theoretical nature.[62] Essentially, Wardlaw argued that California Code of Civil Procedure § 425.16 asks courts to do more than make a calculation concerning the facts presented to them in the case.[63]

With an approach that is more an art than a science, Wardlaw saw the task of the court as committing to an awareness of what the state statute was meant to accomplish, together with employing the motion to strike mechanism in the case.[64] Wardlaw believed that in determining whether the plaintiff has established a probability that he will prevail, courts can aspire to more than acting mechanically in employing the motion to strike, which causes the defendant's First Amendment rights to depend on a mere mechanism of calculation.[65] He wrote,

> [T]he Legislature did not intend that a court . . . would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.[66]

Here, the Ninth Circuit interpreted state anti-SLAPP legislation as including substantive matters of state law, rather than pure procedure like a Federal Rule.[67] Wardlaw's conceptual approach is insightful, because it allows the character of the motion to strike, in relation to California's framework and purpose of creating the statute, to exist alongside the procedural form of the working mechanism.[68]

Regarding Federal Rule 56, Judge Wardlaw maintained that it also does not conflict with California's equivalent California Code of

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62 *Makaeff*, 736 F.3d at 1183 ("Thus, even if we were to conclude that § 425.16 and Rule 12 serve similar purposes, at worst, a motion to strike functions merely as a mechanism for *considering* summary judgment at the pleading stage as is permitted under [Fed. R. Civ. P.] Rule 12(d).") (emphasis added).

63 *Id* at 1182-83.

64 *See id.*

65 *Id.* at 1182-83.

66 *Id.* at 1182-83 (citing Taus v. Loftus, 151 P.3d 1185, 1205 (Cal. 2007)).

67 *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1183 (9th Cir. 2013) (Wardlaw, J., concurring) (quoting Vargas v. City of Salinas, 205 P.3d 207 (Cal. 2009) ("[A] reviewing court 'should grant the motion if, *as a matter of law*, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'") (emphasis added)).

68 *See id.* at 1181-84.

Civil Procedure § 437c(c).[69] As a test for legal sufficiency, the rule sets forth minimum requirements "that were prerequisites," that, despite being necessary, are not *sufficient* to maintain a suit.[70] Significantly, Wardlaw established that California's anti-SLAPP statute and others like it confer substantive rights under *Erie*.[71] The majority's decision in *Makaeff* reveals an awareness that does not just rely on a court's presumptive calculation, but rather its unique ability and position to consider the substantive ramifications of a pretrial mechanism like California's anti-SLAPP law.[72]

2. Abbas v. Foreign Policy Group

In contrast to the Ninth Circuit, the *Abbas* court in the D.C. Court of Appeals recently held that the District of Columbia's anti-SLAPP law could not be applied in federal court.[73] The District of Columbia has enacted its version of an anti-SLAPP statute to establish a procedural mechanism for dismissing certain cases before trial.[74] The *Abbas* case presents a recent example of the circuit split over whether to allow a state's anti-SLAPP law in federal court.[75]

In this case, Yasser Abbas, son of Palestinian leader Mahmoud Abbas, was a businessman with substantial commercial interests in the Middle East.[76] Yasser Abbas and his brother Tarek were featured in an article published on the Foreign Policy Group's website questioning the Abbas brothers' wealth and its possible sources.[77] The article recounted allegations of corruption that a former economic advisor to

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[69] *See id.* at 1183 (reasoning that "[t]he motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

[70] *Id.*

[71] *See id.* at 1184 (holding that "[e]very circuit that has considered the issue has agreed with our conclusion in Newsham that anti-SLAPP statutes like California's confer substantive rights under Erie").

[72] *See id.*

[73] *See* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

[74] *See id.* (citing D.C. Code § 16–5502(a) (establishing that defendant may file a special motion to dismiss "any claim arising from an act in furtherance of the right of advocacy on issues of public interest")).

[75] *See id.* at 1331-32.

[76] *Id.*

[77] *See id.* at 1331 ("At the outset, the article ask two questions: 'Are the sons of the Palestinian president growing rich off their father's system?' and '[h]ave they enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers?'") (quotation marks omitted).

Yasser Arafat made against Mahmoud Abbas, and described the "conspicuous wealth" of Yasser and Tarek Abbas.[78]

In response to the article, Yasser Abbas filed a defamation suit in the U.S. District Court for the District of Columbia against the Foreign Policy Group and author Jonathan Schanzer, one of the Foreign Policy Group's employees.[79] Schanzer and the Foreign Policy Group moved to dismiss the complaint under the special motion to dismiss provision of the D.C. Anti–SLAPP Act.[80] On appeal, the court rejected the special motion to dismiss because "unlike the D.C. Anti–SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal."[81] The *Abbas* court reasoned that the D.C. Anti-SLAPP Act conflicted with the Federal Rules of Civil Procedure 12 and 56.[82] Thus, the D.C. Anti-SLAPP Act provided an additional hurdle for the plaintiff to overcome and essentially nullified the plaintiff's general entitlement to trial, which they would have received by meeting the standards of Federal Rules 12 and 56.[83] The *Abbas* court held that because the D.C. Anti-SLAPP Act "answered the same question" as Federal Rules 12 and 56, under *Shady Grove*, the Federal Rules should govern this federal court.[84]

The impact of *Shady Grove* and its plurality's reliance on *Sibbach* seemed to take a new convoluted turn in *Abbas v. Foreign Policy Group*.[85] The *Abbas* court intended to firmly uphold the Supreme Court's ruling in *Sibbach* until the Supreme Court overruled or nar-

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78 *Id.* at 1332-33 (noting that the brothers' success "has become a source of quiet controversy in Palestinian society").

79 Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1331 (D.C. Cir. 2015).

80 *Id.* at 1331-33.

81 *Id.* at 1332-34 ("In Abbas's view, the D.C. provision makes it easier for defendants to obtain dismissal of a case before trial than the more plaintiff-friendly standards in Rules 12 and 56 of the Federal Rules of Civil Procedure . . . Abbas says we must follow the Federal Rules, not the D.C. Anti–SLAPP Act, in this federal court proceeding. We agree with Abbas on that point.").

82 *See id.* at 1333-34.

83 *Id.* at 1334.

84 *Id.* at 1336-37 (citing Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407-10 (2010) (plurality opinion)).

85 *See* Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1336-37 (D.C. Cir. 2015) (noting that in *Sibbach*, the Supreme Court held that the test for whether a Federal Rule violates the Rules Enabling Act is whether that Rule "really regulates procedure," that is, really regulates "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them").

rowed that decision.[86] Yet, the *Abbas* court still undertook *Shady Grove*'s interpretation of the case.[87] This subtle yet influential reliance by the *Abbas* court establishes the significance of the paradigms presented by the plurality and dissenting opinions in *Shady Grove*.[88]

II. THE PARADIGM OF SUBSTANCE AND PROCEDURE LEADING UP TO SHADY GROVE

Shady Grove entitled federal courts to interpret the *Sibbach* rule as independent of whether individual applications of the rule abridge or modify state-law rights, resulting in an imbalance in how federal courts are to consider state anti-SLAPP laws when they enter the federal arena.[89] The *Erie* Court's rejection of *Swift v. Tyson* and the Court's treatment of the Erie Doctrine before its decision in *Shady Grove* reveal a subtle yet pervasive influence of legal positivism questioning whether state laws like anti-SLAPP statutes may or may not be applied in federal court.[90] As a result, the line between procedural and substantive law through the Erie Doctrine was blurred.[91] Because anti-SLAPP laws rely on procedural mechanisms that protect substantive rights, federal courts are faced with competing precedential interpretations of the state laws.[92]

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[86] *See id.* at 1336-37 (noting that in *Shady Grove*, "four Justices adopted one formulation. One Justice adopted a different formulation. And four Justices did not address the question. What should we do in the face of such an unresolved 4–1 disagreement? Neither the 4–Justice view nor the 1–Justice view on its own is binding in these unusual circumstances.").

[87] *See id.* ("As the Supreme Court indicated in *Shady Grove* . . . pleading standards and rules governing motions for summary judgment are procedural . . . In sum, Federal Rules 12 and 56 *answer the same question* as the D.C. Anti–SLAPP Act, and those Federal Rules are valid under the Rules Enabling Act. A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti–SLAPP Act's special motion to dismiss provision.").

[88] *See generally Shady Grove*, 559 U.S. at 407-15 (offering the Supreme Court's most recent analysis of *Sibbach* and its subsequent effects on the treatment of state anti-SLAPP laws entering federal courts).

[89] *See id.* at 412 n.9; *see also Abbas*, 783 F.3d at 1337 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)) (reasoning that "[t]he *Sibbach* test is very simple to apply here. Under *Sibbach*, any federal rule that 'really regulates procedure' is valid under the Rules Enabling Act").

[90] *See* Quinlan, *supra* note 28, at 368-69 (noting that "[t]he division among the Justices in *Shady Grove* has led to differing evaluations of the opinions' precedential value, which in turn has led to differential treatment of state anti-SLAPP laws").

[91] *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (describing the line between substantive and procedural as "hazy").

[92] *See* Guar. Trust Co. v. York, 326 U.S. 99, 108 (1945) (noting that the words substance and procedure "[e]ach imply different variables depending upon the particular problem for which

A. *The Rules Enabling Act, Legal Positivism and* Erie*'s Rejection of* Swift v. Tyson

The paradigmatic shift resulting from the *Erie* Court's rejection of *Swift v. Tyson* provides a useful perspective to understand why the application of anti-SLAPP laws in federal courts sitting in diversity balance both parties' interests.[93] *Erie* "did not merely overrule a venerable case," it overruled "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."[94] Conceptually, the natural law perspective found in *Swift v. Tyson* controversially considered federal common law as having legal authority independent of the actions of public institutions and officials.[95] This "unconstitutional assumption of powers by the Courts of the United States" was what the majority in *Erie* was determined to end.[96]

The Rules Enabling Act set the stage for the *Erie* Court's decision, producing a whirlwind of judicial interpretations about the justification necessary for displacing a state law in federal court in deference to federal procedure.[97] The Court's take on the substantive and procedural dichotomy of law itself led to differing perspectives on the nature of law in balancing the Federal Rules' authority and the

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[they] are used") (internal quotation marks omitted); *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting) (reasoning that matters of procedure and matters of substance are not "mutually exclusive categories with easily ascertainable contents").

93 *See* Tyler J. Kimberly, *A SLAPP Back on Track: How* Shady Grove *Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201, 1213 (2015).

94 *See Guar. Trust Co.*, 326 U.S. at 101.

95 *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. . . ."); *see also* George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285, 285 n.3 (1993) ("Legal positivism has since become the working legal theory of most judges and lawyers.") (*citing* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 16 (Harv. U. Press, 1978)).

96 Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting); *see also Erie*, 304 U.S. at 78 ("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. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

97 *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co, 559 U.S. 393, 408-09 (2010); *Guar. Trust Co.*, 326 U.S. at 108-09; *Sibbach*, 312 U.S. at 17 (Frankfurter, J., dissenting); *Black & White Taxicab*, 276 U.S. at 533-35 (Holmes, J., dissenting).

substantive rights uniquely subjected to state law.[98] To accomplish this balance, the Rules Enabling Act provided an exception to its grant of judicial power to the Supreme Court.[99] The Federal Rules governing the practice and procedure for federal courts could "not abridge, enlarge[,] or modify any substantive right."[100] Simultaneously, federal courts were also proscribed under the Rules Enabling Act to consider the Federal Rules of Civil Procedure that apply to "all civil actions and proceedings" in federal court.[101] The *Erie* Court's treatment of this conflict had an enormous impact on subsequent jurisprudential understandings of the Rules Enabling Act's substantive distinction.[102]

Judges during the time that *Swift v. Tyson* was decided thought that federal general common law embodied primordial ideals to be "discovered" without any sovereign's approval.[103] Yet, many commentators argue the *Erie* decision affirmed a legal positivist conception of law in holding *Swift v. Tyson* unconstitutional.[104] *Erie*'s legal positivist presupposition noted that *Swift*'s holding rested on a fallacious natural law presumption about the nature of law itself.[105] After *Erie*'s infamous constitutional argument denouncing the federal common law resulting from *Swift v. Tyson*, the second argument posed by the Court "concerned legal positivism, the philosophical idea that law

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98 *See* Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

99 Rules Enabling Act, 28 U.S.C. § 2072.

100 Rules Enabling Act, 28 U.S.C. § 2072(b). *See also* Rules of Decision Act, 28 U.S.C. § 1652 (2012) (establishing that state law governs rules of decision for civil actions in federal court in cases where such law applies); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

101 *See* Rules Enabling Act, 28 U.S.C. § 2072(a)-(b) (authorizing the Supreme Court to prescribe general rules of practice and procedure for federal courts, subject to the prohibition that they not "abridge, enlarge or modify any substantive right"); Fed. R. Civ. P. 1.

102 *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co, 559 U.S. 393, 408-09 (2010); Guar. Trust Co. of New York v. York, 326 U.S. 99, 108-09 (1945); Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting).

103 *See* Craig Green, *Repressing* Erie's *Myth*, 96 CAL. L. REV. 595, 604 (2008).

104 *See* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 674 (1998) (recognizing that "the correct conception of law is legal positivism, *Erie* appears to say, and *Swift's* unconstitutionality follows. *Erie* thus asserts that a jurisprudential commitment to legal positivism has constitutional consequences. Most commentators agree. In different and sometimes contradictory ways, they believe that *Erie's* constitutional holding relies on a commitment to legal positivism.").

105 *See id.* at 673 ("The language of the [*Erie*] opinion intimates that the constitutional holding follows from the jurisprudential commitment. It says that the rule of *Swift* rests on a 'fallacy.' The fallacy is a belief that there is a 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'").

derives from 'posited' authority of some sovereign government."[106] In *Erie*, Justice Brandeis quoted the late Justice Holmes' saying, "The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute. . . .'"[107]

Holmes' dissent in *Black & White Taxicab*, which condemned the "fallacy" of *Swift*, was concerned with the presumption of the federal courts that federal common law was an application of preexisting natural law principles that justified its priority over the sovereignty of the states.[108] Furthermore, Justice Holmes had already set the stage for the *Erie* opinion by stating that, "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. . . ."[109] Despite his colorful rhetoric, Justice Holmes was addressing the need for reforming natural law presuppositions that affected jurisprudential consistency.[110] The critical interpretation of *Swift v. Tyson* by the *Erie* court shows the impact that a legal positivist perspective can have on substantive privileges and subsequent judicial views on applying anti-SLAPP laws in federal courts.[111]

B. *A Note on Presumption and Legal Positivism*

A legal theory such as legal positivism can have legitimate influence on judicial interpretation, which directly affects a court's conclusion about how rights are constitutionally protected.[112] Despite harsh

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[106] Green, *supra* note 103, at 604 (citing H.L.A. HART, THE CONCEPT OF LAW (2d ed., Oxford Univ. Press 1994) (1961); *see also* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 110-12 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832)).

[107] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

[108] *Black & White Taxicab*, 276 U.S. at 532-36 (1928).

[109] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

[110] Green, *supra* note 103, at 604. *But see* Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in the judgment) (calling Holmes's rhetoric "hyperbolic").

[111] *See* Quinlan, *supra* note 28, 376-77 (arguing that "the fate of anti-SLAPP protections depends on federal courts' application of the Erie doctrine and cases governing when the Federal Rules of Civil Procedure displace state law).

[112] *See* Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court."); Rutherglen, *supra* note 95, at 293-96.

criticism directed at the role of legal positivism in *Swift v. Tyson*, the prominent effect of legal positivism's role in the *Erie* decision is one of conceptual and philosophical criticism concerning the paradigm through which earlier judges' decisions were made, not necessarily the constitutionality of federal common law.[113]

Although legal positivism attempts to identify the fundamental nature of law, it is principally motivated by an intuition that is "negative" in the sense of being concerned with what law is not.[114] One of the major proponents of legal positivism, John Austin, significantly argued that law and morality are unrelated: "A law, which actually exists, is a law, though we happen to dislike it, or though it vary from our assumed [moral] standard."[115] Austin's intuition that law and morality are unrelated or "separate" in some conceptual sense is expressed in the Separability Thesis, which forms the foundation of all versions of legal positivism.[116] Conceptual jurisprudence "begins with a set of phenomena about . . . the law" and "tries to give an account of these phenomena that explains what [the essence of] the law is."[117]

Without discounting the value of moral intuition, the Separability Thesis distinguishes the constraints necessary for differentiating the content of law aside from certain moral properties.[118] H.L.A. Hart, a prominent scholar in the realm of legal positivism, noted that the Separabiltiy Thesis is the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[119] Kenneth Himma,

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113 *See* Goldsmith & Walt, *supra* note 104, 676 ("Legal positivism is conceptually and normatively irrelevant to *Erie's* holding."); *id.* at 682-83 ("It is doubtful that *Swift* represented a commitment to or belief in the 'brooding omnipresence' theory . . . Whatever one thinks of the merits of this constitutional argument, it does not rest on a denial of the truth of legal positivism.").

114 *See* Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 1 139-45 (1982).

115 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 73-74 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1885).

116 Kenneth E. Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 OKLA. CITY U. L. REV. 41, 43 (2002) (explaining how legal positivism promotes the understanding that the justification of law or a law is not dependent on moral intuition).

117 *See id.* at 43-44 (claiming that "[t]he identification of these special distinguishing properties [phenomena], called 'existence conditions,' forms the principal subject matter of conceptual jurisprudence").

118 *Id.* at 44.

119 *Id.* at 43-44 (citing H.L.A. HART, THE CONCEPT OF LAW 181-82 (2d ed., Oxford Univ. Press 1994) (1961)).

another legal positivism scholar added, "As a conceptual thesis, the Separability Thesis asserts that the distinguishing properties of, or existence conditions for, law do not include any moral property having to do with law's content."[120] As a result of this distinction, the presence of valid moral criteria does not substantiate the status of a legal system under the Separability Thesis of legal positivism.[121]

A second important feature of legal positivism is the Pedigree Thesis, which claims that "the content of the law is . . . not explained by its logical connections to moral norms, but by [the laws'] historical and logical connections to the acts of the appropriate body, such as a legislature or court."[122] Aiming to explain the sense in which law is an artifact, the Pedigree Thesis "establishes a theoretical account of how human beings manufacture legal content."[123] On this view, the Pedigree Thesis "distinguishes legal norms from nonlegal norms by their historical connection to the acts of the relevant authoritative body."[124] Despite his tendency to narrowly assume the sovereign's command as pedigree, Austin's broader thesis that legal validity is a matter of historical pedigree remains a substantial factor in understanding the origination and validity of a law.[125]

The role of legal positivism's Separability and Pedigree Theses, respectively with relation to law's substantive and procedural definitions, provides a framework to interpret the *Erie* Court's rejection of *Swift* and the Supreme Court's recent decision in *Shady Grove*, a decision that stands as a culmination of legal precedent concerning how federal courts interact with substantive state laws under the Erie Doctrine.[126]

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120 *Id.* at 44.

121 *Id.* at 44.

122 *See* Kenneth E. Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 OKLA. CITY U. L. REV. 41, 47 (2002).

123 *Id.* at 47 (explaining that "the content of the law (or the validity of legal norms) is explained by its historical pedigree; to the extent that the law has content on some issue, it is because the appropriate body enacted a proposition that is logically related to *that* content").

124 *Id. See generally* JOSEPH RAZ, THE AUTHORITY OF LAW 47-52 (Oxford Univ. Press 1979) (explaining the sources of a law are not limited to the legislation, which gives the law its validity, but rather "a whole range of facts of a variety of kinds").

125 *Id.* at 47-48 (citing H.L.A. HART, THE CONCEPT OF LAW 100 (2d ed., Oxford Univ. Press 1994) (1961) (endorsing the broader conceptual proposition of historical pedigree saying "[t]he criteria so provided may . . . take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases.")).

126 *See infra* Part II.C.

C. *The Role of Positivism in* Erie*'s Rejection of* Swift

In writing for the *Erie* majority, Justice Brandeis "had to do more" than accept a condensed version of legal positivism, "which denied judges discretion to turn to sources outside of preexisting law."[127] Brandeis knew that he needed more to his positivist critique of the federal common law of *Swift*, so he argued that *Swift v. Tyson* itself was an unconstitutional assumption of power by the federal courts.[128] A constitutional argument was necessary because any efforts to justify *Erie*'s decision on positivist principles would generate

> . . . the paradox that these principles themselves lacked the pedigree that they required of other sources of law. What Brandeis needed to justify his decision was a hierarchy of legal arguments, so that the argument from the limited powers of the federal government gained priority over the precedential effect of *Swift v. Tyson*.[129]

George Rutherglen's position on positivism's role in *Erie* is that "the positivist argument in *Erie* functions as the linchpin against *Swift's* federal common law and was created in violation of the limited delegation of powers to the federal government."[130] According to Brandeis, the federal courts made federal general common law and did not "discover" a preexisting "transcendental body of law" during the course of their judicial deliberations.[131] Rutherglen illustrates that if the *Erie* Court were to claim that they had made the law themselves, then it could be argued that they acted in excess of the limited powers delegated to the federal government under the Constitution.[132] Rutherglen concludes that "[t]he problem with this argument is not that it proves too little; it proves too much. It discredits the federal common law of *Swift v. Tyson*, but also discredits along with it any form of judge-made law, including that made in *Erie* itself."[133]

Judges may not produce anti-SLAPP legislation, but their interpretation of these statutes can change the course of ordinary people's

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127 *See* Rutherglen, *supra* note 95, at 291-92.

128 *Id.* at 287.

129 *Id.* at 292.

130 *Id.* at 292.

131 *See id.* at 292 (citing Erie R.R. v. Tompkins, 304 U.S. 64, 77 (1938)).

132 *Id.* at 293.

133 Rutherglen, *supra* note 95, at 293.

lives.[134] Consequently, the same conflict between substantive rights and procedural rule mechanisms highlighted in *Erie*, leading to the deliberation of the plurality's opinion in *Shady Grove*, represents a serious and ongoing problem in our judicial system.[135]

D. Shady Grove*'s Insight on the Substantive and Procedural Dichotomy*

In *Shady Grove*, the Supreme Court's plurality and concurring opinions established different approaches to resolving the conflict between state law and the Federal Rules.[136] Consequently, an uncertain future was perpetuated for state legislation like anti-SLAPP laws entering the federal arena via diversity jurisdiction.[137] Justice Scalia wrote for the *Shady Grove* plurality in ruling that even if the state law in question had substantive provisions, the validity of a Federal Rule depends entirely upon whether it regulates procedure.[138] In doing so, Scalia strictly followed Supreme Court precedent in *Sibbach*, which held that the test for whether a Federal Rule violates the Rules Enabling Act is whether it regulates "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[139] Scalia reasoned that the substantive nature or purpose of New York's law made no difference because the validity of a Federal Rule does not depend on how its effects frustrate a state substantive law or a state procedural law enacted for substantive purposes.[140]

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134 *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180 (9th Cir. 2013) (upholding Tarla Makaeff's special motion to dismiss against Trump University's counterclaim); *see also* Pring & Canan, *supra* note 24, at 940 ("Far from unusual, SLAPPs are found in every jurisdiction, at every government level, and against every type of public issue we have investigated.").

135 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 410-11 (2010) (plurality opinion).

136 *See* Quinlan, *supra* note 28, at 385 (explaining that "five justices found a direct conflict and agreed that the Federal Rule displaced the state law, Justice Stevens disagreed with the other four members of the majority as to why the Federal Rule displaced state law").

137 *Id.* at 368-69 (comparing different federal courts' treatment of anti-SLAPP laws after *Shady Grove*).

138 *See Shady Grove*, 559 U.S. at 410 (plurality opinion) (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

139 *See id.* at 407-10; *see also* Hanna v. Plumer, 380 U.S. 460, 464 (1965) (applying the *Sibbach* test).

140 *Shady Grove,* 559 U.S. at 409.

In his reliance on *Sibbach*, Scalia affirmed that the issue was not about the asserted right of a party, but about first assessing if a Federal Rule applied.[141] Accordingly, *Shady Grove* affirmed the holding from *Hanna* that "compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications."[142] Thus, a federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure "answer[s] the same question" as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act.[143] All told, the plurality's holding in *Shady Grove* affirmed that it is not the substantive purpose or procedural nature of the affected state law that matters, but the substantive or procedural nature of the Federal Rule, whose validity depends entirely upon whether it regulates procedure.[144]

In response, Justice Stevens argued that the plurality had misread *Sibbach* in emphasizing that a rule, which "really regulates procedure," must be viewed in light of its federal character as opposed to the state law it addresses.[145] In other words, Stevens argued that courts can "consider the nature and functions of the state law," regardless of the law's form, to interpret what the law *actually* says.[146] He further noted that

> It is important to observe that the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule. And in my view, the application of that balance . . . turns on whether the state law actually is part of a state's framework of substantive rights or remedies.[147]

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141 *Id.* at 410 (plurality opinion) (citing *Sibbach*, 312 U.S. at 13-14) ("[i]f we were to adopt the criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure.").

142 *See id.* at 410 (citing *Hanna*, 380 U.S. at 471) ("[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

143 *Id.* at 398-99 (2010) (citing *Hanna*, 380 U.S. at 463-64).

144 *Id.* at 410.

145 *See id.* at 424-28 (Stevens, J., concurring in part and concurring in the judgment).

146 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 426 n.10 (2010) (Stevens, J., concurring in part and concurring in the judgment).

147 *Id.* at 419; *see also Hanna*, 380 U.S. at 471 (reasoning that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes").

Stevens highlighted the balance that Congress had taken with the Rules Enabling Act with a perspective focusing on the relationship between procedural mechanisms and what they aim to protect.[148] Justice Stevens first established that procedures do not always remain limited to their own effect in regulating procedure.[149] Secondly, Stevens proceeded from his initial premise to further explain, "[P]rocedure and substance are so interwoven that rational separation becomes well-nigh impossible."[150] As a result of the interconnected nature of procedure and substance, the relationship can cause a procedure to influence substantive outcomes.[151] The interwoven nature of substance and procedure can become so bound up with the state-created right or remedy that the procedural conflict defines the scope of that substantive right or remedy.[152] Thus, Federal Rules appearing to regulate procedure in one context may conflict with the substantive nature of the same state rule in another context.[153] If such a state law ends up being displaced because of a conflicting Federal Rule under a Rules Enabling Act analysis, its substantive protections may be prematurely limited.[154]

In response to Justice Stevens' concurrence, Justice Scalia argued against the focus of Justice Stevens' perspective about the procedural nature of the state law being displaced.[155] Here, the two Justices' interpretations significantly differed in determining their views on the procedural-substantive dichotomy.[156] Justice Scalia was adamant that the Court was following the rule applied in *Sibbach* and the test was about what the Federal Rule regulated, rather than its effect in frustrating a state rule sufficiently intertwined with a substantive state law

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148 *Shady Grove*, 599 U.S. at 419.

149 *Id.* (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) ("[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure . . . .")

150 *See id.* (citing *Cohen*, 337 U.S. at 559) (Rutledge, J., dissenting)).

151 *See id.* at 419-20 (citing S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995)).

152 *Id.*

153 *See id.* at 428, n.13.

154 *See, e.g.*, Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1181-83 (D.C. Cir. 2013) (Wardlaw, J., concurring).

155 *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 412-14 (2010) (plurality opinion).

156 *See id.*

right or remedy.[157] However, Justice Scalia failed to sufficiently address the nature of Justice Stevens' perspective in his strict deference to the Federal Rules by admitting that the concurrence's approach would have yielded the same result in *Sibbach*.[158] Then, circling back around, Scalia simply asserted that the rule "leaves no room for special exemptions based on the function or purpose of a particular state rule."[159]

Justice Stevens disagreed with Scalia's interpretation of whether a federal rule "really regulates procedure" to mean whether it regulates "the manner and the means by which the litigants' rights are enforced."[160] Although congruent with the Rules Enabling Act's first limitation to "general rules of practice and procedure,"[161] the plurality ignored the second Rules Enabling Act's limitation that such rules "not abridge, enlarge or modify any substantive right."[162] Accordingly, the plurality ignored the balance that Congress struck between the uniform Federal Rules of Civil Procedure and a sovereign state's construction of its own rights and remedies.[163]

Stevens understood the plurality as uncritically deferring to the Federal Rules with a finger pointing to the Rules Enabling Act, and he illustrated how state laws may not be applied appropriately under that mode of interpretation.[164] Stevens reasoned that the plurality's interpretation appeared to mean that, no matter how bound up a state provision is within the state's framework of its own rights or remedies, any contrary federal rule that *happens* to regulate "the manner and the means by which the litigants' rights are enforced" must govern.[165] From this mode of interpretation, there are many ways in which seemingly procedural rules may *happen* to displace a state's formulation of

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157 *See id.* at 411-12, n.10 ("That the concurrence's approach would have yielded the same result in *Sibbach* proves nothing; what matters is the rule we did apply, and that rule leaves no room for special exemptions based on the function or purpose of a particular state rule.").

158 *See id.* at 411-15.

159 *Id.* at 412 (noting "[w]e have rejected an attempt to read into *Sibbach* an exception with no basis in the opinion . . . and we see no reason to find such an implied limitation today").

160 *See id.* at 424 (Stevens, J., concurring in part and concurring in the judgment).

161 Rules Enabling Act, 28 U.S.C. § 2072(a) (2012).

162 28 U.S.C. § 2072(b).

163 *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 424–26 (Stevens, J., concurring in part and concurring in the judgment) (ignoring also "the separation-of-powers presumption, see Wright § 4509, at 265, and federalism presumption, see Wyeth, 129 S. Ct. at 1194–95, that counsel against judicially created rules displacing state substantive law.").

164 *See id.* at 430-31.

165 *See id.* at 425-26, n.9.

its substantive law, but allowing this to control whether a litigant's rights are adequately protected contradicts the Rules Enabling Act itself.[166] For instance, if the Federal Rules altered the burden of proof in a case, this could potentially deny a critical aspect of how an individual's rights are enforced by the court, which is intricately created by and bound to a state's framework of rights and remedies.[167]

The high point of Stevens' dissent occurs when he highlights the inconsistency in one of Scalia's responses to his dissenting opinion.[168] Scalia remarked that some of the Federal Rules might be invalid under Stevens' view of the Rules Enabling Act because they may not really regulate procedure.[169] Justice Scalia speculated that "Congress may well have accepted the occasional alteration of substantive rights 'as the price of a uniform system of federal procedure.'"[170] Justice Stevens responded, "Were we forced to speculate about the balance that Congress struck, I might very well agree. But no speculation is necessary because Congress explicitly told us that federal rules 'shall not' alter 'any' substantive right."[171]

Justice Scalia's comment was certainly within the scope of the plurality's decision because the Federal Rules he was addressing were not at issue in the *Shady Grove* case.[172] Yet, Scalia's comment suggests that Stevens' concurrence should not be disregarded or isolated in its entirety simply because all Federal Rules under the *Sibbach* test are to be withheld to those which regulate substantive rights.[173] Stevens was correct in stating outright that Scalia's response highlighted how empty the plurality's test really is because of the plurality's speculation that their test may not properly apply state laws with interwo-

166 *See id.* at 426 (noting that "[w]hile it may not be easy to decide what is actually a 'substantive right,' the designations substantive and procedural become important, for the Enabling Act has made them so").

167 *Cf.* Gasperini v. Center for Humanities, 518 U.S. 415, 426 (1996) (explaining how if a federal rule about appellate review displaced a state rule about reviewing damages on appeal, the federal rule might be preempting the state damages cap).

168 *See Shady Grove*, 559 U.S. at 428 n.13 (Stevens, J., concurring in part and concurring in the judgment).

169 *See id.* at 414 n.13 (plurality opinion) (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

170 *Id.*

171 *Id.* at 425 n.9 (Stevens, J., concurring in part and concurring in the judgment).

172 *See id.* at 414 n.13 (plurality opinion).

173 *See Sibbach*, 312 U.S. at 13-14.

ven substantive and procedural elements.[174] Stevens does limit his criticism of Scalia's response to "those rules that can be described as 'regulat[ing]' substance; it does not address those federal rules that alter the right at issue in the litigation, only when they displace particular state laws."[175]

The Supreme Court has frequently employed a balancing methodology to resolve constitutional issues by analyzing a constitutional question through identifying, valuing, and comparing competing interests at issue, and formulating a rule or doctrine that accommodates each interest in accordance with the value assigned to it.[176] The appeal of easily deferring to a mechanical interpretation of precedential authority such as in *Sibbach* that the *Shady Grove* plurality commits to is palpable.[177] However, this deference to authority still requires a certainty that presuming the federal law governs does not displace an individual's substantive right, regardless of the court's commitment to adhere to legal precedent. Justice Stevens' Rules Enabling Act inquiry approach would not be as taxing as Scalia determines because of how rare it is for a Federal Rule to displace a state's definition of its own rights.[178] Under Stevens' approach, substantive state laws like anti-SLAPP legislation will not run the same risk of being subjected to a court's presumption that the degree of conflict with a Federal Rule is qualitatively apparent.

CONCLUSION

All told, Justice Stevens' concurrence in *Shady Grove* provides a necessary paradigm for understanding the supplementary nature of state laws like anti-SLAPP statutes by analyzing the unique features of their substantive character in relation to the procedural form of the Federal Rules.[179] Moreover, Stevens illuminates how anti-SLAPP provisions can apply in federal courts as rules that are procedural in the ordinary sense of the term, and also operate to define the scope of

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174 *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 425 n.9 (2010) (Stevens, J., concurring in part and concurring in the judgment).

175 *See id.*

176 *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 944-45 (1987).

177 *See, e.g.*, *Shady Grove*, 559 U.S. at 412-14 (plurality opinion).

178 *See Shady Grove*, 559 U.S. at 426, 426 n.10 (Stevens, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

179 *See, e.g.*, *id.*

substantive rights under state law.[180] Anti-SLAPP laws act as a useful procedural device for avoiding the abuse of meritless lawsuits and frivolous litigation.[181] From the perspective of legal positivism, the free speech protections provided by anti-SLAPP laws do not require a moral basis to be valid, but rather are an effective means of exposing truth before unnecessary litigation occurs.[182] As a result of the interconnected nature of procedure and substance, the relationship can cause a procedure to influence substantive outcomes.[183]

Containing both procedural and substantive elements, the application of anti-SLAPP laws should include an assessment of truth, with regard to lawsuits that have the potential to drag litigants through the legal system despite lacking merit to their claims. The perspective gained from *Erie* through the lens of legal positivism and the Erie Doctrine's subsequent treatment in *Shady Grove* reveal that the procedural appearance of state laws such as anti-SLAPP statutes can supplement the Federal Rules without detracting from the value of their substantive character.

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180 *Id.* at 428.

181 *See* Quinlan, *supra* note 28, at 376.

182 *See supra* Part II.B.

183 *See, e.g.*, *Shady Grove*, 559 U.S. at 428 n.13.