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I. INTRODUCTION

Summary judgment, long a centerpiece of federal procedural practice, is at something of a crossroads, as efforts to improve the process of making and opposing summary judgment motions by amending Federal Rule of Civil Procedure 56 stand in contrast to challenges to the procedure, including an academic challenge to the constitutionality of the procedure.[1] This essay addresses one particular challenge to federal summary judgment practice: the possibility of a successful challenge to Rule 56 of the Federal Rules of Civil Procedure, pursuant to *Erie Railroad v. Tompkins*[2] and its progeny. Part II of this essay addresses differences between summary judgment as practiced in federal courts pursuant to Federal Rule 56 and summary judgment as practiced in state courts, focusing in particular on differences in the ways the federal courts and some state courts allocate the burdens on moving and non-moving parties.[3] Part III suggests that these differences are problematic under *Erie* and its progeny, and in particular under the Supreme Court's 2001 decision in *Semtek International, Inc. v. Lockheed Martin Corp.*[4] Part III looks ahead to the *Erie* case decided in the Supreme Court's 2010 term[5] and considers the possible impact of

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1. *See* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007).

2. 304 U.S. 64 (1938).

3. *See infra* notes 7-39 and accompanying text.

4. 531 U.S. 497 (2001); *see infra* notes 40-76 and accompanying text.

5. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

that case on Federal Rule 56.[6] The essay concludes that, in light of the Supreme Court's *Erie* jurisprudence, the future of uniform summary judgment practice in federal courts is at least uncertain.

II. FEDERAL AND STATE STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is not a creation of the Federal Rules. Even those who challenge the constitutionality of summary judgment as inconsistent with the historical right to a jury trial acknowledge that summary judgment has a long history.[7] Yet, in this area as in others, the Federal Rules have been influential. Approximately thirty-three jurisdictions have adopted state rules or codes of civil procedure that are modeled to a greater or lesser degree on the Federal Rules of Civil Procedure.[8] Twenty-four jurisdictions—twenty-two states plus the District of Columbia and Guam—currently have summary judgment rules that closely parallel the text of Federal Rule 56.[9] This, of course, leaves eighteen jurisdictions with different rules regimes—some of which resemble the Federal Rules in some respects, and others of which differ in significant ways—and even among those that follow the Federal Rules model, some variation exists, both among states and between state and federal rules.[10] Given this variation, it is easy to imagine the possibility of summary judgment in identical cases being granted under one standard but denied under another.

The variation in the texts of summary judgment rules in some ways understates the extent of the difference between federal and state summary judgment practice. Even in those jurisdictions with procedural rules modeled on the Federal Rules, practices can differ. A state's rule may be textually identical to the Federal Rule, and yet the state courts are not bound by federal courts' interpretations of the Federal Rule.[11] The state courts may treat the federal courts' interpretations as persuasive, but they need not do so, and indeed, sometimes they are not

6. *See infra* notes 76-100 and accompanying text.

7. *See, e.g.*, Thomas, *supra* note 1, at 140.

8. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356-57 (2003).

9. *Id.*; Guam R. Civ. P. 56, available at http://www.guamsupremecourt.com/PromOrder/images/PromOrderNo06-006-01GRCP-LRSuperiorCt05032007.pdf.

10. *Id.* This is particularly so as of December 1, 2007, when the restyled Federal Rules of Civil Procedure went into effect, resulting in substantial textual differences between the Federal Rules and the state rules in those states that had previously mirrored the Federal Rules.

11. *See infra* notes 15-35.

persuaded. Summary judgment represents a good example of this phenomenon.

Consider the state courts' treatment of the United States Supreme Court's decision in *Celotex Corp. v. Catrett*,[12] part of the well-known trilogy of summary judgment cases decided in 1986 that continue to form the basis of the interpretation of Rule 56 at the federal level.[13] In *Celotex*, the Court confronted the question of what a moving party must show to prevail on a summary judgment motion when the non-moving party would have the burden of persuasion at trial—as will frequently be the case when, as in *Celotex*, a defendant moves for summary judgment.[14] The Court rejected the respondent's argument that a defendant moving for summary judgment based on alleged infirmities in the plaintiff's claim must affirmatively demonstrate, through the presentation of evidence that the plaintiff cannot prevail.[15] Instead, the Court concluded that the defendant only needs to "show" that the plaintiff has failed to produce evidence sufficient to permit a reasonable jury to find in the plaintiff's favor, by surveying the record and noting the absence of sufficient proof to establish the plaintiff's claim.[16] The burden then falls to the plaintiff to come forward with evidence, in the form of affidavits, depositions, answers to interrogatories, and so on, demonstrating the existence of a genuine issue of material fact.[17]

In so describing the shifting burdens of production on a motion for summary judgment, the *Celotex* Court resolved a circuit split at the federal level, adopting what had to that point been the minority position within the federal courts.[18] Yet the decision did not eliminate a similar split at the state level. To be sure, a large number of state courts cited *Celotex* approvingly in the years immediately following the decision, and state courts continue to do so to this day. Other state courts, however, explicitly rejected *Celotex* and persist in that rejection more than two decades later.[19]

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12. 477 U.S. 317 (1986).

13. The other two cases in the trilogy are Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

14. *Celotex*, 477 U.S. at 330-31.

15. *Id.* at 321-23, 324.

16. *Id.* at 323.

17. *Id.*

18. *Id.* at 319, 322.

19. *E.g.*, compare Kourouvacilis v. General Motors Corp., 575 N.E.2d 734, 738 (Mass. 1991) (following the holding of *Celotex*, that "[t]he burden on a moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case"), with Kahf v. Charleston South Apartments, 461 N.E.2d 723, 729 (Ind. Ct. App. 1984) (stating that the moving party must "shoulder the burden of establishing the lack of a material factual issue").

Celotex has had a mixed reception in jurisdictions that depart significantly from the text of Federal Rule 56. In Florida, for example, the state supreme court had decided in 1966 that, under Florida Rule of Civil Procedure 1.510(c),[20] a defendant filing a motion for summary judgment bears the burden of establishing the absence of a genuine issue of material fact, by offering proof sufficient to defeat any reasonable inferences in favor of the non-moving party.[21] In the wake of *Celotex*, the Florida Court of Appeals was invited to reconsider the prior state standard, but it declined to do so.[22] This was perhaps an easy decision for the Florida Court of Appeals since, as the court noted, the *Celotex* decision was based on language in Federal Rule 56(c) that did not appear in the Florida rule.[23] Under the circumstances, it would have been wholly inappropriate for the Florida Court of Appeals to depart from state supreme court precedent.[24] In Texas, by comparison, the state supreme court did re-examine its prior law following *Celotex* and affirmatively decided to adhere to its precedent rather than accepting *Celotex*.[25] And the Oregon Supreme Court concluded that a post-*Celotex* amendment to Oregon's summary judgment rule did not incorporate *Celotex*.[26]

Several jurisdictions with procedural rules that closely resemble the Federal Rules have also rejected *Celotex*'s allocation of burdens on motions for summary judgment. Most of the jurisdictions that have refused to follow *Celotex* had addressed the question prior to *Celotex* and thus, rather than rejecting *Celotex* as a matter of first impression,

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20. Although Florida employs a different numbering system than the Federal Rules, its summary judgment rule is textually very similar to the Federal Rule. Florida Rule of Civil Procedure 1.510(c) provides, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

21. Holl v. Talcott, 191 So. 2d 40, 43-44 (Fla. 1966).

22. *See* 5G's Car Sales, Inc. v. Florida Dept. of Law Enforcement, 581 So. 2d 212, 212 (Fla. Dist. Ct. App. 1991).

23. *Id.*

24. Florida's rejection of the Celotex standard is the subject of a critical law review article. *See* Leonard D. Pertnoy, Summary Judgment in Florida: The Road Less Traveled, 20 St. Thomas L. Rev. 69 (2007).

25. *See* Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989); *see also* Lesbrookton, Inc. v. Jackson, 796 S.W.2d 276, 286 (Tex. App. 1990) (stating that "under the Texas summary judgment scheme, the non-movant has no burden to produce proof of an element of his cause of action until that element has been conclusively negated by movant").

26. Jones v. General Motors Corp., 939 P.2d 608, 615-17 (Or. 1997).

were adhering to prior state precedent. In Kentucky, for example, the state supreme court had held in 1985 that "summary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances."[27] After *Celotex*, the court refused to reconsider its standard, emphasizing that summary judgment is appropriate only in those cases in which, "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant."[28]

At least one jurisdiction appears to have rejected *Celotex* as a matter of first impression. In Indiana, the state court of appeals had spoken on the nature of the burden borne by the defendant as moving party, but it had done so only obliquely and with little elaboration.[29] In the wake of *Celotex*, however, the Indiana Supreme Court embraced the courts of appeals' standard and emphasized that it did indeed differ from the *Celotex* standard, requiring the moving defendant to produce evidence negating the plaintiff's claim.[30] This was true, despite the fact that Indiana's summary judgment rule is virtually identical to the Federal Rule.[31]

The Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*[32] has received a similarly mixed response in the state courts. In *Anderson*, the Court concluded that the standards for summary judgment under Rule 56 and for judgment as a matter of law under Rule 50 are identical.[33] Under that standard, the Court concluded, determining whether a genuine issue of material fact exists for trial requires a court to

27. Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985).

28. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991) (quoting Paintsville Hosp., 683 S.W.2d at 256). *See also* O'Bryan v. Cave, 202 S.W.3d 585, 587 (Ky. 2006) (following Steelvest).

29. *See, e.g.*, Kahf v. Charleston South Apartments, 461 N.E.2d 723, 730 (Ind. Ct. App. 1984) (stating that the moving party must "shoulder the burden of establishing the lack of a material factual issue"); Jones v. City of Logansport, 436 N.E.2d 1138, 1143 (Ind. Ct. App. 1982) ("The party seeking the summary judgment, therefore, has the burden to establish that there is no genuine issue as to any material fact.").

30. Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc., 644 N.E.2d 118, 123 (Ind. 1994).

31. Rule 56(C) of the Indiana Rules of Trial Procedure provides, in pertinent part:

At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto. The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

32. 477 U.S. 242 (1986).

33. *Id.* at 252.

take into account the standards for the burden of persuasion that would exist at trial.[34] This has particular significance in defamation cases involving public figures (as was the case in *Anderson*). The *New York Times v. Sullivan* standard[35] requires the plaintiff to establish malice by clear and convincing evidence. In order to defeat a summary judgment motion, the plaintiff must establish the existence of a genuine issue of material fact on malice, producing sufficient evidence to allow a reasonable jury to conclude by clear and convincing evidence that malice exists.[36] As with *Celotex*, a number of state courts have refused to follow *Anderson*. Some of these state opinions are in defamation cases, with the state court expressly declining to apply the clear and convincing evidence standard at the summary judgment stage.[37] Other courts have disagreed more generally with the *Anderson* approach to weighing the evidence on a motion for summary judgment.[38] In either instance, it is apparent that summary judgment is more readily obtained under federal standards than under the standards followed in these states.

The problem is thus defined: federal and state courts follow different rules (or different interpretations of near-identical rules), creating the potential for different results in similar cases in federal and state courts. Given these different standards, and potentially different outcomes under the different standards, parties might well choose a federal forum or state forum based on the applicable summary judgment standard, creating the potential for substantial forum-shopping.[39] The stage is set for an *Erie* problem.

III. SUMMARY JUDGMENT AND THE *ERIE* PROBLEM

The spirit of *Erie* may seem to be troubled by the application of federal rather than state summary judgment standards in diversity cases, and yet until relatively recently the question of whether the *Erie* doctrine required federal courts to apply state summary judgment standards in

34. *Id.*

35. 376 U.S. 254, 285-86 (1964).

36. *Anderson*, 477 U.S. at 254.

37. *See* Moffat v. Brown, 751 P.2d 939, 943 (Alaska 1988); Chester v. Indianapolis Newspapers, Inc., 553 N.E. 2d 137, 140-41 (Ind. Ct. App. 1990).

38. *See, e.g.*, Steelvest, Inc. v. Scansteel, Serv. Ctr., Inc., 807 S.W.2d 476, 482 (Ky. 1991) (concluding that in Kentucky the standards for summary judgment and a directed verdict are not identical); Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (concluding that neither Celotex nor Anderson "compels us to abandon our established summary judgment procedure"); Parker v. Haller, 751 P.2d 372, 377 (Wyo. 1988).

39. *See infra* notes 43-48.

diversity cases would have appeared easy. In *Hanna v. Plumer*,[40] the Supreme Court set out a two-pronged structure for addressing *Erie* problems. The second prong represented a modification of what to that point had been the "traditional" *Erie* analysis, developed over the run of cases from *Guaranty Trust v. York*[41] to *Byrd v. Blue Ridge Rural Electric Cooperative*,[42] focused on whether application of a federal rule or practice rather than a state rule would be "outcome-determinative"—but, the *Hanna* Court emphasized, only outcome-determinative in a way that would produce forum-shopping and inequitable administration of the laws.[43] The first prong applies to situations covered by a Federal Rule of Civil Procedure. In such cases, the court is only to consider whether the applicable Federal Rule represents a valid exercise of the Supreme Court's rulemaking authority under the Rules Enabling Act.[44] In other words, in the broad (and rather unhelpful) language of *Sibbach v. Wilson & Co.*,[45] does the Rule "really regulate[] procedure"? If it does, and the Federal Rule is valid, then the analysis is at an end. On the other hand, if a Federal Rule did not control, the analysis then proceeds down a second prong, considering whether a departure from state law by a federal court would be outcome-determinative in light of *Erie*'s concerns with forum-shopping and inequitable administration of the laws. *Hanna* received some elaboration and subtle modification in subsequent decades: In particular, the Supreme Court's 1996 decision in *Gasperini v. Center for Humanities*[46] reintroduced the notion—stated by the Court in *Byrd* but not mentioned in *Hanna*—that a federal court need not follow a state law if doing so would infringe upon an essential characteristic of the federal judiciary.[47]

Under this standard, Federal Rule 56 would appear to withstand scrutiny rather easily in those situations where federal summary judgment standards differ from state standards. As Federal Rule 56 specifically governs motions for summary judgment, there is no real question that analysis would proceed down *Hanna*'s first prong, focusing on whether Federal Rule 56 complies with the Rules Enabling Act. And although the standards applicable to that analysis were left rather vague at best, the *Hanna* Court emphasized that this was to be a

40. 380 U.S. 460 (1965).
41. 326 U.S. 99 (1945).
42. 356 U.S. 525 (1958).
43. 380 U.S. at 468.
44. *Id.* at 470-71.
45. 312 U.S. 1, 14 (1941).
46. 518 U.S. 415, 428 n.7 (1996).
47. *Id.* at 431, 437.

less searching inquiry than the analysis of outcome-determinative effects under the second prong of the *Hanna* analysis.[48] Summary judgment, on its face, fairly clearly represents a procedural mechanism for disposing of claims or defenses so plainly without merit that the non-moving party cannot reasonably prevail, and so it appears that the rule plausibly can be characterized as a procedural rule that only incidentally affects substantive rights.

The Supreme Court's 2001 decision in *Semtek International, Inc. v. Lockheed Martin Corp.*[49] changed that equation. Although *Semtek* did not overrule *Hanna*, or even call any of the *Hanna* Court's analysis directly into question, it did shift the analysis in significant ways. The rather unusual setting of the *Semtek* case partially obscured the decision's ramifications, potentially calling into question the ability of the Federal Rules of Civil Procedure to serve as a uniform set of rules applicable to all cases heard in federal district court. An analysis of Rule 56 in a post-*Semtek* world illustrates the problem, although it may not reveal its full extent.

Semtek involved a dispute between two large producers of military hardware. Semtek initially filed suit in California state court.[50] Lockheed removed the case to federal court, with jurisdiction based on diversity of citizenship. Once the case had arrived in the United States District Court for the Central District of California, Lockheed promptly moved to dismiss on the ground that the statute of limitations applicable in California to Semtek's claims had run.[51] The district court granted Lockheed's motion, specifically stating in the process that the dismissal was "on the merits and with prejudice."[52] This was unquestionably the source of the difficulties that later emerged: although the federal district court followed Rule 41(b) of the Federal Rules of Civil Procedure in labeling its dismissal "on the merits," California state courts treated dismissals on statute of limitations grounds as without prejudice, allowing plaintiffs to refile their claims in other jurisdictions with longer limitations periods.[53]

Semtek appealed the dismissal to the Ninth Circuit, which affirmed the district court's decision. More significantly, Semtek also filed a second lawsuit, this one in state court in Maryland, where the state's

48. Hanna v. Plumer, 380 U.S. 460, 473 (1965).
49. 531 U.S. 497 (2001).
50. *Id.* at 491.
51. *Id.*
52. *Id.*
53. *Id.* at 499.

three-year statute of limitations did not bar the claims.[54] Lockheed once again moved to dismiss, arguing that, given the dismissal of Semtek's first lawsuit "on the merits and with prejudice," Semtek's second lawsuit was barred by claim preclusion.[55] Semtek responded that, whatever label the district court in California may have placed on its judgment, the judgment could have no greater effect than a judgment of the California state court would have been given had the initial lawsuit not been removed to federal court.[56] The stage thus was set for an *Erie* conflict—a conflict that ultimately found its way to the United States Supreme Court.

A straightforward application of *Hanna v. Plumer* suggests that, despite its somewhat unusual setting, *Semtek* should have been a relatively easy case to resolve. The federal district court's decision to identify its dismissal on statute of limitations grounds as "on the merits and with prejudice" was in compliance with Rule 41(b) of the Federal Rules of Civil Procedure, which in its present form states:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.[57]

Because a Federal Rule of Civil Procedure was involved, analysis of the discrepancy between state and federal law would have proceeded (assuming that the Federal Rules were found to control the question) under *Hanna*'s first prong, with the court considering whether Rule 41(b) complied with the Rules Enabling Act. And although one commentator presciently described potential problems with Rule 41(b) under the Rules Enabling Act some fifteen years before *Semtek* was decided,[58] *Hanna*'s seemingly deferential standard for reviewing Federal Rules, as opposed to non-Rules-based federal practices or procedures, would have seemed likely to uphold the Rule. After all, in the decades

54. Lockheed again attempted to remove to federal court. As a citizen of Maryland, it could not do so on diversity grounds, *see* 28 U.S.C. § 1441 (1991), and the federal district court in Maryland rejected Lockheed's effort to remove on federal question grounds, noting that the asserted federal question arose only by way of a defense. *See* Semtek, 531 U.S. at 499-500.

55. *Semtek*, 531 U.S. at 500.

56. *Id.*

57. FED. R. CIV. P. 41(b).

58. *See* Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 CORNELL L. REV. 733, 780-86 (1986).

following *Hanna*, the Supreme Court had never invalidated a Federal Rule on *Erie/Hanna* grounds.[59]

Semtek, though, substantially changed the picture. Rejecting Lockheed's argument that Rule 41(b) controlled the question before the Court, the *Semtek* Court concluded that if Rule 41(b) did in fact require that the California district court judgment be given preclusive effect, it would probably violate the Rules Enabling Act: The Rule would require the extinction of a substantive claim that would be allowed to continue in state court, and thus would affect substantive rights.[60] Interpreting Rule 41(b) as a rule of claim preclusion, in the Court's view, would also run afoul of the twin aims of *Erie*: it would encourage parties to forum-shop to obtain desirable claim preclusion rules, and it would ultimately lead to inequitable administration of the laws, as different substantive results would emerge in federal and state courts for reasons unrelated to the substantive merits of the claims.[61] The *Semtek* Court avoided the difficulty through a nifty act of interpretation, asserting that the phrase "on the merits" in Rule 41(b) did not mean what it appeared to mean—that is, it did not mean that a judgment so described under Rule 41(b) would have to be treated as a judgment on the merits for claim preclusion purposes.[62]

Semtek's incorporation into *Hanna*'s first prong of the twin concerns of *Erie*—avoidance of forum-shopping and inequitable administration of the laws[63]—made a certain amount of historical sense. The Rules Enabling Act states that a Federal Rule "shall not abridge, enlarge or modify any substantive right."[64] The outcome-determinative test of *Guaranty Trust* was originally stated, after all, as a way of distinguishing substantive law from procedural law: the Court stated that whether a law is substantive "in the aspect that alone is relevant to our problem" turns on whether application of a different rule in federal court would "significantly affect the result of the litigation."[65] Although

59. A number of authors have commented on the fact that the Supreme Court has never invalidated a Federal Rule of Civil Procedure for violating Hanna's "substantive right" prong. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1332 (2006). *See also* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 698 (2002).

60. *Semtek*, 531 U.S. at 503.

61. *Id.* at 503-04.

62. *Id.* at 501-02.

63. *Id.* at 508-09.

64. 28 U.S.C. § 2072(b) (1990).

65. Guaranty Trust v. York, 326 U.S. 99, 109 (1945).

Hanna framed its first prong not in terms of *Guaranty Trust*'s outcome-determinative test but rather in terms of the validity of a Federal Rule under the Rules Enabling Act, the question asked under that inquiry bears a strong resemblance to the question asked under *Hanna*'s second prong, notwithstanding the *Hanna* Court's insistence that the two inquiries are different.

Semtek significantly fleshed out the theretofore poorly defined test for determining whether a Federal Rule violates a substantive right in violation of the Rules Enabling Act. The extent to which it did so seems not to have been recognized by other courts in the wake of the decision—perhaps because of the impenetrability of much of the case's analysis—*Semtek* has been largely ignored by the courts of appeals in cases that do not involve preclusion.[66] Yet the *Semtek* Court's analysis has implications that potentially reach far beyond the narrow confines of claim preclusion, implications that ultimately may affect the continued viability of the Federal Rules of Civil Procedure as a uniform set of procedural rules for lawsuits brought in federal courts.

It is important at the outset not to overstate the potential impact of *Semtek*, as the importation of the twin aims of *Erie* into the analysis of the Rules' validity may suggest. After all, the adoption of the Federal Rules in 1938 represented a significant departure from pre-Rules procedures in many respects, and those departures could easily be seen as implicating the twin concerns of *Erie*. The discovery rules, for example, vastly expanded the ability of a party to compel opposing

66. Courts commonly cite Semtek for the proposition that the federal common law of claim preclusion should incorporate state law (to the extent doing so is not incompatible with federal interests) in situations where the original case was in federal court because of diversity of citizenship. *See, e.g.*, Q Int'l Courier, Inc. v. Smoak, 441 F.3d 214, 218 (4th Cir. 2006); Hells Canyon Preservation Council v. U.S. Forest Serv., 403 F.3d 683, 686 (9th Cir. 2005); Headwaters, Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005); Jackson v. FIE Corp., 302 F.3d 515, 529 n.58 (5th Cir. 2002). Other courts have concluded that the Semtek rationale extends to issue preclusion as well. *See, e.g.*, In re Baycol Products Litig, No. 09-1069, 2010 WL 10397, at *2 (10th Cir. Jan. 5, 2010); Taco Bell Corp. v. TBWA Chiat/Day, Inc., 552 F.3d 1137, 1144 (9th Cir. 2009); In re Sonus Networks, Inc. Shareholder Derivative Litig., 499 F.3d 47, 48-49 (1st Cir. 2007); Matosantos Comm. Corp. v. Applebee's Int'l, Inc., 245 F.3d 1203, 1208 (10th Cir. 2001). Beyond that, the Eleventh Circuit applied Semtek to conclude that in a diversity declaratory judgment action governed by Georgia substantive law, the federal court's declaratory judgment should not reach more broadly than would a declaratory judgment rendered by a Georgia court. *See* Palmer & Cay, Inc. v. Marsh & McLennan Cos., Inc., 404 F.3d 1297, 1310 (11th Cir. 2005). The Seventh Circuit devoted a paragraph to Semtek, but did not otherwise attempt to apply the decision, as part of an extended review of the Supreme Court's Erie jurisprudence in Houben v. Telular Corp., 309 F.3d 1028, 1035-36 (7th Cir. 2002). It seems that no court of appeals panel has yet wrestled with Semtek's broader implications.

parties and non-parties to produce relevant information.[67] In that setting, it is easy to imagine an attorney choosing a federal forum because of the perceived advantages that enhanced discovery would give to the attorney's case. The discovery rules, in other words, certainly had the potential to lead to forum-shopping. Similarly, we might expect that the then-new discovery rules would have had a systematic impact on the outcomes of some categories of cases depending on whether a case was in federal or state court—in other words: they would have resulted in inequitable administration of the laws.[68] The differences between federal and state discovery rules have diminished over time, but differences still exist—the mandatory discovery regime of Federal Rule 26(a), for example, has not been adopted in many states, even those with rules regimes that largely follow the Federal Rules. And these differences may well implicate the twin concerns of *Erie*.[69] *Semtek* does not—it cannot—mean that the federal discovery rules cannot be applied in diversity cases where state courts would follow different discovery rules.[70] Such a conclusion would mean that *Semtek* has effectively overthrown the Federal Rules of Civil Procedure in diversity cases, a conclusion clearly not contemplated by the decision itself.[71] Rather, the concern about *Erie*'s twin aims must be read in conjunction with *Semtek*'s first concern regarding the potential applicability of Rule 41(b): that Rule 41(b), if it had controlled, would have directly extinguished a claim that, had the case been in state court rather than federal court, would have been permitted to continue.[72] Yet even limiting *Semtek*'s impact to those situations in which a Federal Rule would directly terminate a lawsuit that would continue in state court (or, alternatively, would allow to continue in federal court a lawsuit that would terminate in state court) has potentially broad implications for the

67. The Supreme Court has consistently reaffirmed that the federal discovery rules "are to be accorded a broad and liberal treatment[.]" Herbert v. Lando, 441 U.S. 153, 177 (1979) (citing Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964), and Hickman v. Taylor, 329 U.S. 495, 501 (1947)).

68. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (noting that when the choice between a state or federal forum will have an outcome-determinative effect, forum-shopping and inequitable administration of the laws will result).

69. *Id.* at 464 ("[A] non-uniform system increases uncertainty and creates the opportunity for procedural gamesmanship without providing any offsetting benefits . . . .").

70. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (noting that the decisions reference to state law would not apply "in situations in which the state law is incompatible with federal interests").

71. *Id.*

72. *Id.* at 503-04.

Federal Rules in diversity cases.[73] These implications may be seen by considering the potential impact of the decision on Rule 56.

Consider a lawsuit filed in federal district court in Indiana. The plaintiff has a weak claim, and the claim's weakness is made manifest during discovery. The defendant then moves for summary judgment. According to the federal standard set forth in *Celotex*, the defendant does not need to negate the plaintiff's claim; rather, the defendant only needs to "show"—by surveying the available evidence—that no genuine issue of material fact exists; the burden then shifts to the plaintiff to identify specific evidence in the record that demonstrates the existence of a genuine issue of material fact.[74] The difference may be somewhat difficult to articulate, but it is real: it is generally much harder to establish a negative, as the Indiana interpretation of its Rule 56 requires,[75] than it is to suggest a negative and require the opposing party to prove a positive, as *Celotex* requires. A defendant in this situation, facing a weak claim, would prefer to be in federal court; by contrast, a plaintiff would prefer to operate under the more forgiving regime of the Indiana rule. A clear potential for forum-shopping would exist. Similarly, although perhaps less pronouncedly, inequitable administration of the laws could result. *Semtek*'s analysis thus appears to put Federal Rule 56 in peril, at least in diversity cases in those jurisdictions that employ different summary judgment standards, either as a matter of rule or as a matter of decisional law.

Semtek itself was able to avoid the dramatic step of invalidating a Federal Rule through a creative—if not entirely convincing—act of interpretation: a judgment "on the merits" for the purposes of Federal Rule 41(b) need not be a judgment "on the merits" for claim preclusion purposes.[76] But the escape hatch of interpretation utilized by the *Semtek* Court is not available in the summary judgment context. A motion for summary judgment is a motion for summary judgment, and interpretive twists cannot escape the fact that summary judgments in both state and federal courts serve essentially the same broad purpose: to identify those cases that are so one-sided that no reasonable jury could possibly find for the non-moving party, thus negating the need for a trial. If *Semtek* is to be taken at its word, then Federal Rule 56 appears to be in very serious danger of invalidation indeed.

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73. This is so because Rule 56, like Rule 41(b), could potentially terminate a lawsuit under different standards in different courts. *See supra* notes 12-37 and accompanying text.

74. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

75. *See supra* notes 30-31 and accompanying text.

76. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-02 (2001).

IV. LOOKING AHEAD

How serious is the danger that a court, deciding a diversity case, would conclude that Federal Rule 56, by terminating a lawsuit that would be allowed to continue under a different state summary judgment standard, abridges substantive rights and therefore violates the Rules Enabling Act? At one level, it seems almost unimaginable: in the seven decades since the adoption of the Federal Rules, summary judgment has become a cornerstone of federal procedural practice—perhaps not an "essential characteristic" of the federal judiciary, in the words of *Gasperini*[77] and *Byrd*,[78] but something close to it—and although invalidating Rule 56 in the limited context of diversity cases involving the law of states that place a greater burden on moving defendants than the Federal Rule would not eliminate the procedure of summary judgment altogether, it would relinquish federal control over an important procedural mechanism and would call into question the viability of a uniform set of Federal Rules, applicable in all cases brought in federal court. Adding to the unlikelihood of this result is the relative lack of influence that *Semtek* has had in the years since its decision: as noted previously, although *Semtek* stands, for the moment, as the Supreme Court's most recent comprehensive statement of the *Erie* doctrine, the case has been largely overlooked in subsequent judicial decisions—suggesting that it is largely overlooked by litigants and their attorneys as well.[79] *Semtek* has potentially far-reaching implications, but those implications largely are yet to be explored by the courts.

And those implications may not be as far-reaching as they first appeared to be. As this essay was being finalized, the Supreme Court issued its decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Company*.[80] *Shady Grove* involves an apparent conflict between Federal Rule 23, setting forth standards for class actions,[81] and

77. Gasperini v. Center for Humanities, 518 U.S. 415, 431 (1996).

78. Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, 537 (1958).

79. *See* Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707, 722-23 (2006). This article points out that the holding of Semtek, i.e. the narrow construction of the phrase "adjudication on the merits" to avoid a conflict with Rule 41(b), "originated in Semtek itself" and has not been adopted elsewhere. *Id.*

80. 130 S. Ct. 1431 (2010).

81. FED. R. CIV. P. 23:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the class.

Section 901 of New York's Civil Practice Law and Rules, which, like Federal Rule 23, sets out basic prerequisites for maintenance of a lawsuit as a class action, but which, unlike Federal Rule 23, limits the use of the class action mechanism in cases seeking a statutory penalty or a recovery with a minimum set by statute.[82] The putative class in *Shady Grove* sought statutory payments based on Allstate's failure to pay insurance benefits in a timely manner and to pay interest on overdue insurance benefits as required by law.[83] Because the statute establishing the penalty did not specifically authorize lawsuits seeking the penalty to be brought as class actions, Section 901(b) would have barred the plaintiffs from proceeding as a class had the lawsuit been brought in state court.[84] The lawsuit was filed in federal court, however, and the plaintiffs contended that Section 901(b)'s restrictions on class actions could not control federal courts, where Rule 23 sets out the only prerequisites for bringing class actions. Both the district court and the Second Circuit disagreed, concluding that Section 901(b) must be applied in federal court in a diversity case premised on a violation of New York law, but the Supreme Court reversed.[85]

Structurally, the decision is unremarkable: all members of the Court follow the well-established analytical structure set out in *Hanna v. Plumer* and subsequent cases.[86] The first part of the Court's decision, holding that Rule 23 controls the question presented and therefore displaces New York's section 902(b), is surely worthy of commentary, but is perhaps best left to another forum. Although the question of whether Rule 23 directly conflicts with section 902(b) is certainly debatable—the Supreme Court split 5-4 on the question, after all, and the majority disagreed with the unanimous Second Circuit panel—it would be virtually impossible to argue that Federal Rule 56, setting forth the procedures for filing a motion for summary judgment and setting forth the circumstances in which such a motion may be granted, does not control a motion filed in federal court and designated as a motion for summary judgment, even in a diversity case. When a motion for summary judgment is filed in the United States District Court for the Southern District of Indiana, it is self-evident that Federal Rule of Civil Procedure 56 governs, and that any contrary provisions in Indiana Rule of Trial Practice 56 (including interpretations of the Indiana Rule that

82. N.Y. C.P.L.R. § 901(b) (1975).
83. *Shady Grove*, 130 S. Ct. at 1436.
84. *Id.*
85. *Id.*
86. *See infra* notes 40-47 and accompanying text.

are inconsistent with federal interpretations of the Federal Rule) will be excluded.

More significant for present purposes is the Court's analysis of whether Federal Rule 23 complies with the Rules Enabling Act. Given the shape of the Court's analysis of potential problems raised by Rule 41(b) in *Semtek*, this was the portion of the case on which clarity was perhaps most urgently needed. But although the clarity of Justice Scalia's analysis of Rule 23's validity[87] contrasts favorably with the murk of Justice Scalia's discussion of Rule 41(b) in *Semtek*, clear guidance nevertheless fails to emerge from the Court's opinions, for although a majority of the Court concludes that Rule 23 is a valid exercise of the Court's rulemaking authority, that majority is fractured as to the rationale.

Justice Scalia sees the issue of the Rule's validity as straightforward. Justice Scalia's starting point is the uncontroversial notion that, under *Hanna*, the Rule's validity is to be determined not by the classic *Erie* analysis of whether departure from state law would affect the outcome of the case in a way likely to produce forum shopping and inequitable administration of the laws; instead, the focus is on whether the Rule governs only the manner and means of enforcing substantive rights, or whether the Rule itself amounts to a definition of substantive rights. As Justice Scalia sees it, this inquiry is to be undertaken with little if any reference to the state law that the Federal Rule displaces.[88] The Rule is either categorically procedural (and therefore valid) or substantive (and therefore invalid); it cannot be "valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)."[89] By this approach, Rule 23 is plainly procedural: it represents nothing more than a joinder device, without substantively modifying the remedy to which any one individual class member may be entitled.[90]

87. Describing Justice Scalia's analysis of Rule 23's validity as "clear" is not meant here as an endorsement of his approach. Whatever else may be said about Justice Scalia's opinion, though, it sets forth a relatively straightforward test, one that, although perhaps not always easy to apply, nevertheless requires consideration of fewer factors than the alternatives voiced by the concurring and dissenting opinions.

88. *See Shady Grove*, 130 S. Ct. at 1435 ("In sum, 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.").

89. *Id.*

90. *Id.*

Justice Scalia's analysis of Rule 23's validity is fairly straightforward, and it is certainly easier to apply than the standard set forth in *Semtek*, yet it remains troubling. For one thing, Justice Scalia fails to grapple with his own *Semtek* handiwork: although Justice Scalia wrote for a unanimous Court in *Semtek*, and that opinion pivoted around the Court's conclusion that a particular interpretation of Rule 41(b) would arguably violate the Rules Enabling Act, Justice Scalia's *Shady Grove* opinion almost entirely ignores *Semtek*.[91] Entirely gone is *Semtek*'s suggestion that whether a Federal Rule is substantive may be determined, at least in part, by asking whether application of the Rule would be outcome-determinative in light of the twin aims of *Erie*.[92] The reference is not missed, as the *Semtek* Court's importation of the *Erie-Guaranty Trust* outcome-determination test threatened to undermine *Hanna's* clear line between analysis of whether a federal court may depart from state law by applying a Federal Rule of Civil Procedure and analysis of whether a federal court may depart from state law by applying judge-made federal law. Indeed, Justice Scalia's *Shady Grove* opinion emphasizes the fundamental difference between the two inquiries. Justice Scalia, it appears, would effectively overrule *Semtek* by ignoring it.

The implications of Justice Scalia's approach for summary judgment and Rule 56 at first glance seem clear. Justice Scalia focuses on the Federal Rule itself, without examining individual state rules (at least those that are nominally procedural) or considering the rationales that the states put forward for their departures from federal practice. Thus, Justice Scalia would ignore the reasons why state courts have refused to follow *Celotex*, even if some of those reasons may implicate substantive concerns. The focus would be solely on whether, in *Sibbach*'s terms, Rule 56 "really regulates procedure."[93] And, given Rule 56's centrality in federal procedural practice and Justice Scalia's forthright acknowledgment that the Supreme Court had never invalidated a Federal Rule under the Rules Enabling Act,[94] it seems extremely unlikely that Justice Scalia (and the justices who join his opinion) would conclude that Rule 56 is substantive and therefore invalid.

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91. Justice Scalia cites *Semtek* only twice, both times for the proposition that where a Federal Rule may plausibly be read in two ways, one of which would violate the Rules Enabling Act, the Court should adopt the reading that would not require invalidating the Rule. *Shady Grove*, 130 S. Ct. at 1442 (citing Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001)).

92. *See Semtek*, 531 U.S. at 503-05.

93. *Shady Grove*, 130 S. Ct. at 1442 (quoting Sibbach v. Wilson, 312 U.S. 1, 14 (1941))

94. *Id.*

Justice Stevens, concurring in the judgment,[95] rejects Justice Scalia's categorical approach to determining if a Federal Rule violates the Rules Enabling Act, and in doing so deprives Justice Scalia's approach of a majority. Justice Stevens asserts that whether a Federal Rule enlarges, abridges, or modifies substantive rights cannot be determined by looking at the Rule in isolation to see if, by its terms, it relates only to the manner and means of enforcing rights defined elsewhere by substantive law.[96] He asserts, instead, that determining the validity of a Federal Rule requires consideration, not only of the text of the Federal Rule itself, but also of the details of the state law that it purports to displace. Merely categorizing the state law as "procedural" (relating to the manner and means of enforcing rights) or "substantive" (relating to the definition of the rights themselves) will not fully resolve the question, for a nominally procedural rule "may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[97] In such cases, Justice Stevens insists, a Federal Rule cannot displace state law and therefore, if a conflict cannot be avoided by an interpretive act, must yield.[98] In his view, however, section 902(b) does not represent one of the "rare"[99] state rules that, though framed in procedural terms, serve effectively to define substantive rights and remedies. The bar for finding a violation of the Rules Enabling Act, he insists, is "high."[100]

The *Shady Grove* opinions are frustrating in their unwillingness to engage the broad language of *Semtek.* They may nevertheless contain the key to unlocking the mystery of how to reconcile the *Semtek* opinion with the idea that federal courts may follow Federal Rule 56 rather than contrary state rules (or contrary interpretations of state rules) in diversity cases. The key to *Semtek*, perhaps, ultimately is not that application of Federal Rule 41(b) as a rule of claim preclusion would have conclusively terminated a particular claim that would not have been conclusively terminated had the initial lawsuit remained in state court. As both Justice Scalia and Justice Stevens note in their *Shady Grove* opinions (as does Justice Ginsburg in her dissenting opinion),[101] statutes

95. Justice Stevens also joins the portion of Justice Scalia's opinion addressing whether Rule 23 conflicts with section 902(b) and thereby supplies the fifth vote for that portion of the opinion. *See id.* at 1448 (Stevens, J., concurring).

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

97. *Id.* at 1450 (Stevens, J., concurring).

98. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

99. *Id.* at 1455 n.13 (Stevens, J., concurring).

100. *Id.* at 1457.

101. *See id.* at 1454 n.12 (Scalia, J.), 1450 (Stevens, J., concurring), 1471 (Ginsburg, J., dissenting).

of limitations, though procedural in a sense, have long been regarded as substantive for *Erie* purposes;[102] they function, in effect, as part of a substantive definition of rights and remedies—as part of the substantive definition of a plaintiff's claim. If, as in *Semtek*, California decides to treat the running of the statute of limitations not as the termination of the plaintiff's entire claim but rather only as the extinction of a right to a remedy under California law, then a federal court's decision, applying Federal Rule 41(b), to treat a dismissal on statute of limitations grounds as claim preclusive would amount to a substantive rewriting of the elements of the plaintiff's claim. Contrast this with summary judgment, which (when sought against a plaintiff) does not rewrite the elements of the plaintiff's claim but rather measures the adequacy of the plaintiff's evidence to determine if a reasonable factfinder could find for the plaintiff at trial. In this way, summary judgment looks more like part of the "manner and means" of enforcing a substantive right, and less like an alteration of the substantive right itself.[103]

In the days following the *Shady Grove* decision, Federal Rule 56 appears to be on firmer ground than it was when *Semtek* represented the Court's last major statement on how to assess the validity of a Federal Rule. It was always difficult to imagine that the Supreme Court would invalidate Rule 56, regardless of *Semtek*'s implications, and it is still more difficult to imagine now. Yet given the Court's divisions in *Shady Grove*, the unanimous opinion in *Semtek* still stands as the Court's most recent authoritative guidance as to how to assess a Federal Rule's validity under the Rules Enabling Act. And as long as that remains the case, Federal Rule 56 will remain in the shadow of *Erie.*

102. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945).

103. This distinction may not be entirely persuasive. For example, Justice Stevens notes in his *Shady Grove* concurrence that burdens of proof are regarded as substantive for *Erie* purposes. *See id.* at 1450 n.4 (Stevens, J., concurring); *see also id.* at 1468 (Ginsburg, J., dissenting). The *Celotex* standard for summary judgment under Rule 56 and competing state rules and interpretations may be seen as variations on the burden of persuasion, which is a sub-unit of the burden of proof. The various summary judgment standards, however, do not change the parties' ultimate burdens of persuasion, and therefore may possibly be regarded as distinct—and not substantive, or at least less substantive—for *Erie* purposes.