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SHADY GROVE, THE RULES ENABLING ACT, AND THE APPLICATION OF STATE SUMMARY JUDGMENT STANDARDS IN FEDERAL DIVERSITY CASES

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INTRODUCTION

Twenty-five years ago, the United States Supreme Court's plurality opinion in *Celotex Corp. v. Catrett*[1] and the other two cases in the "*Celotex* trilogy"[2] breathed new life into summary judgment as a method of disposing of civil cases without trial in the federal courts. Although most states have adopted procedural rules for civil actions that are based upon the Federal Rules of Civil Procedure, not all state courts have chosen to follow the Supreme Court's interpretation of Federal Rule of Civil Procedure 56 in *Celotex*. Notwithstanding similarities between the language of Rule 56 and corresponding state summary judgment rules, several states have interpreted their own rules more restrictively than the *Celotex* plurality construed the federal rule.[3] As a result, it is more difficult in those states for a moving party to obtain dismissal at the summary judgment stage in state court than it is in federal court.

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[1] 477 U.S. 317 (1986).

[2] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[3] *See, e.g.*, Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8 (Tenn. 2008) (interpreting TENN. R. CIV. P. 56); *see also* Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc., 644 N.E.2d 118, 123 (Ind. 1994) (interpreting IND. TRIAL R. 56(C)); Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 481 (Ky. 1991) (interpreting KY. CR 56.03).

The conventional wisdom to date has been that the federal summary judgment standard applies in federal court regardless of the basis for federal subject matter jurisdiction.[4] Some commentators are skeptical that federal courts would ever apply state summary judgment standards in diversity cases,[5] while others have been more open to the idea.[6] This Article argues that where the state standard for adjudicating a motion for summary judgment differs from the *Celotex* standard, the most rational outcome by a federal court applying the modern vertical choice-of-law doctrine that has evolved through *Erie Railroad Co. v. Tompkins*,[7] *Hanna v. Plumer*,[8] and their progeny, including, most recently, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[9] is to apply the state standard.

Part I of this Article briefly summarizes the relevant history of the *Erie* doctrine, including its origins in both the Rules of Decision Act and the Rules Enabling Act, and concludes with a discussion of *Shady Grove*, the latest landmark in the Supreme Court's *Erie* jurisprudence. Part II summarizes the summary judgment standards in federal and state courts, highlighting how certain state courts have distinguished their summary judgment rules from the interpretation of the federal rule set forth in *Celotex*. Part III argues that, based upon the controlling precedent from Justice Stevens's concurring opinion in *Shady Grove*, the federal court should apply the state standard. A district court could reach this outcome through either a Rules Enabling Act analysis or, less likely, a Rules of Decision Act analysis. In fact, the results of several lower court decisions applying *Shady Grove* suggest that the case has revived the

[4] *See, e.g.*, Shropshire v. Laidlaw Transit, Inc., 550 F.3d 570, 574 (6th Cir. 2008) (stating that Federal Rule of Civil Procedure 56 applies "even where the federal summary judgment requirements displace state law that would require a jury to make a particular determination").

[5] *See* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1035 (2011) ("Because Rule 56 really treats procedure and it covers the standard of decision, it applies in any diversity case to displace state law that covers the same matter.").

[6] *See* Jeffrey O. Cooper, *Summary Judgment in the Shadow of* Erie, 43 AKRON L. REV. 1245, 1257–58 (2010); Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 282–83 (2008).

[7] 304 U.S. 64 (1938).

[8] 380 U.S. 460 (1965).

[9] 130 S. Ct. 1431 (2010).

possibility that a Federal Rule of Civil Procedure that otherwise controls the issue in dispute might be invalidated under the Rules Enabling Act. A lasting—and perhaps unintended—legacy of the fractured *Shady Grove* case, therefore, may be that it has opened the door to the increased application of state rules—and, potentially, state summary judgment standards—by federal courts sitting in diversity. The Court's steady shift towards the procedural disposition of suits in the federal courts[10] and the concomitant pushback in the state courts[11] make this an area ripe for further development of the Court's *Erie* jurisprudence.

I. VERTICAL CHOICE-OF-LAW DECISIONS BY FEDERAL COURTS SITTING IN DIVERSITY

The *Erie* doctrine has long been a favorite source for criticism among the legal commentariat.[12] Professor Rowe has opined that this steady stream of chatter may be due to the fact that "this area combines inherent complexity and interest while being a key part of the rite of passage through which most of us went and continue to put our students."[13] The modern *Erie* doctrine towers over the civil procedure landscape like a mighty

[10] Summary judgment is certainly not the only area in which the Supreme Court's interpretation of procedural rules has promoted the pre-trial disposition of civil suits. See, for example, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), both adopting a higher pleading standard of plausibility when considering whether a complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

[11] Like the state courts that have rejected *Celotex*, several state courts have declined to adopt the plausibility standard when presented with that opportunity. *See* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 347 (Ariz. 2008) (en banc); Colby v. Umbrella, Inc., 955 A.2d 1082, 1086 n.1 (Vt. 2008); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863–64 (Wash. 2010) (en banc). *But see* Doe v. Bd. of Regents of the Univ. of Neb., 788 N.W.2d 264, 274–78 (Neb. 2010) (adopting the plausibility standard in state court); *see also* Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008); Sisney v. Best Inc., 754 N.W.2d 804, 808–09 (S.D. 2008).

[12] *See* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 963–64 (1998) (observing that "much of the law review commentary on the Court's *Erie* decisions has been critical—and sometimes deservedly so"); Steinman, *supra* note 6, at 247 & n.3 (citing secondary sources and commenting that "*Erie* has achieved a mythic status, and . . . has been a constant subject of scholarly debate and analysis").

[13] Rowe, *supra* note 12, at 1015.

oak tree with two root systems that had separate origins but are now intertwined. These two sets of roots are the Rules of Decision Act ("RDA") and the Rules Enabling Act ("REA").

A. The Rules of Decision Act Cases

The *Erie* doctrine has its genesis in efforts by the Supreme Court to interpret the older of the two statutes, the RDA, which can be traced back to section 34 of the Judiciary Act of 1789.[14] The RDA's vague instruction that federal courts exercising diversity jurisdiction are to regard "[t]he laws of the several states" as "rules of decision" in federal civil actions left much open to interpretation. The Supreme Court's original interpretation of the RDA, of course, was that the phrase "laws of the several states" encompassed state statutes, rules, and "long-established local customs," but not the decisions of state courts, which were, "at most, only evidence of what the laws are, and . . . not, of themselves, laws."[15] After the mandate in *Swift* to follow principles of general commercial law, rather than the common law of the forum state,[16] the federal courts were free to "exercise an independent judgment as to what the common law of [a] state is—or should be."[17] The resulting inconsistencies between the federal and state courts, and among the federal courts, led to increasing criticism of the *Swift* rule and eventually gave rise to the legal realism movement, which found its most prominent voice with Justice Holmes's dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co*.[18] In *Erie*, the Court deemed the *Swift* rule unconstitutional

[14] "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2006).

[15] Swift v. Tyson, 41 U.S. 1, 18 (1842).

[16] *Id.* at 19.

[17] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938). "*Swift* created a topsy-turvy world in diversity cases—federal, not state, substantive law was applied, but state, not federal, procedure governed." JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 731 (2004).

[18] 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) ("[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State . . . .").

and abandoned the concept of the federal general common law, which, in the Court's view, "invaded rights . . . reserved by the Constitution to the several states."[19]

Erie's instructions as to when federal courts should apply state or federal law were less than clear. The Court's mandate that "Congress has no power to declare substantive rules of common law applicable in a state"[20] was easy enough to follow where, as in *Erie*, the state law in question was obviously substantive.[21] As Justice Reed observed in his concurrence, however, "[t]he line between procedural and substantive law is hazy."[22] It was clear after *Erie* that federal courts sitting in diversity should apply state substantive law, whether created by state statute or common law, yet all agreed that the federal courts retained power over procedure.[23] The question remained as to how to distinguish between the two.

The Court endeavored to answer this question in two significant post-*Erie* cases. In *Guaranty Trust Co. of New York v. York*,[24] Justice Frankfurter wrote that by "overrul[ing] a particular way of looking at [the] law,"[25] *Erie* evinced an intent to ensure in federal diversity cases that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it

[19] *Erie*, 304 U.S. at 79–80.

[20] *Id.* at 78.

[21] The plaintiff in *Erie*, Mr. Tompkins, was injured by a passing train while walking along the right-of-way adjacent to the railroad tracks. *Id.* at 69. The issue in controversy in the case was the duty owed by the railroad to individuals on its right-of-way. The railroad asserted that the court should apply Pennsylvania common law, under which individuals on a railroad right-of-way were trespassers to whom the railroad was not liable for injuries resulting from its negligence. Mr. Tompkins responded that because there was no state statute governing the duty owed by railroads to individuals walking along their rights-of-way, federal common law principles of negligence should apply, and he should be treated as an invitee to whom the railroad owed a duty of care. *Id.* at 70. The lower courts, applying *Swift*, had agreed with Mr. Tompkins.

[22] *Id.* at 92 (Reed, J., concurring in part).

[23] *Id.* at 91–92 ("If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion . . . seems questionable. . . . [N]o one doubts federal power over procedure.").

[24] 326 U.S. 99 (1945).

[25] *Id.* at 101.

would be if tried in a [s]tate court."[26] *York*'s "outcome-determinative test" required federal courts not to simply decide whether a particular legal issue is "substantive" or "procedural,"[27] but rather to inquire whether it would "significantly affect the result of a litigation" if the federal court were to disregard a state law that would control an action involving the same parties and the same cause of action in state court.[28] If so, then it was incumbent upon the court to apply the law of the state. The Court in *York* seemed guided by the purpose behind federal diversity jurisdiction—to assure "non-resident litigants of courts free from susceptibility to potential local bias"—and the fundamental unfairness of permitting those litigants to take advantage of not only "another tribunal," but "another body of law."[29] The advance of the *York* outcome-determinative test witnessed its high-water mark with the release of three Supreme Court decisions on the same day in 1949, each of which mandated the application of a state law instead of an arguably conflicting federal standard.[30]

[26] *Id.* at 108–09 ("[S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.").

[27] In *York*, the issue was whether to apply a state statute of limitations or the equitable doctrine of laches followed in the federal courts. *Id.* at 108.

[28] *Id.* at 109.

[29] *Id.* at 111–12; *see also id.* at 109 ("The nub of the policy that underlies *Erie [R.R] Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a [s]tate court a block away, should not lead to a substantially different result.").

[30] *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (applying a New Jersey statute requiring Plaintiffs in shareholder derivative suits owning less than a specified percentage of the corporation's stock to post bond instead of Federal Rule of Civil Procedure 23, which does not require such a bond for federal class actions); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 531 n.1 (1949) (applying a Kansas law requiring that process be served within the statutory period in order to toll the limitations period rather than Federal Rule of Civil Procedure 3, which provides that "[a] civil action is commenced by filing a complaint with the court"); Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (holding that a Mississippi "door closing" statute, which prohibited out-of-state corporations doing business in the state from suing in state court unless they had first consented to service within the state, also prohibited suits by such corporations in federal district court in Mississippi).

Thirteen years after *York*, the Court's decision in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[31] represented a reassertion of federal interests, at least when the interest in question is the right to jury trial in federal court. Describing the outcome-determinative test as dispositive only "in the absence of other considerations,"[32] Justice Brennan wrote that where there are "affirmative countervailing considerations at work," a balancing test is required to ensure that essential federal interests are protected.[33] Thus, the relatively straightforward outcome-determinative test of *York* was qualified by the caveat that courts consider the importance of the policies behind the competing state and federal rules before determining which to apply.

If the Court's interpretation of the RDA was far from a model of clarity after *Byrd*,[34] the vertical choice-of-law decision would only be further muddled by a parallel line of cases that presented an alternative method of determining whether federal or state law should apply.

B. The Rules Enabling Act Cases

The REA, enacted by Congress in 1934, represented the culmination of decades of activism for a simplified system of procedure that merged the courts of law and equity at the federal level.[35] The REA conferred upon the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in" the federal "district courts,"[36] subject to the restriction that "[s]uch rules shall not abridge, enlarge or modify

[31] 356 U.S. 525 (1958).

[32] *Id.* at 536.

[33] *Id.* at 537–38. The application of the balancing test in *Byrd* resulted in following the federal law because the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts" outweighed "the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." *Id.* at 538–39.

[34] *Byrd* "exhibits a confusion that exceeds even that normally surrounding a balancing test, and lower courts understandably experienced considerable difficulty in applying it." John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 709 (1974).

[35] *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 288, 299–300; 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, 1308–09 (2006).

[36] 28 U.S.C. § 2072(a) (2006).

any substantive right."[37] This broad power led most concretely, of course, to the development of the Federal Rules of Civil Procedure, which became law in 1938.[38] The Supreme Court had one of its first opportunities to interpret the scope of the REA only a few years later in *Sibbach v. Wilson & Co.*[39] Sibbach filed suit in the United States District Court for the Northern District of Illinois seeking redress for bodily injuries that she had allegedly suffered in Indiana.[40] Illinois common law prohibited courts from ordering physical examinations of plaintiffs who filed suits for damages for physical injuries, while Indiana common law permitted such examinations.[41] While Sibbach's suit was pending, the Federal Rules of Civil Procedure took effect.[42] Applying Federal Rule of Civil Procedure 35, the court ordered Sibbach to submit to a physical examination, and when she refused to comply, it held her in contempt, ostensibly under the authority of Federal Rule of Civil Procedure 37.[43] In her appeal to the Supreme Court, Sibbach admitted that Rules 35 and 37 were procedural rules but argued that applying them in the face

[37] *Id.* § 2072(b). While this Article focuses primarily on the effect of Federal Rule 56 on "substantive rights" that have been granted to litigants by states, specifically those conferred through the adoption of separate summary judgment standards, a number of commentators have argued that "the primary purpose of the Enabling Act's procedure/substance dichotomy is to allocate prospective federal lawmaking between the Supreme Court and Congress, not to protect lawmaking choices already made, and certainly not to protect state lawmaking choices exclusively." Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 43 (2010); *see also* Leslie M. Kelleher, *Amenability to Jurisdiction as a "Substantive Right": The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1201 (2000) (citing Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1113–15 (1982)). In the views of these scholars, any protection that § 2072(b) provides to federalism concerns is ancillary to the provision's chief purpose: "preventing the Supreme Court, exercising delegated legislative power to promulgate court rules, from encroaching upon Congress's lawmaking prerogatives." Burbank & Wolff, *supra*, at 44. In other words, Congress intended through § 2072(b) to "retain[ ] for itself the power to make primary policy decisions, including those that involve the displacement of state substantive law." Kelleher, *supra*.

[38] Redish & Amuluru, *supra* note 35, at 1310.

[39] 312 U.S. 1 (1941). For an extended discussion of *Sibbach*, see Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041 (2011).

[40] *Sibbach*, 312 U.S. at 6.

[41] *Id.* at 6–7.

[42] *See* Ides, *supra* note 39, at 1051–52.

[43] *Sibbach*, 312 U.S. at 6–9.

of Illinois's policy against physical examinations violated the REA's mandate that a federal "court shall not abridge, enlarge, nor modify the substantive rights."[44] Her argument defined a "substantive" right as an important or substantial right and reasoned that the federal rules, by permitting a physical examination of a plaintiff filing suit to recover damages for bodily injuries, abridged the substantive right not to submit to an examination that was granted by Illinois law.[45]

Justice Roberts, writing for the majority, made the non-controversial observation that the REA "was purposely restricted in its operation to matters of pleading and court practice and procedure."[46] While the Court reaffirmed that a federal "court shall not 'abridge, enlarge, nor modify the substantive rights', in the guise of regulating procedure,"[47] it also declined Sibbach's invitation to construe the term "substantive" broadly and prohibit procedural rules from affecting "important and substantial rights theretofore recognized."[48] Instead, the Court set the test for whether a rule is procedural, and thus within the power that Congress granted to the Court under the RDA, to be "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or

[44] *Id.* at 10–11 (internal quotation marks omitted).

[45] *Id.* at 11; *see also* Ides, *supra* note 39, at 1053 ("[A]ccording to [Sibbach's] argument, the abridge-enlarge-modify limitation of the REA precluded the federal district court from promulgating a rule that revised an important or substantial right.").

[46] *Sibbach*, 312 U.S. at 10. This statement has been criticized as "devoid of supportive reasoning" and as revealing "the Court's fatally simplistic understanding of the substance-procedure distinction." Redish & Amuluru, *supra* note 35, at 1327–28.

[47] *Sibbach*, 312 U.S. at 10.

[48] *Id.* at 13–14 ("Recognized where and by whom? . . . If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded.").

infraction of them."[49] Because Sibbach had admitted that Rules 35 and 37 "really regulate[d] procedure," the Court applied those federal rules.[50]

Sibbach, then, upheld the application of a Federal Rule of Civil Procedure established by the REA in the face of a seemingly conflicting state practice without citing to *Erie* at all. *Sibbach* and other cases interpreting the REA were difficult to reconcile with the *Erie* line of cases interpreting the RDA, particularly *York*'s outcome-determinative test and subsequent decisions that had favored state rules over federal rules of procedure. As Chief Justice Warren observed in *Hanna v. Plumer*,

> [t]he broad command of *Erie* was . . . identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act.[51]

Hanna provided the opportunity to merge these two lines of cases into one coherent rule.[52]

C. Hanna *and the Modern* Erie *Doctrine*

The Court in *Hanna* faced a standard *Erie* dilemma: whether to apply the state or federal rule concerning the method of service of process.[53] An Ohio citizen filed suit in federal court in Massachusetts against a Massachusetts citizen for injuries stemming from an automobile accident in South Carolina.[54] If Federal Rule of Civil Procedure 4(d)(1)—now Rule 4(e)—applied, the method of service was proper, but if the Massachusetts law regarding service controlled, service was improper and the suit

[49] *Id.* at 14. In the wake of the renewed reliance on *Sibbach* by the *Shady Grove* plurality, *Sibbach*'s narrow interpretation of the term "substantive rights" has been criticized as "out of touch with the way in which law was made and applied in the United States." Burbank & Wolff, *supra* note 37, at 33. Interestingly, although the Court made a clear statement in *Sibbach* as to what a "substantive right" is *not*, it left the term undefined. As discussed in Part I.D below and at length in Ides, *supra* note 39, the scope of "substantive rights," and thus the reach of 28 U.S.C. § 2072(b), was the focus of the debate between Justices Scalia and Stevens in *Shady Grove*.

[50] *Sibbach*, 312 U.S. at 14.

[51] *See Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

[52] For this reason, *Hanna* has been referred to as "arguably the most significant *Erie*-doctrine decision of the last seventy years." Steinman, *supra* note 6, at 260.

[53] *Hanna*, 380 U.S. at 461.

[54] *Id.*

would be dismissed.[55] The Court held that Rule 4(d)(1) was "the standard against which the District Court should have measured the adequacy of the service."[56] Far more influential than the holding, however, was the analysis that Chief Justice Warren undertook to reach it.

The Court first engaged in a traditional *Erie* analysis under the RDA. Citing *Byrd*, the Court wrote that the outcome-determinative analysis of *York* "was never intended to serve as a talisman."[57] Rather, that test could not "be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[58] The Court in *Hanna* thus adopted a modified outcome-determinative test, which views the differences between the federal and state laws from an *ex ante* perspective. Rather than considering whether the competing rules will result in a different outcome—as countless procedural rules will—courts are to look toward whether the competing rules are so different as to either encourage a litigant to file suit in one forum over the other or substantially alter the mode of enforcement of state-created rights.[59]

After discussing the RDA line of cases, the Court turned its attention to the REA line. It made clear that a state law should be applied over a Federal Rule of Civil Procedure in federal court only where the scope of the Federal Rule can be interpreted narrowly enough so as not to control the disputed issue in the case.[60] If the federal rule covers the legal controversy, however, "the question facing the court is a far cry from the typical, relatively unguided *Erie* [c]hoice" that had been described in the first part of the Court's opinion.[61] Instead, when the federal rule

[55] *Id.* at 461–62.

[56] *Id.* at 464.

[57] *Id.* at 466–67.

[58] *Id.* at 468.

[59] *Id.* at 469. Moreover, the discussion of "the importance of a state rule" in footnote nine of *Hanna* seems to fold *Byrd*'s balancing test into *York*'s outcome-determination test. *Id.* at 468 n.9.

[60] *Id.* at 470.

[61] *Id.* at 471.

controls, the court must apply the federal rule unless it exceeds the power to regulate all procedure in the federal court granted by the REA or constitutional restrictions.[62]

After *Hanna*, then, the steps in the modern *Erie* analysis are clear. The threshold question is whether the Federal Rule of Civil Procedure controls the issue in dispute before the court. If the Federal Rule is in conflict or "direct collision" with the state standard, then the court must apply the federal law as long as it does not run afoul of the Constitution or exceed the power that Congress granted to the courts under the REA, meaning that it is "arguably procedural" and does not abridge, enlarge, or modify a substantive state right.[63] This analysis has been expanded to include federal procedural statutes, which, if controlling, will apply over competing state laws if they do not exceed the constitutional boundaries—that is, if they are "arguably procedural."[64] If there is no federal rule or statute that controls the issue in dispute, or if the competing federal standard is a judge-made doctrine, then the court should employ the "modified" or "unguided" *Erie* analysis. This requires application of the state law if doing so would further *Erie*'s "twin aims" of avoiding forum shopping and preventing the inequitable administration of laws.[65]

As might be expected, the decision regarding whether to apply federal or state law has, since *Hanna*, been heavily influenced by the threshold question of how broadly a court is willing to interpret the relevant federal rule or statute.[66] Where the federal rule or statute has been deemed to cover or control the issue in dispute, courts have almost exclusively applied it.

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[62] *Id.*; *see also id.* at 473–74 ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.").

[63] *Id.* at 471–72; *see also* 28 U.S.C. § 2072(b) (2006).

[64] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988).

[65] *Hanna*, 380 U.S. at 468.

[66] *See* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 879 (2011) ("As *Shady Grove* shows, the initial 'characterization question'—whether a case falls on the Enabling Act or the *Erie* side of the line—can lack a clear answer."). As a prelude to his recommendation for a new approach to distinguishing matters of substance and procedure, Professor Tidmarsh argues that while "[i]t is far too early to sing a requiem for *Hanna*[,] . . . *Shady Grove* exposes the ease of manipulating *Hanna*'s framework, the contested nature of the framework itself, and the Court's ever veering course in applying the framework in real-world contexts." *Id.* at 880.

Indeed, "[t]he Supreme Court has never invalidated a Federal Rule for violation of the Act's 'substantive right' limitation,"[67] and the idea that the jurisdictional limitation language in § 2072(b) might be used to invalidate a federal rule or statute has been argued, by some, to be purely conceptual.[68] In three major cases that followed *Hanna*, however, the Court showed a willingness to defer to the state law by interpreting the federal rule or statute in question narrowly and, in so doing, resorting to the modified outcome-determinative test, or unguided *Erie* analysis.

First, in *Walker v. Armco Steel Corp.*,[69] the Court considered whether its *Hanna* decision had implicitly overruled its earlier directive that a federal court sitting in diversity should apply state law, rather than Federal Rule of Civil Procedure 3,[70] in determining when an action is commenced for purposes of the state statute of limitations. The Court held, as it had in *Ragan v. Merchants Transfer & Warehouse Co.*,[71] that the state service rule, which was "part and parcel of the [state] statute of limitations," should apply over the Federal Rule of Civil Procedure 3.[72]

Second, in *Gasperini v. Center for Humanities, Inc.*,[73] the defendant claimed on appeal that the jury verdict entered against it was excessive, citing a New York tort reform statute that instructed appellate courts, when reviewing an itemized jury verdict, to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."[74] Instead of applying Federal Rule of Civil Procedure 59, governing motions for a new trial, which was

[67] Redish & Amuluru, *supra* note 35, at 1332; *see* Carrington, *supra* note 35, at 286–87 ("Inasmuch as the Supreme Court has not applied [§ 2072(b)] to affect the outcome of a single case in the fifty years of its operative history, the sentence might be considered excess verbiage.").

[68] Rowe, *supra* note 12, at 978–79 ("This issue of possible invalidity of a Federal Rule for affecting substantive rights is of considerable academic interest . . . . It is, though, a rarity in the real world and of limited practical significance.").

[69] 446 U.S. 740 (1980).

[70] "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

[71] 337 U.S. 530 (1949).

[72] *Walker*, 446 U.S. at 751–52; *see also* Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1148 (2011) ("The Court held that Rule 3 was too *narrow* to displace state law on this issue . . . .").

[73] 518 U.S. 415 (1996).

[74] N.Y. C.P.L.R. 5501(c) (MCKINNEY 2011).

the procedural mechanism by which the Defendants had challenged the jury verdict, the Court measured the state law against the judge-made federal appellate standard for determining whether a jury verdict is excessive—that is, whether the verdict "shocks the conscience."[75] Justice Ginsburg, writing for the majority, stressed that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[76] The Court applied the modified outcome-determinative test from *Hanna* and held that there would be significant outcome variations between the federal and state courts if an appeals court were to apply the "shocks the conscience" standard rather than that of the New York statute.[77] Therefore, the state law should apply so long as it did not endanger any "essential [federal] characteristic."[78]

Third, in *Semtek International Inc. v. Lockheed Martin Corp.*,[79] the Court considered the claim-preclusive effect of the dismissal of a federal diversity action on grounds of the statute of limitations. At issue was whether the case's outcome should be controlled by Federal Rule of Civil Procedure 41(b), which provides that an involuntary dismissal other than the types specifically identified in the Rule "operates as an adjudication upon the merits."[80] Justice Scalia, writing for a unanimous Court, determined that the phrase "adjudication upon the merits" in Rule 41(b) does not necessarily mean a judgment that is entitled to claim-preclusive effect.[81] One of the rationales provided for this conclusion was that Rule 41(b), which governs the internal procedures of the federal courts, could not possibly control "the effect that must be accorded federal judgments by other courts."[82] "Indeed, such a rule would arguably violate the

[75] *Gasperini*, 518 U.S. at 429. The Court took this approach despite Justice Ginsburg's acknowledgement "that a most usual ground for a Rule 59 motion is that 'the damages are excessive.' " *Id.* at 438 n.22 (quoting CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 680 (6th ed. 2002)).

[76] *Id.* at 428 n.7; *see also* Rowe, *supra* note 12, at 994 ("*Gasperini* speaks in terms that suggest somewhat more deferential interpretations of federal law to avoid federal-state conflicts.").

[77] *Gasperini*, 518 U.S. at 429–31.

[78] *Id.* at 431–32 (internal quotation marks omitted) (citing Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).

[79] 531 U.S. 497 (2001).

[80] *Id.* at 501 (quoting FED. R. CIV. P. 41(b)).

[81] *Id.* at 503.

[82] *Id.*

jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right.' "[83] Justice Scalia also concluded that this interpretation of Rule 41(b) would encourage forum shopping between state and federal courts, which would violate *Erie*'s federalism principles.[84] Thus, the Court incorporated reasoning approximating both the REA ("guided") and the RDA/modified *Erie* ("unguided") approaches to reject the application of a federal rule.[85] The Court ultimately held that *Semtek* was "a classic case for adopting, as the federally prescribed rule of decision, the [claim-preclusion] law that would be applied by state courts in the [s]tate in which the federal diversity court sits."[86] By citing both *Walker* and *Gasperini* in reaching this conclusion, the Court appeared to signal a continuing emphasis on state law principles in its *Erie/Hanna* jurisprudence.[87]

These three post-*Hanna* cases suggested the possibility of applying state law in areas where federal law had traditionally been applied pursuant to the REA.[88] Although the Court had stated in *Walker* that the Federal Rules "should be given their plain meaning" and not "narrowly construed in order to avoid a 'direct collision' with state law,"[89] prior to 2010 it seemed willing,

[83] *Id.* (quoting 28 U.S.C. § 2072(b) (2006)).

[84] *Id.* at 504.

[85] The reasoning employed by the Court in *Semtek* is not without its critics. *See, e.g.*, Burbank & Wolff, *supra* note 37, at 40–41 ("The opinion rummaged in dictionaries and engaged in multiple wordplays to reach a result that is demonstrably erroneous according to two very different interpretive techniques, including one that Justice Scalia . . . usually favors: the exercise of logic in divining 'plain meaning.' ").

[86] *Semtek*, 531 U.S. at 508. The Court observed that "any other rule would produce the sort of 'forum-shopping . . . and . . . inequitable administration of the laws' that *Erie* seeks to avoid." *Id.* at 508–09 (alterations in original) (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

[87] *See* Steinman, *supra* note 6, at 303 (describing *Semtek* as "insisting that federal courts defer to state law preclusion principles that favored plaintiffs").

[88] Cooper, *supra* note 6, at 1257 ("*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."); Steinman, *supra* note 6, at 273 (considering how traditional *Erie* principles may encourage the application of differing state standards in the areas of summary judgment, class certification, and pleading).

[89] Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980).

in practice, to apply the Federal Rules with caution, or at least, as Justice Ginsburg stated, "with sensitivity to important state interests and regulatory policies."[90]

D. The Impact of Shady Grove *on the Modern* Erie *Doctrine*

The Supreme Court's 2009 to 2010 term featured the most influential *Erie* case in years: *Shady Grove*.[91] Although the opinions in the case appear hopelessly splintered,[92] they do provide significant guidance as to the current state of the *Erie* doctrine, and in particular the application of the REA's substantive rights provision.

Shady Grove Orthopedic Associates treated Sonia Galvez, the victim of a car accident and an Allstate policyholder.[93] When Allstate did not pay Shady Grove within thirty days and refused to pay interest on the overdue payments pursuant to statute,[94] Shady Grove filed a class action lawsuit on behalf of all medical providers to whom Allstate had failed to pay such penalties.[95] A New York state law provided that unless the state statute imposing a penalty "specifically authorize[d] the recovery thereof in a class action," class actions to recover the penalties imposed by the statute were not permitted.[96] The particular statute at issue in *Shady Grove* did not explicitly authorize class action suits, and without a class action, there could be no federal subject

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[90] Gasperini v. Ctr. for Hunmanities, Inc., 518 U.S. 415, 427 n.7 (1996).

[91] Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co., 130 S. Ct. 1431 (2010). While *Shady Grove* was eagerly awaited by civil procedure professors, it is dubious whether the Court thought it was one of the "featured" cases of its term. While reading through the ten-minute summary of his plurality opinion, Justice Scalia observed that " '[e]yes have glazed over already.' " James Vicini, *Eyes Glaze Over at the U.S. Supreme Court*, REUTERS (Mar. 31, 2010, 12:03 AM), http://blogs.reuters.com/frontrow/2010/03/31/eyes-glaze-over-at-the-u-s-supreme-court/. He also paused halfway through his statement to ask "courtroom spectators, including tourists visiting on spring break, 'Are you with me?' " *Id.*

[92] Justice Scalia garnered five votes for Parts I and II-A of his plurality opinion, which held that Federal Rule of Civil Procedure 23 controlled. Justice Scalia was joined by only three other Justices (Chief Justice Roberts and Justices Thomas and Sotomayor) for Parts II-B and II-D of his opinion regarding the application of the REA. Only Chief Justice Roberts and Justice Thomas joined in part II-C of Justice Scalia's plurality, which responded directly to Justice Stevens's separate concurrence. Justice Ginsburg was joined in dissent by Justices Kennedy, Breyer, and Alito. *Shady Grove*, 130 S. Ct. at 1435.

[93] *Id.* at 1436.

[94] N.Y. INS. LAW § 5106(a) (McKinney 2011).

[95] *Shady Grove*, 130 S. Ct. at 1436–37.

[96] N.Y. C.P.L.R. 901(b) (McKinney 2011).

matter jurisdiction over the case because Shady Grove's individual claim was well below the amount in controversy required for diversity jurisdiction.[97] Shady Grove sought certification of its class under Federal Rule of Civil Procedure 23 and 28 U.S.C. § 1332(d)(2).[98] The Second Circuit of the United States Court of Appeals, following the principles set forth in *Gasperini* and *Semtek*, held that Rule 23 did "not control the issue of which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs," and thus applied an unguided *Erie* analysis.[99] Because a failure to apply the state law would encourage forum shopping and initiate a migration of class action plaintiffs towards the federal courts, the "twin aims" of *Erie* were implicated, and the Second Circuit panel applied the state law.[100]

There were five votes in *Shady Grove* for the position reversing the Second Circuit of the United States Court of Appeals and disposing of the case: that Federal Rule of Civil Procedure 23 is broad enough to encompass class actions filed to recover penalties under the New York state law and that, therefore, Rule 23 controls. In part II-A of his opinion, Justice Scalia rejected the Second Circuit's rationale that Rule 23 only determined whether a class could be certified, not whether a particular type of claim is eligible to be brought as a class action.[101] Instead, Justice Scalia wrote that "Rule 23 provides a one-size-fits-all formula for deciding the class-action question."[102] Because "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met," the five-justice majority declined to

[97] *Shady Grove*, 130 S. Ct. at 1437; *see* 28 U.S.C. § 1332(a) (2006).

[98] *Shady Grove*, 130 S. Ct. at 1437 n.3.

[99] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 143 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010).

[100] *Id.* at 145; *see also* Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV. 285, 299 (2010) (characterizing the Second Circuit's opinion as "an unusually clear example of a state substantive policy relating to class actions" and the panel's decision to bar the class action as "a simple matter").

[101] *Shady Grove*, 130 S. Ct. at 1438 ("[T]he line between eligibility and certifiability is entirely artificial. Both are preconditions for maintaining a class action.").

[102] *Id.* at 1437.

"contort" the Rule's text, "even to avert a collision with state law that might render it invalid."[103] Under the modern *Erie* analysis, then, Rule 23 must apply unless the REA precludes it.

Although five justices agreed that Rule 23 complied with the REA, they split as to the rationale. Justice Scalia, joined by three other justices in parts II-B and II-D of his opinion, relied heavily upon *Sibbach* to construe the scope of § 2072(b)'s proscription on any Federal Rule of Civil Procedure that happens to "abridge, enlarge or modify any substantive right."[104] Most procedural rules affect a litigant's substantive rights in some way or another; nonetheless, a procedural rule will not implicate § 2072(b) if it "really regulat[es] procedure," meaning that "it governs only 'the manner and the means' by which the litigants' rights are 'enforced.' "[105] Observing that the Court has "rejected every statutory challenge to a Federal Rule that has come before [it],"[106] Justice Scalia would not look to the nature of the state law being displaced to determine whether the Federal Rule abridges, enlarges, or modifies a substantive right.[107] Rather, a Federal Rule's compliance with the REA "is to be assessed by consulting the Rule itself, and not its effects in individual applications."[108] If the Federal Rule regulates procedure, "it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights."[109] Under Justice Scalia's proposed standard, it would be difficult to fathom a situation in which the federal court would not apply a Federal Rule of Civil Procedure once it is determined that the Rule directly conflicts with a state statute. Justice Scalia acknowledged in section II-D of the plurality opinion that forum shopping may be an unfortunate byproduct of this standard, but that, ultimately, "a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping."[110]

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[103] *Id.* at 1442.

[104] *Id.* at 1442, 1444 (internal quotation marks omitted) (quoting 28 U.S.C. § 2072(b) (2006)).

[105] *Id.* at 1442 (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

[106] *Id.*

[107] *See id.* at 1443–44; *accord* 28 U.S.C. § 2072(b) (2006).

[108] *Shady Grove*, 130 S. Ct. at 1444.

[109] *Id.*

[110] *Id.* at 1447–48.

In his separate opinion, Justice Stevens acknowledged that "the bar for finding an [REA] problem is a high one,"[111] and he concurred in the majority's result because he agreed that Rule 23 did not "abridge, enlarge, or modify a substantive right."[112] Unlike Justice Scalia, however, Justice Stevens was willing to entertain the possibility that an application of a Federal Rule that effectively abridges, enlarges, or modifies a state-created right or remedy could violate the REA.[113] In Justice Stevens's view, when a Federal Rule appears to violate § 2072(b), "federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result."[114] In making this determination, it is necessary for a court to look not only to the nature of the Federal Rule in question, as Justice Scalia instructed, but also to the effect on the state law or standard that the Federal Rule would displace.[115] Moreover, it is not merely enough to characterize the state law as "procedural" in order to apply the federal law. If a state law defines substantive rights, a Federal Rule that displaces it "would have altered the State's substantive rights" and thus violated the REA, even if the state law might be described as "procedural."[116] Thus, even if the competing state law involves a procedural matter, the federal court must determine whether it "actually is part of a State's framework of substantive rights or remedies"[117] or is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[118] Justice Stevens provided several examples of "ways in which seemingly procedural rules may displace a [s]tate's formulation of its

[111] *Id.* at 1457 (Stevens, J., concurring in part and concurring in the judgment).

[112] 28 U.S.C. § 2072(b) (2006).

[113] *Shady Grove*, 130 S. Ct. at 1451.

[114] *Id.* at 1452 (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001)).

[115] *Id.* at 1453–54. In response to Justice Scalia's argument in part II-C of the plurality opinion that requiring courts sitting in diversity to investigate the effect of the Federal Rule on the state law would unduly tax the court, Justice Stevens wrote that "[t]he question . . . is not what rule *we* think would be easiest on federal courts. The question is what rule Congress established. . . . Courts cannot ignore text and context in the service of simplicity." *Id.* at 1454.

[116] *Id.* at 1453 n.8 (internal quotation marks omitted).

[117] *Id.* at 1449.

[118] *Id.* at 1452.

substantive law," such as through a statute of limitations, the alteration of the burden of proof in a case, or the adoption of a differing standard of appellate review.[119]

Justice Ginsburg's dissent is reminiscent of her majority opinion from fourteen years earlier in *Gasperini*. She stressed that she "would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies."[120] Moreover, she criticized the majority for "veer[ing] away from that approach . . . in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord."[121] Justice Ginsburg would have held, as she did in *Gasperini*, that the Federal Rule was not controlling, then applied an unguided *Erie* analysis to reach the conclusion that the New York statute should have barred the class action suit.[122]

In attempting to extract the precedential value of *Shady Grove*, it is clear that a majority of the Court subscribed to Justice Scalia's expansive view of when a Federal Rule or procedural statute controls and rejected the dissent's more narrow interpretation of the Federal Rules, in general, and Federal Rule of Civil Procedure 23, in particular. It has yet to be determined whether *Shady Grove* portends an enduring shift in the Court's view as to the threshold *Erie/Hanna* question,[123] or whether the impact of its analysis could be limited to the class action realm. The plurality's reliance on *Sibbach*'s "really regulates procedure" standard to determine whether a Federal Rule exceeds the boundaries of the REA by abridging, modifying, or enlarging a substantive state right potentially has broad implications, but this position failed to garner the support of a majority of justices.[124] It is well established that "[w]hen a

[119] *Id.* at 1453 n.9; *see* discussion *infra* Part III.

[120] *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

[121] *Id.* at 1463–64.

[122] *See id.* at 1468–70. For the time being, at least, critics of Justice Ginsburg's *Gasperini* opinion have been redeemed. *See generally* 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, 710–18 (2006).

[123] The notion that any shift in the Court's *Erie/Hanna* jurisprudence might be "enduring" should be met with skepticism. "[W]ith nearly every case, the Court seems to correct course or careen in a different direction." Tidmarsh, *supra* note 66, at 878.

[124] For an extended and illuminating discussion of the debate between Justices Scalia and Stevens regarding the analysis to be undertaken in determining whether a federal rule exceeds the boundaries of the REA, see generally Ides, *supra* note 39.

fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' "[125] Applying this standard, Justice Stevens's concurring opinion is the holding of the Court on the § 2072 analysis.[126] Thus, by thrusting the debate over when a Federal Rule might be held invalid out of the theoretical realm and into the Court's jurisprudence, the four members of the plurality may have unwittingly revitalized the federalism principles espoused by Justice Stevens and the dissenters. As discussed in Part III below, Justice Stevens's position on the validity of a Federal Rule under the REA, when combined with principles from the still-valid decisions in *Gasperini* and *Semtek*, has significant implications for the application of state substantive law by federal courts sitting in diversity, including principles, such as the summary judgment standard, that traditionally have been characterized as "procedural."

II. DIVERGENT FEDERAL AND STATE SUMMARY JUDGMENT STANDARDS

Most states have adopted procedural rules that are based, in whole or in part, upon the Federal Rules of Civil Procedure; however, several of these states have declined to follow the Supreme Court's guidance in *Celotex* regarding the standard to be applied in adjudicating a motion for summary judgment.[127] Federal Rule of Civil Procedure 56 and most state standards provide that a court may grant summary judgment to the moving party if there is no genuine dispute of material fact. Where state standards have differed from the federal approach, however, is in

Professor Ides ultimately concludes that Justice Stevens's approach is the preferable interpretation because it is more faithful to the text of § 2072(b). *Id.*

[125] Marks v. United States, 430 U.S. 188, 192 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

[126] *See* discussion and cases cited *infra* Part III.

[127] For sources acknowledging the differences between *Celotex* and a number of individual states and discussing such differences in varying levels of detail, see Cooper, *supra* note 6, at 1248–49; Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee after* Hannan v. Alltel Publishing Co., 77 TENN. L. REV. 305, 344–45 & nn.266–75 (2010); Lind, *supra* note 17, at 769–70 & nn.293–316; Steinman, *supra* note 6, at 278–79 & nn.220–21.

the amount of evidence that the moving party must present to shift the burden of proof to the non-moving party and, ultimately, prevail on the motion.

A. The Federal Summary Judgment Standard

The changes in the federal summary judgment standard wrought by the *Celotex* trilogy of cases have been the subject of voluminous commentary since their release in 1988, such that an extended discussion here would be redundant.[128] Because this Article focuses on the effect of the differences between the Supreme Court's interpretation of the Federal Rule of Civil Procedure 56 in *Celotex* and the standards in several states,[129] however, a brief review of the *Celotex* rule is needed. In *Celotex*, a widow asserted that her husband's death was caused by exposure to asbestos manufactured or distributed by the corporate defendants.[130] Celotex asserted that summary judgment was proper because the plaintiff "had failed to identify . . . any witnesses who could testify about the decedent's exposure to petitioner's asbestos products."[131] In response to the summary judgment motion, Catrett produced three documents which tended to establish the decedent's exposure to asbestos.[132]

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[128] *See generally* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005); Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006); Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

[129] *Anderson*, which addressed the burden of proof on summary judgment when the nature of the plaintiff's claims are such that there would be a heightened standard of proof at trial, and *Matsushita*, which stands for the proposition that the party bearing the burden of persuasion at trial must present evidence at the summary judgment phase that at least plausibly establishes its case, are both significant cases in their own right. *See* Redish, *supra* note 128, at 1334. Moreover, some state courts have specifically declined to follow *Anderson* or *Matsushita*, creating additional variations between the state and federal summary judgment standards. *See* Lind, *supra* note 17, at 770 & nn.305–16. This Article, however, focuses on *Celotex*, which, "[o]f the three . . . most clearly altered well-established summary judgment practice, and . . . far more than the others, decisively opened the eyes of the federal courts to the propriety of summary judgment in certain cases . . . ." Redish, *supra* note 128, at 1348.

[130] Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986).

[131] *Id.* at 320.

[132] *Id.*

The *Celotex* plurality opinion, written by Justice Rehnquist, construed the plain language of Federal Rule of Civil Procedure 56(c)[133] as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[134] This meant that a moving party who did not bear the burden of persuasion at trial was not required to "support its motion with affidavits or other similar materials negating the opponent's claim."[135] Instead, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."[136]

Because only three other justices joined in Justice Rehnquist's opinion, *Celotex* did not set a definite precedent regarding the evidence that a moving party who does not bear the burden of proof at trial is required to present in support of its summary judgment motion. Under the *Marks* rule,[137] the holding of the Court ostensibly should have been represented by the concurring opinion of Justice White, who clarified that "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[138] Adding to the confusion was Justice Brennan's dissenting opinion, which set forth its own view of the burden of proof on summary judgment under the guise of providing "clarity" to the majority opinion.[139]

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[133] At the time of *Celotex*, the language of Rule 56(c) stated, in relevant part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.* at 323 n.4. Substantially similar language can still be found in the current Rule 56(a). FED. R. CIV. P. 56(a).

[134] *Celotex*, 477 U.S. at 322.

[135] *Id.* at 323 (emphasis omitted).

[136] *Id.* at 325.

[137] *See* Marks v. United States, 430 U.S. 188, 192 (1977).

[138] *Celotex*, 477 U.S. at 328 (White, J., concurring).

[139] *Id.* at 329–33 (Brennan, J., dissenting). Justice Brennan indicated his view of how the moving party might satisfy its burden of production under Rule 56 where the burden of persuasion at trial would be on the non-moving party. "First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* at 331.

Most lower federal courts, however, have interpreted *Celotex* to mean that a moving party who does not have the burden of proof at trial lacks any burden of production at the summary judgment phase.[140] Thus, the moving party can "meet the initial burden of showing 'the absence of a genuine issue of material fact' as to an essential element of the non-movant's case . . . by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case."[141] This interpretation reduces summary judgment to the "put up or shut up" moment in litigation,[142] during which the burden of proof falls entirely on the non-moving party who will bear the burden at trial.

B. State Summary Judgment Standards

In contrast to the interpretation that most federal courts have given *Celotex*, several state courts have imposed a higher burden of production on the party moving for summary judgment, even where that party will not bear the burden of proof at trial. One state in which this issue has received significant attention in recent years among the bench and bar is Tennessee. The Tennessee Rules of Civil Procedure, modeled upon the Federal Rules, were adopted in 1971.[143] Beyond differences in the internal numbering of the rules, the Tennessee summary judgment rule is virtually identical to its federal

[140] *See* A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 791 (3d ed. 2011); Redish, *supra* note 128, at 1345 ("Since *Celotex*, the majority of lower federal courts have wisely read that decision to impose virtually no burden at all on the movant where she would have no burden of proof at trial."). *But see* Steinman, *supra* note 128, at 109–13 (describing this "paper trial" interpretation of *Celotex* as a "myth," primarily because this interpretation "places *Celotex* in fundamental conflict" with *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)).

[141] Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

[142] *Id.* at 1478 (internal quotation marks omitted); *see also* Steen v. Myers, 486 F.3d 1017, 1022 (7th Cir. 2007) ("[W]e have consistently held that summary judgment is 'not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.' ") (quoting Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 859 (7th Cir. 2005)); Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006) ("In this respect, summary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument.") (citing Jersey Cent. Power & Light Co. v. Lacey Twp., 772 F.2d 1103, 1109–10 (3d Cir. 1985)).

[143] *See* Cornett, *supra* note 127, at 310.

counterpart.[144] Prior to the adoption of the Rules, summary judgment was not available in civil actions in Tennessee; because of the significance of this change, the Advisory Committee considered Tennessee Rule of Civil Procedure 56 as "one of the most important and desirable additions to Tennessee procedure contained in the Rules of Civil Procedure" and "a substantial step forward to the end that litigation may be accelerated, insubstantial issues removed, and trial confined only to genuine issues."[145]

The Tennessee Supreme Court's first major interpretation of the summary judgment standard under Tennessee Rule of Civil Procedure 56 was in *Byrd v. Hall*,[146] a 1993 case that "quickly became Tennessee's summary judgment bible."[147] In *Byrd*, the court affirmed the vitality of summary judgment in Tennessee, assuring litigants that summary judgment "is not a disfavored procedural shortcut but rather an important vehicle for concluding cases that can and should be resolved on legal issues alone."[148] The court summarized the federal standard set forth in *Celotex*, and while it purported to "embrace" that standard,[149] it also stated that Justice White's concurring opinion, which observed that a movant cannot shift the burden of proof through a conclusory motion unsupported by evidence, "correctly place[d] a finer point on the Court's holding" in *Celotex*.[150] To this end,

[144] Prior to the changes in Federal Rule of Civil Procedure 56 that became effective December 1, 2010, the primary textual distinction between the federal and state rules was Tennessee Rule of Civil Procedure 56.03, which requires all motions for summary judgment to "be accompanied by a separate concise statement of the material facts [set forth in a separate, numbered paragraph] . . . to which the moving party contends there is no genuine issue for trial." TENN. R. CIV. P. 56.03. Adopted in 1997, this section "tracks the language of a local federal rule of the Middle District of Tennessee." Nancy Fraas MacLean, Practice Series, TENN. R. CIV. P. 56.03 (4th ed. 2010–11).

[145] MacLean, Practice Series, TENN. R. CIV. P. 56.03; *see also* Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993).

[146] 847 S.W.2d 208.

[147] Andrée Sophia Blumstein, *Bye, Bye* Byrd*? Summary Judgment after* Hannan *and* Martin*: Which Way To Go?*, TENN. B.J., Feb. 2009, at 23, 23.

[148] *Byrd*, 847 S.W.2d at 210.

[149] *Id.* at 214.

[150] Judy M. Cornett, *The Legacy of* Byrd v. Hall*: Gossiping About Summary Judgment in Tennessee*, 69 TENN. L. REV. 175, 184 (2001) (emphasis omitted). Professor Cornett made the following observation about the *Byrd* court's tacit approval of Justice White's concurring opinion in *Celotex*:

> Despite quoting the Sixth Circuit, the Tennessee Supreme Court obviously read *Celotex* differently, indicated most clearly by the adverb

the court made clear that "[a] conclusory assertion that the nonmoving party has no evidence is clearly insufficient."[151] Instead, a moving party can only demonstrate to the court that there are no genuine issues of material fact for trial either by "affirmatively negat[ing] an essential element of the nonmoving party's claim" or by "conclusively establish[ing] an affirmative defense that defeats the nonmoving party's claim."[152] Notably, the court cited to Justice Brennan's dissenting opinion in *Celotex* in developing this test.[153] Although the state supreme court reaffirmed *Byrd*'s burden-shifting standard in several subsequent cases,[154] the inconsistent statements in *Byrd* regarding the federal and Tennessee rules for summary judgment had "led to some confusion among Tennessee courts as to the proof required for the moving party to meet its burden of production."[155]

This confusion was addressed in 2008 in *Hannan v. Alltel Publishing Co.*, which clarified that the Tennessee Supreme Court "did not adopt a 'put up or shut up' approach to burden-shifting in *Byrd* or in subsequent cases."[156] Instead, the court adopted a standard that was similar to, but actually posed a heavier burden than, the standard espoused in Justice Brennan's dissent in *Celotex*.[157] Then-Chief Justice Janice Holder left no doubt about the operative standard for summary judgment in Tennessee: "[A] moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving

> *correctly*. In one sense, the adverb is inappropriate because the Tennessee Supreme Court is not the authority on what constitutes a correct reading of Federal Rule of Civil Procedure 56. In another sense, however, the court was signaling its reluctance to adopt an interpretation of a "virtually identical" Tennessee Rule of Civil Procedure 56 that would allow a movant to do nothing more than conclusorily assert that the nonmovant cannot prove its case. The adverb "correctly" is the first telltale sign that Tennessee and federal summary judgment practice are about to diverge.

Id. at 186.

[151] *Byrd*, 847 S.W.2d at 215.

[152] *Id.* at 215 n.5.

[153] *Id.* at 215 n.6.

[154] *See, e.g.*, Blair v. W. Town Mall, 130 S.W.3d 761, 767 (Tenn. 2004); McCarley v. W. Quality Food Serv., 960 S.W.2d 585, 587–88 (Tenn. 1998).

[155] Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 5 (Tenn. 2008).

[156] *Id.* at 6.

[157] *See id.* at 6–7.

party cannot prove an essential element of the claim at trial."[158] Applying this standard to the facts of *Hannan*, the court held that summary judgment was inappropriate.[159]

Two fact patterns illustrate the practical effects of the difference between the *Byrd/Hannan* standard in Tennessee and other similar state summary judgment standards and the *Celotex* standard in federal court. First, *Hannan* itself presented a situation in which the complaint likely would not survive a summary judgment motion brought in federal court in Tennessee, particularly because the state sits within the Sixth Circuit of the Untied States Court of Appeals, which has explicitly adopted the "put up or shut up" interpretation of *Celotex*.[160] The plaintiffs, who operated a bed and breakfast in a rural area of Tennessee, alleged that their business was irrevocably harmed because the defendants mistakenly omitted their paid advertisement from the telephone book.[161] The *ad damnum* clause of their complaint sought damages in the amount of $225,000.[162] The defendants moved for summary judgment, pointing to, inter alia, the plaintiffs' deposition testimony, in which they were unable to quantify any measure of damages.[163] As Professor Cornett has observed, this evidence "appeared to present a classic case in which the party having the ultimate burden of proof lacked evidence at the discovery phase of an essential element of its case, damages."[164] Under the "put up or shut up" standard followed by federal courts in the Sixth Circuit of the United States Court of Appeals, summary judgment almost certainly would have been granted. The Tennessee Supreme Court held, however, that even though the

[158] *Id.* at 8–9. Some of the confusion about the standard arose from the *Byrd* court's use of the term "affirmative defense" in a way that conflicted with its commonly understood definition. *Id.* at 6. The court set this misstatement straight in *Hannan*, clarifying that to "establish an affirmative defense," as used in *Byrd*, actually means to "show[ ] that the nonmoving party cannot establish an essential element of the claim at trial." *Id.* at 7.

[159] *Id.* at 10–11.

[160] *See, e.g.*, Cox v. Ky. Dep't of Transp., 53 F.3d 146, 149 (6th Cir. 1995); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

[161] *See Hannan*, 270 S.W.3d at 2–3.

[162] *Id.* at 3.

[163] *See id.* at 3–4. For example, when asked in her deposition how she might document or quantify in dollars the amount of her loss as a result of the omission in the telephone book, Mrs. Hannan responded " I 'have absolutely no way of doing that. And neither does anyone else.' " *Id.* at 4.

[164] Cornett, *supra* note 127, at 324.

plaintiffs' testimony failed to quantify the *amount* of damages, they consistently alleged the *existence* of damages.[165] Thus, the deposition testimony introduced by the defendants neither negated an essential element of the plaintiffs' claim nor showed that they could not prove the existence of damages at trial.[166]

Justice William Koch, in his dissent, described a second example of a fact pattern that would have a disparate outcome under the federal and Tennessee standards. In his efforts to show that the majority's decision would have "significant and far-reaching" effects and "provide another safe harbor for those who are unprepared," Justice Koch cited the example of the plaintiff in a medical malpractice case, who is required by statute in Tennessee to proffer qualified expert testimony regarding the standard of care and the breach of that standard.[167] Traditionally, Tennessee defendants could obtain summary judgment in their favor by showing that the plaintiff's experts were unqualified to testify because, for example, they failed to meet the statutory requirements of familiarity with both the medical specialty and the locality in which the alleged breach of the standard of care occurred.[168] Certainly such a motion would be successful in a federal court applying the substantive law of Tennessee. Justice Koch observed, however, that under the majority's standard, "[s]uccessfully challenging a particular expert's qualifications does not demonstrate that the plaintiff cannot prove an essential element of its case," but rather simply shows "that the plaintiff cannot establish an essential element of its case *with that expert*."[169] Subject to a court's enforcement of its expert discovery deadlines, the case could continue indefinitely while the plaintiff tries to find an expert who is qualified.[170]

Tennessee is the most recent and active example of a state that has affirmatively rejected the *Celotex* standard in favor of one that places a greater burden on the moving party at the

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[165] *Hannan*, 270 S.W.3d at 10.

[166] *Id.* at 11.

[167] *Hannan*, 270 S.W.3d at 19–20 (Koch, J., dissenting); see also TENN. CODE ANN. § 29-26-115(b) (West 2011).

[168] *Hannan*, 270 S.W.3d at 19 n.28, 20 (Koch, J., dissenting).

[169] *Id.* at 20.

[170] *See id.* Justice Koch observed that this "remains an open question." *Id.*

summary judgment phrase.[171] Several other states, however, have also done so. For example, the Kentucky Supreme Court explicitly eschewed the federal standard and reaffirmed that summary judgment is only appropriate under Kentucky Civil Rule 56.03 "where the movant shows that the adverse party cannot prevail under any circumstances."[172] Like Tennessee Rule of Civil Procedure 56, Kentucky Civil Rule 56.03 corresponds to the language of Federal Rule of Civil Procedure 56.[173] Given the choice to conform to the federal standard, however, the Kentucky Supreme Court declined and chose to retain the standard that it had adopted several years earlier.[174] Asserting the importance of allowing litigants to retain the right to try all valid issues, the court observed that, unlike the federal courts, it "perceive[d] no oppressive or unmanageable case backlog or problems with unmeritorious or frivolous litigation in the state's courts that

[171] In May 2011, the Tennessee General Assembly passed legislation with purpose of "overrul[ing] the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, its progeny, and the cases relied on in *Hannan*." 2011 Tenn. Pub. Acts 498 (codified at TENN. CODE ANN. § 20-16-101 (West 2011)). The standard adopted in the bill is as follows:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Id. § 1. This standard is identical to that espoused in the dissenting opinions written by Justice Brennan in *Celotex* and, subsequently, Justice Koch in *Hannan*. *See Celotex*, 477 U.S. at 331 (Brennan, J., dissenting); *Hannan*, 270 S.W.3d at 15–17 (Koch, J., dissenting). Because the legislation applies only to actions filed after July 1, 2011, the impact of the Public Law No. 498 may not be determined for some time. 2011 Tenn. Pub. Acts 498 at § 3. Despite the bill's express purpose, it is not clear that it overrules *Hannan*. *Hannan* determined how a party moving for summary judgment shifts the burden to the non-moving party, while the bill sets forth when the moving party "shall prevail on its motion for summary judgment." *Id.* § 1. Moreover, if the bill does overrule *Hannan*, it is open to a constitutional challenge, particularly on separation of powers grounds. *See* State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001) ("[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power . . . . Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved." (citations omitted)).

[172] Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 479–82 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

[173] *Id.* at 480.

[174] *Id.* at 482.

would require us to adopt a new approach such as the new federal standards."[175] The Kentucky standard, which is similar to the second prong of the Tennessee burden-shifting analysis as set forth in *Hannan*, has three significant differences from the *Celotex* standard: (1) a movant in Kentucky "must convince the court, by the evidence of record, of the nonexistence of an issue of material fact," rather than simply pointing to a lack of evidence offered by the non-moving party; (2) the state test for summary judgment is different from the test for a directed verdict, reflecting a policy choice in Kentucky "that a ruling on a summary judgment is a more delicate matter and that its inquiry requires a greater judicial determination and discretion since it takes the case away from the trier of fact before the evidence is actually heard"; and (3) summary judgment will not be granted in Kentucky unless the moving party's "right to judgment is shown with such clarity that there is no room left for controversy."[176]

Like its sister courts in Tennessee and Kentucky, the Indiana Supreme Court has "expressly disavowed the federal standard set forth in *Celotex*."[177] Specifically, Indiana's highest court has held that the party moving for summary judgment has the burden of negating the nonmoving party's claim—that is, showing that there is no genuine issue of material fact—with evidence.[178] "Merely alleging that the plaintiff has failed to produce evidence on each element" is not enough to obtain summary judgment.[179] As Professor Cooper observes, the difference between the Indiana standard and the federal standard "may be somewhat difficult to articulate, but it is real: "[I]t is generally much harder to establish a negative, as the

[175] *Id.* at 482–83.

[176] *Id.* at 481–82. Professor Cornett has considered the relationship between summary judgment and the directed verdict in Tennessee after *Hannan* and concluded that the Tennessee Supreme Court has made a policy choice similar to that made in Kentucky. *See* Cornett, *supra* note 127, at 344 ("Tennessee's summary judgment standard says, in effect: If you want out of this lawsuit on the merits short of a trial, you must be willing to bear some burden. If you do not wish to produce evidence, you can wait for the trial and make a motion for a directed verdict at the end of the plaintiff's case in chief. But we will not substitute one for the other.").

[177] Dennis v. Greyhound Lines, Inc., 831 N.E.2d 171, 173 (Ind. Ct. App. 2005) (citing Jarboe v. Landmark Cmty. Newspapers of Ind., Inc., 644 N.E.2d 118, 118 (Ind. 1994)).

[178] *Jarboe*, 644 N.E.2d at 123.

[179] *Id.*

Indiana interpretation of its Rule 56 requires, than it is to suggest a negative and require the opposing party to prove a positive, as *Celotex* requires."[180] In addition to these three examples, several other states appear to have rejected the *Celotex* standard in favor of one that raises the burden on the party moving for summary judgment. These states include California,[181] Florida,[182] Oklahoma,[183] Oregon,[184] Texas,[185] and Utah.[186]

Clearly, there exist differences between the federal and state standards for summary judgments in several states, and these differences are more than simply theoretical. Moreover, the number of states asserting their independence from the *Celotex* standard appears to be growing, rather than dissipating, over time. This dichotomy between two court systems leads inevitably to the vertical choice-of-law question addressed in Part I above: When a federal judge in one of the several states that assign a higher burden of proof to summary judgment movants is faced

[180] Cooper, *supra* note 6, at 1257.

[181] Krantz v. BT Visual Images, L.L.C., 107 Cal. Rptr. 2d 209 (Ct. App. 2001) (citing the *Celotex* standard and observing that "a like rule does not appear ever to have prevailed under the California summary judgment statute.").

[182] 5G's Car Sales, Inc. v. Fla. Dep't of Law Enforcement, 581 So. 2d 212, 212 (Fla. Dist. Ct. App. 1991) (declining to follow *Celotex* and continuing to follow standard set forth in *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966)). *See generally* Leonard D. Pertnoy, *Summary Judgment in Florida: The Road Less Traveled*, 20 ST. THOMAS L. REV. 69 (2007) (arguing that Florida should revisit its restrictive summary judgment standard, which has not been comprehensively reexamined since *Holl*).

[183] Kating *ex rel* Gist v. City of Pryor *ex rel.* Mun. Util. Bd., 977 P.2d 1142, 1144 (Okla. Civ. App. 1998) ("[T]he federal summary judgment standards established in *Celotex* . . . and other related federal cases are not specifically applicable in Oklahoma appellate review of summary judgments.").

[184] Jones v. Gen. Motors Corp., 939 P.2d 608, 616 (Or. 1997) (declining to interpret Oregon's summary judgment statute, which was patterned on Federal Rule 56, to incorporate the *Celotex* trilogy when Oregon adopted its rule prior to those cases).

[185] Casso v. Brand, 776 S.W.2d 551, 555–56 (Tex. 1989) (observing that "[s]ummary judgments in federal courts are based on different assumptions, with different purposes, than summary judgements in Texas," and holding that "[n]othing in [*Celotex*] compels us to abandon our established summary judgment procedure").

[186] Orvis v. Johnson, 177 P.3d 600, 604 (Utah 2008) ("Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party's case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact.").

with a summary judgment motion, and the basis for federal subject matter jurisdiction is diversity, should the court apply the federal standard or the state standard?

III. THE VERTICAL CHOICE OF LAW IN SUMMARY JUDGMENT CASES AFTER *SHADY GROVE*

Is it realistic to expect that federal courts sitting in diversity will apply state summary judgment standards when they differ from the *Celotex* standard? *Shady Grove* provides substantial insight. Federal courts have traditionally applied the federal summary judgment standard, regardless of the basis for federal subject matter jurisdiction.[187] Prior to *Shady Grove*, however, some commentators were bullish that *Gasperini* (which urged courts to focus on state regulatory interests when undertaking an *Erie* analysis) and *Semtek* (which declined to apply a federal rule based, in part, on the conclusion that doing so would abridge, enlarge, or modify a substantive state right) at least cracked open the door for application of divergent state summary judgment standards under the *Erie* doctrine.[188] At first glance, it might appear that the *Shady Grove* plurality, with its reaffirmation of *Sibbach*'s "really regulates procedure" standard, has slammed that door shut.[189] The Court's recent denial of a petition for writ of certiorari by a party arguing for the application of Tennessee's summary judgment standard in a

[187] *See, e.g.*, Shropshire v. Laidlaw Transit, Inc., 550 F.3d 570, 574 (6th Cir. 2008) (stating that Federal Rule of Civil Procedure 56 applies "even where the federal summary judgment requirements displace state law that would require a jury to make a particular determination").

[188] *See* Cooper, *supra* note 6, at 1255 ("[T]he *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."); Steinman, *supra* note 6, at 273–304 (considering how traditional *Erie* principles may encourage the application of differing state standards in the areas of summary judgment, class certification, and pleading).

[189] Clermont, *supra* note 5, ("[T]he summary judgment hypothetical seems an easy case after *Shady Grove*, because the Court sapped *Gasperini* and *Semtek*'s vitality as to Rule construction."); Cooper, *supra* note 6, at 1263 ("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."); *see also* Ides, *supra* note 39, at 1041 (awaiting cautiously a future opinion of the Court that takes a clear majority position on the issue).

federal court does little to alter that initial impression.[190] Justice Stevens's concurring opinion, however, provides significant, and perhaps surprising, support to the position that a faithful application of *Erie*'s principles mandates the use of state summary judgment standards by federal courts sitting in diversity. An argument may be made for a federal court to apply the state's summary judgment standard using either a guided *Erie* approach under the REA or an unguided *Erie* approach under the RDA. The former is likely to find a more receptive audience in the lower federal courts.

A. The Rules Enabling Act Approach

Both arguments for the application of state summary judgment standards in federal court begin, as *Shady Grove* did, with the threshold "characterization question"[191] of whether a Federal Rule of Civil Procedure, specifically Rule 56, is broad enough to cover the issue in dispute. If it is, then under *Hanna* the court must apply Federal Rule of Civil Procedure 56 so long as it meets the requirements of the REA. Although a narrow construction of Federal Rule of Civil Procedure 56 might have been justified after *Gasperini* and *Semtek*, the five votes to apply Federal Rule of Civil Procedure 23 in *Shady Grove* make this determination highly unlikely.[192] Presuming that Federal Rule of Civil Procedure 56 is in "direct collision" with the summary judgment standards of the state in which the federal court sits, the federal court must apply it unless it runs afoul of the Constitution or 28 U.S.C. § 2072(b). Of course, Federal Rule of Civil Procedure 56 is "arguably procedural," but the analysis of whether its application abridges, enlarges, or modifies a substantive state right is much more intriguing. Under Justice

[190] *See* Medison Am., Inc. v. Preferred Med. Sys., L.L.C., 357 F. App'x. 656, 661–62 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 101 (2010).

[191] *See* Tidmarsh, *supra* note 66.

[192] Professor Cooper recently described the odds against the Court opting for an unguided *Erie* analysis in the area of summary judgment:

> Although the question of whether Rule 23 directly conflicts with section 902(b) is certainly debatable . . . 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.

Cooper, *supra* note 6, at 1259.

Scalia's approach, which would look only to whether Federal Rule of Civil Procedure 56 "really regulates procedure," the answer would be simple: the federal rule applies. Justice Stevens's concurring view on the § 2072(b) analysis, however, is controlling under the "narrowest grounds" rule of *Marks*, despite technically having received only one vote.[193] Thus, until the Supreme Court weighs in on the issue again, the lower federal courts should look at the competing state law and determine whether it "actually is part of a [s]tate's framework of substantive rights or remedies,"[194] or "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[195]

A review of the lower court decisions citing to *Shady Grove* suggests that Justice Stevens's concurring opinion has given teeth to the notion that a Federal Rule of Civil Procedure can be invalidated pursuant to 28 U.S.C. § 2072(b). Indeed, several federal courts faced with the choice between a federal rule and competing state law in the wake of *Shady Grove* have cited Justice Stevens's concurrence and held that, although the federal rule controls, it should be invalidated and the state law applied because the federal law abridges, enlarges, or modifies a substantive state right.[196] Several of these decisions involve the application of Federal Rule of Civil Procedure 23.

In *Bearden v. Honeywell International, Inc.*, the plaintiffs had moved into a newly constructed home with two electronic air cleaners installed.[197] Subsequently, one of the plaintiffs developed a respiratory infection that lasted over several months.[198] The plaintiffs filed a class action suit in the United States District Court for the Middle District of Tennessee, alleging that the illness was caused by ozone produced by the air

[193] Although Justice Ginsburg's dissent did not explicitly join with Justice Stevens's concurrence on this point, she did observe that "a majority of th[e] Court . . . agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns." Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1464 n.2 (2010) (Ginsburg, J., dissenting).

[194] *Id.* at 1449 (Stevens, J., concurring).

[195] *Id.* at 1452.

[196] *In re* Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 660 (E.D. Mich. 2011) (citing cases) ("Courts interpreting the *Shady Grove* decision, and searching for guidance on this issue, have concluded that Justice Stevens' concurrence is the controlling opinion by which interpreting courts are bound.").

[197] *Bearden v. Honeywell Int'l, Inc.*, No. 3:09-1035, 2010 WL 3239285, at *1 (M.D. Tenn. Aug. 16, 2010).

[198] *Id.*

cleaners and claiming various torts, including violations of the Tennessee Consumer Protection Act ("TCPA").[199] Tennessee decisional law interpreting the TCPA is clear that class actions are not permitted for claimed violations of the TCPA claim.[200] The plaintiffs argued that *Shady Grove* compelled the district court to allow the class action to proceed.[201] The district court seemed to assume, likely correctly, that Federal Rule of Civil Procedure 23 controlled over the state supreme court's interpretation of the TCPA. Citing the *Marks* "narrowest grounds" rule, however, the court concluded that "Justice Stevens's concurrence is the controlling opinion" in *Shady Grove* with regard to whether the federal rule abridges, enlarges, or modifies a substantive right provided by the state.[202] Applying this approach, the court held that "the class-action limitation contained in the TCPA is so intertwined with that statute's rights and remedies that it functions to define the scope of the substantive rights."[203] Because the restriction on class actions under the TCPA "is a part of Tennessee's framework of substantive rights and remedies, Rule 23 [did] not apply," and the plaintiffs were prohibited from maintaining a class action suit for their TCPA claim, just as they would have been had they filed their suit in Tennessee state court.[204]

In two other cases with similar claims, courts in the Northern District of Ohio reached the same conclusion.[205] The Ohio Consumer Sales Practice Act ("OCSPA") includes a provision that a class action suit is permissible to recover damages for a violation of the OCSPA if "the violation was an act or practice declared to be deceptive or unconscionable."[206] The

[199] *Id.* at *2. The TCPA is codified in TENN. CODE ANN. § 47-18-104–130 (West 2011).

[200] *See* Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 308–11 (Tenn. 2008) (holding that the TCPA's directive in TENN. CODE ANN. § 47-18-109(a)(1) that states that anyone aggrieved under the statute "*may bring an action individually* to recover actual damages" is unambiguous and does not authorize plaintiffs to bring class-action TCPA claims).

[201] *Bearden*, 2010 WL 3239285, at *9.

[202] *Id.* at *10.

[203] *Id.*

[204] *Id.*

[205] McKinney v. Bayer Corp., 744 F. Supp. 2d 733 (N.D. Ohio 2010); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947 (N.D. Ohio July 12, 2010).

[206] OHIO REV. CODE ANN. § 1345.09(B) (West 2011); *accord In re Whirlpool Corp.*, 2010 WL 2756947, at *1 (citing OHIO REV. CODE ANN. § 1345.09(B)).

plaintiffs failed to show that the defendant's conduct had been declared deceptive or unconscionable, yet argued that they should be able to maintain a class action suit for the alleged OCSPA violations, notwithstanding the state law based upon the Court's application of Federal Rule of Civil Procedure 23 in *Shady Grove*.[207] The district court, rejecting this argument, reasoned that the class action restriction in the Ohio statute is substantive in nature because it "is intimately interwoven with the substantive remedies available under the OCSPA."[208] Federal Rule of Civil Procedure 23, therefore, was declared "ultra vires under the approach of Justice Stevens (the crucial fifth vote in *Shady Grove*) because it 'would abridge, enlarge, or modify [Ohio's] rights or remedies, and thereby violate the [Rules] Enabling Act.' "[209] The *McKinney* court followed the rationale of the opinions in *Bearden* and *Whirlpool* to reach the same conclusion.[210]

Most recently, a district court in the Eastern District of Pennsylvania considered whether class plaintiffs should be given leave to amend their complaint to add Illinois and New York state law antitrust claims after the Supreme Court's *Shady Grove* opinion was released.[211] The plaintiffs argued that the restrictions on bringing class actions under Illinois and New York state laws were no longer valid after *Shady Grove*, which had held that similar restrictions in New York did not apply in federal court because they conflicted with Federal Rule of Civil Procedure 23.[212] Like the federal courts in Tennessee and Ohio before it, the court held that Justice Stevens's concurrence was

[207] *In re Whirlpool Corp.*, 2010 WL 2756947, at *1.

[208] *Id.* at *2.

[209] *Id.* (alterations in original) (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1457 (2010) (Stevens, J., concurring)).

[210] *McKinney*, 744 F. Supp. 2d at 747–49. A recent article looked to these three decisions and suggested both that "[d]efendants should invoke the narrowest grounds rule as a basis for applying the approach of Justice Stevens" and, more specifically, that "[f]or federal class action claims under state consumer protection statutes that restrict class actions—for example, by limiting the conduct on which plaintiffs may base such a claim—defendants should argue . . . that those restrictions are part of the state's framework of substantive rights and remedies and reflect the state's policy on how to remedy wrongful conduct affecting a consumer class." Jack E. Pace III & Rachel J. Feldman, *From Shady to Dark: One Year Later,* Shady Grove*'s Meaning Remains Unclear*, 25 ANTITRUST 75, 81 (2011).

[211] *In re* Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 672 (E.D. Pa. 2010).

[212] *Id.*

controlling with regard to whether "the validity of Federal Rules of Civil Procedure turns, in part, on the rights afforded by the state rule that the Federal Rule displaces."[213] Applying this test, the court held that the Illinois restrictions on class action suits by indirect purchasers were

> intertwined with Illinois substantive rights and remedies because (1) the restrictions apply only to the [Illinois Antitrust Act], (2) they are incorporated in the same statutory provision as the underlying right, not a separate procedural rule, and (3) [they] appear to reflect a policy judgment about managing the danger of duplicative recoveries.[214]

Because the "application of Rule 23" in the face of these state restrictions "would 'abridge, enlarge, or modify' Illinois' substantive rights," the state restrictions applied in federal court, and the plaintiffs could not amend their complaint to add the Illinois antitrust claims.[215]

Each of these four cases, like *Shady Grove*, involved class actions; perhaps they are indicative of pushback from district court judges who are reaffirming the ability of states to place limitations on class actions filed within their borders.[216] For lower court judges who are convinced that the *Shady Grove* plurality overreached, Justice Stevens's concurrence provides a lifeline justifying the use of § 2072(b) to enforce federalism interests and maintain some control over causes of action arising from their own state statutes.[217] There is no logical reason,

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[213] *Id.* at 675.

[214] *Id.* at 677. The court allowed the Plaintiffs to add the New York state law claims, concluding that they were "distinguishable from the [Illinois Antitrust Act's] restrictions not merely because New York's limitation is in a separate procedural provision, but also because [the New York statute] does not define state-created rights because it applies to all sources of law." *Id.* at 680.

[215] *Id.* at 677.

[216] Recently, a district court in the Southern District of New York deferred to Justice Stevens's concurring opinion as the controlling precedent from *Shady Grove* on the issue of whether a federal rule " 'exceeds statutory authorization or Congress's rulemaking power.' " *In re* Digital Music Antitrust Litig., No. 06 MD 1780(LAP), 2011 WL 2848195, at *17 (S.D.N.Y. July 18, 2011) (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) (plurality opinion)). The court rejected the Plaintiff class's attempt to amend its complaint in the wake of *Shady Grove* to add Illinois antitrust claims, holding that the Illinois legislature's decision to preclude class action suits to remedy violations of the state antitrust statute was a substantive policy judgment. *Id.* at *18.

[217] As Justice Ginsburg wryly observed, Congress passed the Class Action Fairness Act of 2005 "envision[ing] fewer—not more—class actions overall," and it will be highly ironic if CAFA makes "federal courts a mecca for suits of the kind

however, to limit Justice Stevens's § 2072(b) analysis to class action suits. Indeed, the lower courts' willingness to use Justice Stevens's rationale when considering the application of Federal Rule of Civil Procedure 23, the same federal rule that a majority of the Court, including Justice Stevens, interpreted so broadly in *Shady Grove*, should suggest that courts should not hesitate to extend the rationale to other federal rules when they conflict with state laws, rules, and standards that are bound up with substantive rights.

Indeed, the Tenth Circuit of the United States Court of Appeals did exactly that in *Garman ex rel. Garman v. Campbell County School District No. 1*.[218] In *Garman*, the mother of a junior high school student in Wyoming who allegedly was injured during her physical education class filed suit against the school district in federal court alleging both federal and state law claims.[219] A state statute, the Wyoming Governmental Claims Act ("WGCA"),[220] codified a provision in the state constitution[221] requiring anyone filing suit against a governmental entity to first file a signed notice of the claim with the entity in order to avoid dismissal on qualified immunity grounds.[222] Here, while the mother alleged that both federal question and diversity jurisdiction were present, she neglected to allege compliance with the signature and certification requirements of the WGCA on the face of her complaint, as the statute mandated.[223] "The district court dismissed for lack of subject matter jurisdiction, as any Wyoming court would be required to do," and the mother

Shady Grove has launched: class actions seeking state-created penalties for claims arising under state law-claims that would be barred from class treatment in the State's own courts." *Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting); *see* Burbank & Wolff, *supra* note 37, at 76 ("But that irony should not obscure the underlying similarity between CAFA and *Shady Grove*. Both developments have deprived the states of power to pursue visions of the class action that differ from the federal vision. CAFA was a product of the democratic process, however protracted and messy. *Shady Grove* was not.").

[218] 630 F.3d 977 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 95 (2011).

[219] *Id.* at 981.

[220] WYO. STAT. ANN. §§ 1-39-101–121 (West 2011).

[221] WYO. CONST., art. 16, § 7 (West, Westlaw through Nov. 2008 amendments) (stating, in relevant part, that no claims or demands against the state or any county or political subdivision shall be paid "until a full itemized statement in writing, certified to under penalty of perjury, shall be filed with the officer or officers" of the entity).

[222] *Garman*, 630 F.3d at 981.

[223] *Id.*

appealed, arguing that her complaint complied with Federal Rule of Civil Procedure 8(a).[224] The Tenth Circuit of the United States Court of Appeals determined that because "Rule 8(a)(1) directly addresses the requirements for sufficient pleading of jurisdiction under the notice-pleading standards . . . . [t]he rule is broad enough to control the area addressed by Wyoming's pleading requirements."[225] Moreover, because the complaint sufficiently pleaded jurisdiction under the federal rule but the court would lack jurisdiction if it applied the Wyoming law, "[t]he two rules are in direct, irreconcilable conflict."[226] Applying the rationale of Justice Stevens's concurrence, however, the Tenth Circuit affirmed the dismissal of the suit.[227] The court observed that "[t]he WGCA is the only vehicle through which a claimant may escape the bar of sovereign immunity in Wyoming."[228] The law's special pleading requirement

> is a necessary condition before sovereign immunity is abrogated under the WGCA as interpreted by the Wyoming Supreme Court. The rule is part of the substantive law of Wyoming. . . . Permitting the federal rules to trump substantive Wyoming law would "abridge, enlarge, or modify" the litigants' rights in violation of the Rules Enabling Act. Justice Stevens' concurrence in *Shady Grove* is critical to our decision as he concurred in the judgment only because he concluded the rule at issue was not part of substantive state law. Because we reach the opposite conclusion here, we likewise reach the opposite result.[229]

These decisions released in the months following *Shady Grove* indicate a willingness by lower federal courts to use Justice Stevens's test to invalidate a Federal Rule of Civil Procedure under the REA, a procedural step that the Supreme

[224] *Id.* at 980.
[225] *Id.* at 983.
[226] *Id.* at 984.
[227] *Id.* at 986–87.
[228] *Id.* at 984.
[229] *Id.* at 985. Another federal district court considering a similar issue also determined that Justice Stevens's opinion controls the REA analysis, but reached a different outcome. In considering whether the plaintiff's failure to meet more stringent Texas filing requirements stripped the federal court of its jurisdiction, the court held that the Texas pleading standard was in conflict with the federal pleading rules and that the federal rules should apply because the obvious purposes of the state rule were procedural, not substantive. Estate of C.A. v. Grier, 752 F. Supp. 2d 763, 770–71 (S.D. Tex. 2010).

Court has never taken,[230] and one for which even Justice Stevens believed the bar should be set high.[231] To determine whether the rationale of these courts could be extended to justify the application of state summary judgment standards in federal court, however, we must answer two questions. First, by diverging from *Celotex* and adopting a standard for summary judgment that raises the burden of proof on the moving party and makes summary judgment more difficult to obtain, have certain states either conferred a substantive right or remedy on their citizens or created a procedural rule so intertwined with a state right or remedy that it helps define the scope of the state-created right? And, if so, does the forced application of *Celotex* in federal courts sitting in diversity in those states "abridge, enlarge, or modify" those substantive rights conferred by the states? If we can answer both of these questions affirmatively, then the application of Federal Rule of Civil Procedure 56 to displace a more restrictive state rule violates § 2072(b), and the court should apply the state law on summary judgment.

Because most, if not all, procedural rules have some effect on the value of a party's claim, the mere fact that the procedural rule might possibly affect a party's substantive rights cannot form the basis for invalidating that procedural rule.[232] If that were the case, the exception (28 U.S.C. § 2072(b)) would swallow the rule (28 U.S.C. § 2072(a)). In considering whether the summary judgment standard is one of those state laws, rules, or standards that, while procedural in nature, is functionally substantive, it is logical to consider other state rules that courts

[230] Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (observing that the Court has "rejected every statutory challenge to a Federal Rule that has come before [it]"). Professors Burbank and Wolff, while acknowledging the accuracy of this statement in the plurality opinion, suggested that this fact "is hardly cause for the institutional self-satisfaction that Justice Scalia's opinion manifests." Burbank & Wolff, *supra* note 37, at 41. Indeed, the Court's

> failure to find a violation of the Enabling Act has frequently been made possible through Federal Rule interpretations that were restrained without being enlightened, many of which reflected implicit acknowledgment of the inadequacy of *Sibbach*, both in its federalism account of the Enabling Act's limitations and its narrow view of the substantive rights that are protected.

Id. at 42.

[231] *Shady Grove*, 130 S.Ct. at 1457 (Stevens, J., concurring).

[232] Professor Tidmarsh argues that, in fact, "every 'procedural' rule changes entitlements and values of claims," and thus has some effect on substance, even "the most quintessentially procedural of all rules—the requirement that pleadings and motions be filed on 8' x 11' [sic] paper." Tidmarsh, *supra* note 66, at 891.

and commentators have deemed candidates to invalidate conflicting federal rules under § 2072(b). The state rules that led to invalidation of Federal Rule of Civil Procedure 23 in *Bearden*, *McKinney*, *Whirlpool*, and *Wellbutrin* all placed restrictions on litigants' abilities to file class action suits to enforce rights provided under state statutes: consumer protection laws in Tennessee and Ohio and an antitrust law in Illinois.[233] The restrictions varied in their origin and scope.[234] Their common characteristic was that they were all interpretations of, or contained within, the substantive law itself, rather than codified as separate rules of procedure. The state rule at issue in *Garman*, while clearly a procedural requirement, had its basis in a statute conferring a substantive right—the ability to sue a governmental entity in Wyoming despite the presumption of qualified immunity—and, indirectly, the state constitution.[235] Commentators have suggested that there are other federal rules that are ripe for invalidation when state standards conflict. These include Federal Rule of Civil Procedure 4(k)[236] and federal rules or statutes governing sufficiency of the evidence or the allocation of issues to the judge or jury.[237] And of course, Justice

[233] *See In re* Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 676–77 (E.D. Pa. 2010); McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 743, 748–49 (N.D. Ohio 2010); Bearden v. Honeywell Int'l, Inc., No. 3:09-1035, 2010 WL 3239285, at *8, *10 (M.D. Tenn. Aug. 16, 2010); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *1–2 (N.D. Ohio July 12, 2010).

[234] The Tennessee restriction was found not within the statute, but in a state supreme court decision interpreting the provisions of that statute. *Bearden*, 2010 WL 3239285, at *8 (citing Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 308–11 (Tenn. 2008)). The Ohio restriction was contained in the text of the statute but did not exclude all class actions, instead permitting them if the violation was an act or practice declared to be "deceptive or unconscionable." *In re Whirlpool Corp.*, 2010 WL 2756947, at *1–2 (citing OHIO REV. CODE ANN. § 1345.09(B) (West 2011)). The Illinois statute excluded class action antitrust suits by a particular class of individuals: indirect purchasers. *In re Wellbutrin*, 756 F. Supp. 2d at 676 (quoting 740 ILL. COMP. STAT. 10/7(2) (2010)).

[235] Garman *ex rel.* Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 980–81 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 95 (2011) (citing WYO. STAT. ANN. § 1-39-113(a); WYO. CONST., art. 16, § 7).

[236] *See generally* Kelleher, *supra* note 37 (arguing that Rule 4(k) abridges, enlarges, or modifies the substantive right of amenability to jurisdiction, which is a substantive right conferred by the Due Process Clause of the Constitution).

[237] *See generally* Richard C. Worf, Jr., *The Effect of State Law on the Judge-Jury Relationship in Federal Court*, 30 N. ILL. U. L. REV. 109 (2009) (positing that, after *Byrd* and *Gasperini*, federal courts should follow state rules in these areas because they involve powerful substantive interests).

Stevens, in footnote nine of his concurring opinion, provided concrete examples of the "many ways in which seemingly procedural rules may displace a [s]tate's formulation of its substantive law."[238] These included statutes of limitations,[239] rules regarding burdens of proof,[240] and rules setting forth the standard of review for damages on appeal.[241]

Does the burden of proof at the summary judgment stage of litigation fall into the same category as these other state rules and statutes? Unlike the other state laws, rules, and standards that have been cited, any determination of the burden of proof on summary judgment is, at its core, an interpretation of a state procedural rule, not of a procedural provision within a state substantive law. To hold that the federal summary judgment rule should be invalidated under the REA where the state standard is different requires, then, an additional step beyond those taken by the lower courts after *Shady Grove*. This step, however, is warranted, because summary judgment involves issues of burdens of proof, sufficiency of the evidence, and allocation of issues between the judge and jury that are substantive in nature.

As discussed, states such as Tennessee, Kentucky, and Indiana that have declined to adopt the *Celotex* standard have changed the burden of production at the summary judgment stage of litigation.[242] The party moving for summary judgment cannot simply point to a lack of evidence presented by the non-moving party and prevail at the summary judgment stage; rather, the moving party actually has to offer evidence proving

[238] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1453 n.9 (2010) (Stevens, J., concurring).

[239] *Id.* ("[S]tatutes of limitations, although in some sense procedural rules, can also be understood as a temporal limitation on legally created rights; if this Court were to promulgate a federal limitations period, federal courts would still, in some instances, be required to apply state limitations periods.").

[240] *Id.* ("[I]f the federal rules altered the burden of proof in a case, this could eviscerate a critical aspect—albeit one that deals with *how* a right is enforced—of a State's framework of rights and remedies."). In response to this point, Justice Scalia conceded that burdens of proof may be among those "rare cases [in which] it may be difficult to determine whether a rule 'really regulates' procedure or substance." *Id.* at 1446 n.13 (plurality opinion).

[241] *Id.* at 1453 n.9 (Stevens, J., concurring) ("[I]f a federal rule about appellate review displaced a state rule about how damages are reviewed on appeal, the federal rule might be pre-empting a state damages cap.") (citing Gasperini v. Ctr. for Hunmanities, Inc., 518 U.S. 415, 427 (1996)).

[242] *See supra* Part II.B.

that the non-moving party cannot prove its case. This raises the burden beyond that which the moving party would have at trial, and even beyond what that party would have to show if it simply waited for trial and moved for a directed verdict. And while state courts have not always been completely forthcoming about their motivations for rejecting *Celotex* and raising the bar on summary judgment,[243] policies such as fairness and the benefits of having litigants' claims decided by the trier of fact are inherent within those decisions.[244]

Of course, the ultimate burden of proof in any civil action will still lie with the plaintiff; no variation on the summary judgment standard can change that. But the close relationship between summary judgment standards and both burdens of proof and the sufficiency of evidence lends itself to a strong argument that a state's summary judgment standard is part of the state's network of substantive rights and remedies, or at the very least is so intertwined with those rights that it serves to define their scope.[245] Once that determination is made, it would be easy for a court to follow Justice Stevens's interpretation of 28 U.S.C. § 2072(b) and hold that a federal court's selection of the *Celotex* standard instead of the state's standard would abridge, enlarge, or modify a substantive right conferred by the state. Thus, the limiting provision of the REA, apparently revived after *Shady Grove*, seems to provide a viable route to applying state summary judgment standards in diversity actions.[246]

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[243] Cornett, *supra* note 127, at 348–49 (opining on the basis for the Tennessee Supreme Court's decision to decline to follow *Celotex* and describing the rationale of other state courts that have done the same).

[244] The Kentucky Supreme Court was straightforward regarding its reasons for rejecting the *Celotex* standard, stating that it did not view the volume of litigation or backlog of cases to be a problem in the commonwealth, and that ensuring each litigant has his or her day in court is more important than the efficiency benefits that might accrue from an aggressive approach to summary judgment. *See* Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 482–83 (Ky. 1991).

[245] *See generally* Steinman, *supra* note 6, at 288–93 (considering how imposing the federal court summary judgment practice might abridge substantive rights).

[246] Professor Cooper provides the alternative view:

> [S]ummary judgment . . . (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.

Cooper, *supra* note 6, at 1263.

B. The Rules of Decision Act Approach

The alternative argument, concededly more difficult after *Shady Grove*, is that Federal Rule of Civil Procedure 56 does not control the issue in dispute, so a modified, or unguided, *Erie* analysis should be used. Professor Steinman has suggested that for broad Federal Rules such as Federal Rule of Civil Procedure 56 (summary judgment), Rule 23 (class actions), and Rule 8(a) (pleadings), it is not the Rule itself that sets forth the federal policy but the judicial interpretation of those rules.[247] In *Gasperini*, for example, the majority of the Court agreed that it was not Federal Rule of Civil Procedure 59 that controlled the standard for determining whether punitive damages were excessive, but rather the "judicial gloss" that federal appellate courts had placed on the question—that is, whether they "shocked the conscience."[248] Once the Court determined that the Federal Rule did not control, and that it could undertake the modified *Erie* analysis set forth in the first part of Chief Justice Warren's opinion in *Hanna*, it became easy to apply the state rule. Similarly, if it is indeed the judicial interpretation of Federal Rule of Civil Procedure 56 through case law, and not the rule itself, that has imposed the federal summary judgment standard, then this may make for "a surprisingly strong argument that a federal court's choice between state and federal law on the[ ] issue[ ] should be treated as an unguided one."[249] As in *Gasperini*, an unguided *Erie* analysis would weigh strongly in favor of applying the state summary judgment standard rather than the federal standard. Based upon the many practical differences between *Celotex* and the divergent state standards,[250]

[247] *See* Steinman, *supra* note 6; *see also* Burbank & Wolff, *supra* note 37, at 48–49 ("Unless a Federal Rule alleged to violate the Enabling Act actually makes a policy choice that Congress has had an opportunity to review . . . the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized and analyzed accordingly.").

[248] Steinman, *supra* note 6, at 283 (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429–30 (1996)); *see also* Burbank & Wolff, *supra* note 37, at 49 (asserting that the *Gasperini* majority was correct to refuse "to assimilate to Rule 59 a policy choice that its drafters did not make and that federal common law could not make for state law diversity cases").

[249] Steinman, *supra* note 6, at 282–83.

[250] *See supra* Part II.B.

it seems clear that applying the state law would undoubtedly promote the "twin aims" of *Erie*: to avoid forum shopping and to prevent the laws from being administered inequitably.[251]

Under this smoother path to the modified *Erie* analysis under the RDA, the state law almost certainly would be applied. However, while this approach may have found some support based upon *Gasperini*, its likelihood of success was sharply reduced by part II-A of Justice Scalia's opinion in *Shady Grove*, which obtained the votes of a majority of the Court. Federal Rule of Civil Procedure 56 is written broadly, and it may follow that its true meaning has been divined not by its language, but by judicial opinions such as *Celotex* that have interpreted it. However, the same could be said about Federal Rule of Civil Procedure 23, and a majority of the Court held in *Shady Grove* that, at least on the facts presented in that case, it was the Rule itself, and not the decisional law construing that Rule, that controlled. Given a choice between the RDA and REA arguments for applying state summary judgment standards, the REA appears to be the more persuasive of the two, particularly after *Shady Grove*.[252]

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[251] In pondering the effects of the Tennessee Supreme Court's decision in *Hannan*, Professor Cornett makes a classic argument for applying the state rule under a modified, or unguided, *Erie* approach:

> Given the now-inarguable divergence between state and federal summary judgment practice in Tennessee, forum selection decisions take on added significance. Plaintiffs need to think hard before filing in federal court if their case would be vulnerable to a *Celotex* motion. A plaintiff who needs time to develop proof, or whose expected proof may be comparatively weaker than the defendant's, is better off in Tennessee state court. Conversely, a defendant in such a case would be better off in federal court . . . .

Cornett, *supra* note 127, at 348; *see also* Lind, *supra* note 17, at 769 (observing that the net result of differing state and federal summary judgment standards "is to make it much more likely that a defendant in federal court will obtain summary judgment than a defendant in state court[,] [which] becomes a powerful motive for defendant forum-shopping and another reason why tort reformers want to redirect tort litigation to the federal forum"); Pertnoy, *supra* note 182, at 83 (arguing that Florida's distinct summary judgment standard "is an affront to the dual aims of the *Erie* doctrine").

[252] A recently unsuccessful petition for writ of certiorari emphasized the RDA argument rather than the REA argument. The petitioner argued that in determining whether state or federal law controls, "focus must be on the decisional law applying Rule 56 and that the decisional law does not amend or re-codify previous codification." Petition for Writ of Certiorari at 6, Medison Am., Inc. v. Preferred Med. Sys., L.L.C., 131 S. Ct. 101 (2010); *see also id.* at 9 ("All of these issues are addressed only in decisional law from federal and Tennessee courts, making the conflict

CONCLUSION

After *Shady Grove*, the modern *Erie* doctrine continues to be in a state of flux. The replacement of the most influential vote in *Shady Grove*, Justice Stevens, with Justice Elena Kagan makes the outcome of the Court's next *Erie* case even less predictable.[253] Moreover, the voting patterns in *Shady Grove*, which belied the conventional alliances on the Court, make it difficult to ascertain the direction that the Court's *Erie* jurisprudence might take. Suffice it to say that, for now, a majority of the Court is inclined to construe a Federal Rule of Civil Procedure broadly to displace arguably competing state rules. However, a single concurring voice in *Shady Grove* has opened the door for invalidation of a federal rule where it abridges, enlarges, or modifies a substantive state right, any possibility heretofore only existed in theory. A court's decision to grant or deny a summary judgment motion involves issues such as burdens of proof, sufficiency of the evidence, and the allocation of responsibilities between judge and jury, thus arguably making it either part of the network of substantive rights conferred by states on their citizens or so tied up with those rights as to render it functionally substantive. This makes summary judgment an ideal battleground for the next step in the Court's *Erie* jurisprudence. It remains to be seen whether, in the meantime, the lower federal courts will continue to walk through the door that Justice Stevens's REA analysis has opened.

between state and codified federal law existing in *Hanna*, nonexistent in this case, making the REA inapplicable."). Several of the lower court decisions adopting Justice Stevens's REA analysis as controlling, and applying state rules based upon the REA approach, have been issued since the Court denied the cert petition in *Medison*.

[253] Although Justice Kagan taught Civil Procedure at Harvard Law School, none of her academic writings, which focus primarily on the First Amendment and Administrative Law, shed light on her *Erie* leanings. *See* Tom Goldstein, *9750 Words on Elena Kagan*, SCOTUSBLOG (May 8, 2010, 1:00 AM), http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/.