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SYMPOSIUM: THE FUTURE OF SUMMARY JUDGMENT

FOREWORD

**SUMMARY JUDGMENT AND THE INFLUENCE OF
FEDERAL RULEMAKING**

*Bernadette Bollas Genetin**

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I. INTRODUCTION

Summary judgment, the acknowledged “workhorse” of federal pretrial practice,¹ is again under scrutiny. It certainly performs the yeoman-like task of sorting cases that deserve trial from those that do not and, hence, it can work to conserve scarce judicial and jury resources.² To the extent that it identifies claims that are factually unsupported, it serves an important, indeed, vital role in the pretrial process. Summary judgment has, however, become the subject of far-reaching criticism, including assertions that judges too readily employ

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1. EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 1-2 (Thompson 3rd ed. 2006) (citing Robert K. Smits, *Federal Summary Judgment: The “New” Workhorse for an Overburdened Federal System*, 20 U.C. DAVIS L. REV. 955 (1987)).

2. Edward J. Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1167 (2010).

summary judgment when issues of fact remain;³ that summary judgment violates the requirements of the Seventh Amendment;⁴ that the tool is used disparately in different geographical regions and in different types of cases⁵ and that such variation is played out with particularly harsh consequences for plaintiffs in employment and civil rights suits;⁶ that judges consider summary judgment motions in a mechanistic manner that often results in a “slice and dice” analysis or “legal and factual carving” that “sees less in the parts than in the whole by subjecting the nonmovant’s ‘evidence’ to piece-by-piece analysis”;⁷ and that the summary judgment process itself is inefficient.⁸

Current criticism of summary judgment practice, however, is, if not counterbalanced, at least met in some corners by calls for continued, but more tempered, use of summary judgment⁹ and even for increased use of summary judgment.¹⁰ Moreover, at the same time that commentators

3. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1065-69 (2003); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1898 (1998); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229 (1993); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 84, 89-90 (1990).

4. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140-45 (2007); Miller, *supra* note 3, at 1074-1132.

5. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592-93, 618 (2004).

6. See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520, 548-50 (2010) [hereinafter Schneider, *Disparate Impact*] (citing Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr. to Judge Michael Baylson 2-3 (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/\\$file/insumjre.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf)); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709-11 (2007) [hereinafter Schneider, *Dangers of Summary Judgment*]. Further, Kevin M. Clermont and Stewart J. Schwab have concluded that plaintiffs in employment discrimination cases in federal court are treated less favorably than other plaintiffs in pretrial, trial, and appellate phases of litigation and that these plaintiffs are now filing fewer such cases in federal court. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 131-32 (2009).

7. Burbank, *supra* note 5, at 624-25; McGinley, *supra* note 3, at 228-36; accord Schneider, *supra* note 6, at 544.

8. See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522-27 (2007); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 172 (1988).

9. See, e.g., Brunet, *supra* note 2, at 1167-68.

10. See, e.g., Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197, 1199-2000, 1202-03, 1241-44 (2010); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

question seriously its implementation, summary judgment is contributing to the reinvention of other pretrial tools, most notably (but by no means only), the Rule 12(b)(6)¹¹ motion to dismiss.¹² Additionally, summary judgment has been the subject of recent rulemaking, both in the general restyling of the Federal Rules of Civil Procedure and in a separate rulemaking project to improve Rule 56.¹³ Thus, the Section on Litigation of the Association of American Law Schools devoted its most recent Annual Meeting program to consideration of the future of summary judgment. This symposium issue provides perspectives on emerging implementation strategies and roles for summary judgment. The articles also reveal the tendency of changes in summary judgment law to emerge through interpretation, often of trial and appellate courts, rather than through intentional change of Rule 56 through the Rules Enabling Act process.

Summary judgment has undergone multiple incarnations. Conceived in England and carried forward in early America as a tool that would primarily assist plaintiffs in terminating one-sided and undisputed cases before trial,¹⁴ summary judgment was intended to reduce “delay and expense resulting from frivolous defenses”¹⁵ and, thus, early served the efficiency and fairness premise of procedure.¹⁶ The original Federal Rules saw the birth of an expanded summary judgment device in Rule 56 that would be available to both plaintiffs and defendants,¹⁷ but would still serve to prevent the delay, expense, and inconvenience of proceeding through trial when one party proposed “sham claims or defenses.”¹⁸ Over the years, summary judgment received mixed reaction in the federal courts, with some judges using it aggressively and others approaching the grant of summary judgment based on a preview of the record with much more caution.¹⁹ The

11. FED. R. CIV. P. 12(b)(6).

12. See, e.g., Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1189-92 (2010).

13. FED. R. CIV. P. 56.

14. See, e.g., Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929); Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA. L. REV. 91, 97 (2002); Burbank, *supra* note 5, at 595; Burbank, *supra* note 12, at 1193.

15. See, e.g., Friedenthal and Gardner, *supra* note 14, at 97; Burbank, *supra* note 5, at 600-03.

16. Burbank, *supra* note 5, at 600-03; Burbank, *supra* note 12, at 1191.

17. Burbank, *supra* note 5, at 600-03.

18. Friedenthal & Gardner, *supra* note 14, at 97-98; Burbank, *supra* note 5, at 594-600.

19. See, e.g., Friedenthal & Gardner, *supra* note 14, at 98.

Supreme Court, ultimately, through its 1986 trilogy,²⁰ elevated summary judgment from a “disfavored procedural shortcut”²¹ to a position of pretrial prominence. Indeed, summary judgment has been identified as the central element in federal pretrial practice: “Summary judgment lurks over pleading, Rule 12(b)(6) motions to dismiss, rule 11, discovery, and mediation or dispute resolution if a case is diverted to a ‘neutral third party,’ for the question is always what will happen on summary judgment. It impacts and intertwines with every aspect of litigation. . . . The threat of summary judgment shapes settlement even in advance of a motion being filed. . . .”²² And defendants, of course, have come to use the summary judgment tool much more frequently than plaintiffs.²³

Through this odyssey, summary judgment has evolved from a predominantly plaintiff’s side tool to be used in limited instances of clearly one-sided and undisputed cases to a pretrial weapon deployed most often by defendants and too often, in the view of some, to deprive a party of a right to trial when issues of fact may remain.²⁴ In some respects, then, summary judgment has come to appear not so much as a workhorse employed in the task of efficient pretrial sorting, but as something of a Trojan horse that has been brought into the federal pretrial encampment and that is used to isolate factually insufficient claims, but that can be and is sometimes also deployed to deny trial on potentially meritorious claims, based on an early preview of the evidence.

20. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

21. *Anderson*, 477 U.S. at 327. This oft-quoted characterization of pre-trilogy treatment of summary judgment approaches hyperbole, as Professor Burbank points out that the available empirical data does not show a sharp increase in use of summary judgment following the Supreme Court’s 1986 trio of decisions. Instead, Professor Burbank notes that the increased role of summary judgment began in the 1970s. See Burbank, *supra* note 5, at 620-21; see also Stempel, *supra* note 8, at 159-60.

22. Schneider, *Disparate Impact*, *supra* note 6, at 539-40; see also Bronsteen, *supra* note 8, at 523-24 (recognizing summary judgment as a “pillar of our system,” along with trial and settlement); Miller, *supra* note 3, at 1016 (noting that summary judgment has “moved to the center of the litigation stage”). Professor Schneider perceives, however, that summary judgment may lose its central role to the revitalized Rule 12(b)(6) motion to dismiss under the plausibility standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Schneider, *Disparate Impact*, *supra* note 6, at 530-31, 539-40.

23. Burbank, *supra* note 12, at 1190; Friedenthal & Gardner, *supra* note 14, at 103 (noting that defendants bring three-fourths of all motions for summary judgment and that defendants’ motions are granted more often than plaintiffs’ motions).

24. See, e.g., Schneider, *Disparate Impact*, *supra* note 6, at 542-44; Miller, *supra* note 3, at 1065-69; Wald, *supra* note 3, at 1898; McGinley, *supra* note 3, at 229; Stempel, *supra* note 8, at 159.

In this review of the evolving role of summary judgment, Professor Steven Gensler provides insight into whether Rule 56(c) give judges discretion to deny summary judgment even if the preconditions of Rule 56(c) have been met, i.e., if there is no genuine issue of material fact and judgment as a matter of law could be entered,²⁵ and Professor Edward Brunet engages directly the important debate regarding intemperate use of summary judgment to deny potentially meritorious claims, contending that currently available “safeguards” can prevent inappropriate grant of summary judgment.²⁶ Professor Stephen Burbank and Professor Linda Mullenix enlarge the discussion to consider as well the impact of summary judgment on other aspects of the interconnected federal procedural system. Professor Burbank explores the increasing doctrinal linking of the Rule 12(b)(6) motion to dismiss and summary judgment and the impact of the Supreme Court’s decisions in *Twombly*²⁷ and *Iqbal*²⁸ on the future of rulemaking.²⁹ Professor Mullenix evaluates the desirability of increasing the tasks assigned to the sturdy summary judgment workhorse, at least in the area of complex litigation, by including in the Federal Rules explicit authorization for courts to consider summary judgment on the named plaintiffs’ claims before class certification.³⁰ Finally, Professor Jeffrey Cooper reviews diverging Supreme Court opinions to provide insight on whether, under the *Erie* doctrine, Federal Rule 56 will continue to control in diversity cases.³¹

Pervading these discussions is the appropriate balance of use of summary judgment to further the efficiency canon of procedure and of the corresponding need to temper its use to ensure access and accuracy, or what Professor Spencer would refer to as the ongoing dialectic between the currently ascendant “restrictive ethos” in federal procedure and federal procedure’s core liberal ethos, which would privilege court access and accuracy over efficiency.³² A dominant subtext of the articles is the interplay between summary judgment and federal

25. Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139 (2010). This article was chosen for inclusion in the symposium from a Call for Papers issued by the Section on Litigation of the Association of American Law Schools.

26. Brunet, *supra* note 2, at 1168.

27. *Twombly*, 550 U.S. 544.

28. *Iqbal*, 129 S. Ct. 1937.

29. Burbank, *supra* note 12.

30. Mullenix, *supra* note 10.

31. Jeffrey O. Cooper, *Summary Judgment in the Shadow of Erie*, 43 AKRON L. REV. 1245 (2010). This article was chosen for inclusion in the symposium from a Call for Papers issued by the Section on Litigation of the Association of American Law Schools.

32. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353-57, 366-68 (2010).

rulemaking, including the impact on summary judgment of federal rulemaking, the effect of the transsubstantive assumption of the Rules Enabling Act, and the limits of the substantive rights prohibition of the Rules Enabling Act.

II. SUMMARY JUDGMENT IN PRACTICE: IDENTIFYING THE STATUS QUO AND ASSESSING STRATEGIES TO PREVENT IMPROVIDENT GRANT OF SUMMARY JUDGMENT

Articles by Professor Steven Gensler and Professor Edward Brunet address, respectively, recent rulemaking regarding summary judgment and the criticism that current implementation of summary judgment can lead to denial of the right to trial on meritorious claims.³³ Professor Gensler explores the effect of recent rulemaking amendments on the debate regarding whether Rule 56 permits a measure of judicial discretion to deny summary judgment even when the record reveals, on undisputed facts, that judgment is appropriate as a matter of law.³⁴ He concludes that although pending amendments to Rule 56 will eliminate express textual reference to the issue, those amendments do not eliminate judicial discretion to deny summary judgment, but, instead, maintain the level of discretion that was available before the restyling change to Rule 56.³⁵ Professor Brunet's article acknowledges the criticism that current implementation of summary judgment can result in dismissal of meritorious cases, but concludes that the efficiency gains associated with appropriate use of summary judgment justify attempts to remedy defects in current practice.³⁶ He assesses available techniques to

33. Gensler, *supra* note 25; Brunet, *supra* note 2.

34. See Friedenthal & Gardner, *supra* note 14, at 104-09 (illustrating that, as a practical matter, judges do deny summary judgment in some cases in which the Rule 56 standard for summary judgment has been met).

35. Gensler, *supra* note 25, at 1142, 1160-62 & n.16. Professor Gensler concentrates, in *Must, Should, Shall*, on the impact, if any, of rulemaking changes to Rule 56 on judicial discretion to deny summary judgment when summary judgment is otherwise applicable. He concludes that two recent sets of rulemaking changes to the language of Rule 56 do not alter the judge's discretion. He also concludes that, as a normative matter, judges should have discretion to deny summary judgment in at least some categories of cases, but he reserves his detailed discussion of those categories for a sequel to this article. See Steven S. Gensler, *In Defense of the Trial Court's Limited Discretion to Deny Summary Judgment* (forthcoming 2011). Commentators, Jack Friedenthal and Joshua Gardner, have previously discussed a variety of circumstances in which courts have declined, as a discretionary matter, to grant summary judgment; they have staked out a view that summary judgment should be discretionary; and they have advocated inclusion of trial court discretion to deny summary judgment in the text of Rule 56. See Friedenthal & Gardner, *supra* note 14, at 95, 104-09, 125-30.

36. Brunet, *supra* note 2, at 1167-68.

avoid inappropriate grant of summary judgment, concluding that protections set forth in the text of Rule 56 are the most effective.³⁷

Professor Gensler's article, *Must, Should, Shall*,³⁸ examines the Advisory Committee's recent forays into the restyling and improvement of Rule 56 – efforts that were to leave the standard for summary judgment unchanged and unaddressed by Rule.³⁹ He focuses on the short-lived textual change from language providing that summary judgment “shall be rendered” if the record reveals “no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law,” to language stating that summary judgment “should” be rendered if those conditions pertain, and back, again, to “shall.”⁴⁰ The 2007 change to include “should” originated in the Style Project,⁴¹ in which the inherently ambiguous “shall” was to be excised from all restyled Rules and replaced with “must,” “may,” or other appropriate and unambiguous language.⁴² The drafters of restyled Rule 56 settled on the use of “should” as a replacement for “shall” in Rule 56 with the expectation that “should” would continue the then-existing level of judicial discretion to deny summary judgment when the required Rule 56 showing had been made.⁴³

As part of a subsequent, separate rulemaking project to improve Rule 56, Professor Gensler notes, the Advisory Committee solicited comment on the restyling change from “shall” to “should.”⁴⁴ It received

37. *Id.* at 190-91.

38. Gensler, *supra* note 25, at 1139.

39. The mission of the Style Project, which resulted in changing “shall” to “should,” was to retain the existing meaning of the Federal Rules of Civil Procedure, but to import clarity, consistency, and modern usage into the Rules. See Gensler, *supra* note 25, at 1142-43 (citing Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1761-63, 1771-72, 1780 (2004)). A subsequent rulemaking project, “the Rule 56 Project,” was initiated to resolve issues that had surfaced regarding Rule 56 during the Style Project, but that were outside the scope of that project, including variations between practice and the text of Rule 56. The Rule 56 Project, in contrast to the Style Project, had authority to address the *standard* for summary judgment, but the Advisory Committee elected not to do so. See Gensler, *supra* note 25, at 1150-52.

40. Gensler, *supra* note 25, at 1139-41.

41. For a discussion of the Style Project, see Cooper, *supra* note 39; Gensler, *supra* note 25, at 1142-43.

42. Gensler, *supra* note 25, at 1143-48.

43. *Id.* at 1147-48, 1160-631 (noting that when the Advisory Committee chose to use “should” in restyled Rule 56, they added, in an explanatory Committee Note, that such discretion should seldom be used, and concluding that restyled Rule 56 and the Advisory Committee Note together reflected the Committee's belief that the language “shall be rendered” included limited discretion to deny summary judgment).

44. *Id.* at 1154-55. The separate “Rule 56 Project” included a set of amendments intended to “improve” Rule 56, which pursued three primary goals: (1) to establish uniform motion and

a substantial volume of comments, and those comments reflected significant disagreement,⁴⁵ two factors that are sufficient to derail rulemaking changes, as the Rules Enabling Act process is currently implemented.⁴⁶ Faced with substantial disagreement and lack of

briefing procedures (ultimately referred to as the “point-counterpoint” amendment) that would require the moving party to file a statement of material facts that are not in dispute, the nonmoving party to respond to the statement of purportedly uncontested facts, and the movant to file a final submission; (2) to address explicitly in the Rule common practices nationwide that were not codified, such as the practice to permit partial summary judgment; and (3) to continue to permit the standard for summary judgment to be governed by judicial decision. *Id.* at 1153. Perhaps the most controversial of these amendments was the so-called “point-counterpoint” proposal, which would have included in Rule 56 detailed requirements for parties to assert, support, and contest the statements of fact offered in support of or in opposition to a summary judgment motion, and which the Advisory Committee ultimately abandoned. *See, e.g.,* Schneider, *Disparate Impact*, *supra* note 6, at 521-22 & n.22, 542, 557-61.

45. Gensler, *supra* note 25, at 1155-57 (citing Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure, at xix-xx (Feb. 2005)). Those favoring use of the term “must” emphasized, among other issues, the need for unequivocal and mandatory language to countermand a “persistent reluctance” of federal judges to grant summary judgment. Those favoring continued use of “should” asserted, *inter alia*, that federal judges are, to the contrary, too quick to grant summary judgment.

46. *See, e.g.,* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 326-27 (2008) [hereinafter Bone, *Making Effective Rules*] (noting that the Advisory Committee’s desire for consensus tends to push rulemakers toward highly general rules); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 916 (1999) [hereinafter Bone, *Process of Making Process*] (noting that the search for consensus can paralyze rulemaking and suggesting that the likelihood of consensus on important procedural issues is slim); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1963-65, 2002-18 (2007) [hereinafter Bone, *Who Decides?*] (concluding that “delegating discretion allows rulemakers to dodge difficult questions and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate”); *see also* Panel Eight: *Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. 135, 138 (2004) (Honorable John L. Carroll) (noting the “firestorm” over the potential amendments to the class action rule and concluding “[s]o I guess the thesis of all this is the Rules process is really consensus, and if you don’t have a consensus, there is really no point in jumping into the Rules process as a vehicle for change”); *but see* Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 222-24 (2010) (indicating that at times the Advisory Committee will adopt “revolutionary” or “controversial” change in whole and at other times it will move incrementally). Commentators have also, in the context of particular rulemaking, recognized that the Advisory Committee will abandon rulemaking in the face of controversy and absent consent. *See, e.g.,* Robert G. Bone, “*To Encourage Settlement*”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1608-10 (2008) (discussing abandonment of successive, proposed changes to Rule 68 in response to firestorm of criticism and continuing controversy); Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 228 (1997) (discussing effect of amendments to Rule 11, which ultimately became effective, on rulemaking power struggles); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 852-55 (1991) (discussing the likely controversy regarding proposed revisions to Rule 11); Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY LAW & POL’Y REV. 243, 271-72 &

consensus on either “must” or “should,” the Advisory Committee resolved the disagreement by return to the original “shall,” concluding that the phrase “shall be entered” as used in Rule 56 had, through usage and interpretation, acquired a special meaning that could not be safely altered.⁴⁷

Professor Gensler emphasizes that both the restyling change to “should” and the pending restoration of “shall” in Rule 56(c) were intended to maintain, rather than alter, the level of judicial discretion to deny summary judgment.⁴⁸ Thus, after the Rule 56 language is returned to the original “shall be entered” on December 1, 2010, judges will have the same level of discretion as before the restyling of Rule 56.⁴⁹ The trickier task is to define the pre-restyling level of judicial discretion, since neither the text of Rule 56 nor Supreme Court case law provides a definitive answer. Commentators Friedenthal and Gardner have previously established that many courts, in fact, exercise discretion to deny summary judgment even when the requirements of Rule 56 have been met.⁵⁰ They have also argued that trial courts should have this discretion in some cases.⁵¹ Professor Gensler will also conclude, in a sequel to *Must, Should, Shall*, that trial courts should have a limited discretion to deny summary judgment.⁵² That limited discretion to deny summary judgment when its grant would otherwise be appropriate would respond to some current criticisms of summary judgment: it would maintain and perhaps enhance the efficiency rationale of

n.88 (2001) (noting “firestorm” touched off by proposed amendments to include settlement classes in Rule 23).

47. Gensler, *supra* note 25, at 1158-59; Kravitz, *supra* note 46, at 221.

48. Gensler, *supra* note 25, at 1160-62.

49. *Id.*

50. Friedenthal & Gardner, *supra* note 14, at 95, 104-09 (noting that courts have exercised discretion to deny summary judgment in instances including cases involving (1) complicated facts, lengthy affidavits, and numerous depositions; (2) complex questions of first impression; (3) situations in which summary judgment would not expedite resolution of the case; and (4) inadequacies in the record); *see also* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 993-94 & n.145 (1998); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 275 (1990).

51. Friedenthal & Gardner, *supra* note 14, at 95, 125-30. Friedenthal and Gardner suggest a balancing test that would balance the interest of the plaintiff and defendant and the efficiency concerns of the court. *Id.* They advocate that a judge should consider factors, including whether the claim involves motive, state of mind, or credibility; the complexity of the issue; and whether issues ripe for summary judgment are intertwined with issues for which summary judgment is not appropriate, i.e., whether any summary judgment granted could ultimately be partial only. The judge would have authority to deny summary judgment when the “matter is better suited to adjudication by trial rather than through summary judgment procedures.” *Id.*

52. Gensler, *supra* note 35.

summary judgment⁵³ by permitting a judge to screen most claims for early dismissal whose outcome is fixed as a matter of law, but it would also provide a safety valve of judicial discretion to deny summary judgment when the benefits of reserving judgment until presentation of the merits at trial outweigh the cost and delay of waiting until trial.⁵⁴ Moreover, inclusion of a limited discretion to deny summary judgment in the text of Rule 56 would provide needed guidance to the courts.⁵⁵

The resolution of the “must, should” dispute by failing to decide the issue and by returning to the pre-restyling “shall,” however, presents in microcosm the rulemakers’ increasing tendency to abandon proposed procedural Rule change if amendment cannot be accomplished by consensus.⁵⁶ In the Rule 56 project alone, Professor Gensler notes that rulemakers declined to consider including the standard for summary judgment in the Rule (in part because the rulemakers concluded that such an attempt would likely draw fire);⁵⁷ abandoned the controversial “point-counterpoint” proposal for lack of consensus,⁵⁸ and proposed return to the “*shall* be entered” language to obviate the need to resolve

53. Providing discretion to deny summary judgment may, in some cases, result in greater efficiency, and Friedenthal and Gardner propose that Rule 56 explicitly provide to judges the discretion to deny summary judgment when it would “be cost-efficient for both the parties and the court.” Friedenthal & Gardner, *supra* note 14, at 95, 115-16.

54. Friedenthal & Gardner, *supra* note 14, at 104.

55. Friedenthal & Gardner, *supra* note 14, at 95 (noting that “judges should be given guidelines for deciding when a denial of summary judgment would be appropriate”); *see also* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One-Size-Fits-All” Assumption*, 87 DENV. U. L. REV. 377, 391 (2010) [hereinafter Subrin, *Transsubstantive Procedure*] (concluding that the “open-textured,” general rules adopted to meet the transsubstantive assumption of the Federal Rules give “little direction to judges and in turn, to lawyers”); Bone, *Who Decides?*, *supra* note 46, at 1963-65, 2002-18 (contending that rulemakers are in a better position to evaluate procedural options than trial judges in the context of individual cases, and rulemakers ought to craft Rules that provide more guidance to trial judges); Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 182 (2007) [hereinafter Subrin, *Simplified Procedure*]; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988) (emphasizing that the trend away from explicit policymaking in procedural Rules and toward Rules that permit ad hoc decisionmaking by trial judges sacrifice simplicity and predictability); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997) (noting that the open-textured Rules in the 1983 amendments to the Federal Rules gave judges broad discretion over pretrial but led to criticism that such Rules prevented predictability and uniformity).

56. *See, e.g.*, Bone, *Process of Making Process*, *supra* note 46, at 916; *see also generally supra* note 46.

57. Gensler, *supra* note 25, at 1151-52 (discussing as well the 1992 abandonment, for lack of consensus, of attempts to revise Rule 56 to include, among other items, a restatement of the standard for summary judgment).

58. *Id.* at 1160; Schneider, *Disparate Impact*, *supra* note 6, at 556-62.

the “must, should” disagreement.⁵⁹ Professor Bone has illustrated that the rulemakers seek consensus among competing interest groups, and, failing that, adopt general procedural Rules with vague standards that leave the “hard questions” to judges in the context of specific cases.⁶⁰ Other commentators have, likewise, noted that procedural change under the Rules Enabling Act has come virtually to require consensus.⁶¹ In fact, Professor Mullenix, in her contribution to this symposium, proposes amending the Federal Rules explicitly to authorize summary judgment before certification of a class action, and she hastens to add that, at this point, Rule revision to authorize pre-certification summary judgment motions would “consist of little more than codification of existing practice.”⁶² Rulemakers also, as in the “must, should” context, choose to make no decision at all, which similarly privileges trial court discretion, and, in so doing, encourages procedural disuniformity.⁶³

In short, the Rules Enabling Act process has come to work best when it codifies existing practice,⁶⁴ makes stylistic changes that consciously avoid change to content,⁶⁵ makes housekeeping or claims processing changes, as with the recent time computation amendments;⁶⁶ or alters Rules in ways that can otherwise be reached by consensus. Failure to amend Rules, absent consensus, however, has far-reaching

59. Gensler, *supra* note 25, at 1158.

60. See, e.g., Bone, *Making Effective Rules*, *supra* note 46, at 326-27; Bone, *Process of Making Process*, *supra* note 46, at 916-17; see also Bone, *Who Decides?*, *supra* note 46 at 1961-65.

61. See also generally *supra* note 46.

62. Mullenix, *supra* note 10, at 1242.

63. See Subrin, *Transsubstantive Procedure*, *supra* note 55, at 391 (noting that the discretionary Federal Rules give little guidance to judges, thus, empowering different judges to treat similar cases differently and precluding uniformity); Burbank, *supra* note 55, at 715; Burbank & Silberman, *supra* note 55, at 675.

64. See, e.g., Mullenix, *supra* note 10, at 1212-14, 1246 (emphasizing that her proposal to provide authorization in the Federal Rules for summary judgment before class certification would amount to textual recognition of existing practice). Additionally, Professor Gensler notes that one of the purposes of the Rule 56 project (which followed the Style Project) was to align the text of Rule 56 with “everyday summary-judgment practice.” Gensler, *supra* note 25, at 1147-58, 1160-62.

65. Style Projects have been completed with respect to the Appellate Rules and Criminal Rules. Cooper, *supra* note 39, at 1762 & n.3. The restyled Appellate and Criminal Rules became effective on December 1, 1998, and December 1, 2002, respectively. *Id.* A restyling project regarding the Federal Rules of Evidence is proceeding. For a comparison of the existing and the proposed restyled Federal Rules of Evidence, see http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

66. Federal Rules of Civil Procedure that were amended to make changes to computation of time are listed at the following site: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/Rules120109.aspx>. A listing of parallel amendments to statutory time periods is available at the following site: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/HR1626.pdf>.

consequences, both for the Rule at issue, here Rule 56, and for the federal rulemaking enterprise in general. Failure to decide the “must, should”/judicial discretion issue by Rule amendment, for example, may contribute to the continued substantial variation in summary judgment practice in different parts of the country and in different types of cases,⁶⁷ as it continues to authorize judges to make normative decisions, in the context of particular cases, about whether they have discretion to deny summary judgment when it is otherwise technically available, and, if so, when to exercise such discretion. Additionally, the failure continues a trend of remitting procedural Rule change to ad hoc trial court decisionmaking in the context of individual cases, which presents the following downsides: the common law process is less democratic than the congressionally created Rules Enabling Act process; trial judges have less ability, in the context of specific cases, to gather the information regarding the competing views that is required to make optimal normative choices; and the general Rules adopted by the Advisory Committee will be transsubstantive in language only, but will result in varying application, at the discretion of trial judges.⁶⁸ Of equal importance, Rule-based guidance regarding the circumstances under which trial courts may appropriately consider discretionary denial of summary judgment would provide guidance to appellate courts and enable appellate courts more effectively to review the discretionary district court decision, which would enhance the predictability and uniformity of summary judgment.

67. Burbank, *supra* note 5, at 592-93, 618; Burbank, *supra* note 55, at 715.

68. Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 536, 543, 557 (2009) [hereinafter Burbank, *Dilemmas of “General Rules”*]; Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 918 (2009); Subrin, *Simplified Procedure*, *supra* note 55, at 182; Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473-75 (1987) [hereinafter Burbank, *Costs of Complexity*]; Bone, *Who Decides?*, *supra* note 46, at 1986-2001. Moreover, we have recently learned, in our *Twombly* and *Iqbal* lessons, that making consensus an unstated prerequisite to amendment under the Rules Enabling Act process may ultimately mean (absent the infrequent Rule change by congressional legislation or implementation of a means for cooperative Court-congressional rulemaking in a particular instance) that controversial procedural Rule change may be accomplished only by the Supreme Court acting in its adjudicatory capacity. Burbank, *Dilemmas of “General Rules,” supra* at 562. Rule change accomplished by Court interpretation, however, is inferior to Rules promulgated under the Rules Enabling Act process and for many of the same reasons that ad hoc trial court decision making is inferior: the Court, acting in its adjudicatory capacity, has less institutional ability to obtain sufficient information; less institutional authority to make prospective policy decisions; and no institutional capacity to make substantive decisions. *See, e.g.*, Burbank, *Dilemmas of “General Rules,” supra* at 537, 561; Burbank, *Costs of Complexity, supra* at 1473-75; Burbank, *supra* note 55, at 715-16; Bone, *supra* at 918.

A Rule-based conclusion that judges have discretion to deny summary judgment in some instances when summary judgment is technically warranted or that they have no such discretion – that is, Advisory Committee resolution of the “must, should” disagreement – would have led to greater uniformity in application of Rule 56 and much needed guidance to federal trial and appellate judges. As Professor Gensler concludes, however, for now, the complex questions regarding whether Rule 56 confers discretion to deny summary judgment, and, if so, how much and in what circumstances, await further trial, appellate, and, perhaps, ultimately, Supreme Court consideration.⁶⁹

In assessing currently available techniques to harness summary judgment, Professor Brunet concludes, in a similar vein, that inclusion of such techniques in the text of Rule 56 is essential to consistency of application and, thus, effectiveness. In *Six Summary Judgment Safeguards*,⁷⁰ Professor Brunet critiques six potential “safeguards” that may prevent inappropriate grants of summary judgment: (1) judicial discretion to deny summary judgment based on a single issue of disputed fact; (2) the Rule 56(f) “time out” procedure that permits additional discovery before proceeding to summary judgment; (3) the requirement of de novo appellate review; (4) the requirement to weigh inferences in the light most favorable to the non-moving party; (5) the potential ability of a nonmovant to provide contradictory evidence in inadmissible form; and (6) case law “cautions” against inappropriate use of summary judgment in particular categories of cases, including antitrust, negligence, and civil rights cases.

Professor Brunet reminds that summary judgment, though under attack, advances important policies, including screening meritless cases; conserving expensive and scarce trial and jury resources; promoting and encouraging settlement; and promoting efficiency.⁷¹ Conceding that summary judgment may be misused, he nevertheless finds reason for optimism in summary judgment practice, emphasizing that existing protections can deter improper grants of summary judgment and facilitate its even-handed application.⁷² He would rank the identified safeguards on a scale of effectiveness, ranging from significant impact in deterring inappropriate grants of summary judgment to relative ineffectiveness in deterring misuse. He ranks, as significant deterrents of inappropriate grants of summary judgment, two protections that find

69. Gensler, *supra* note 25, at 1163.

70. Brunet, *supra* note 2, at 1165.

71. *Id.* at 1167-68.

72. *Id.* at 1168, 1186-88.

textual support in Rule 56: judges, he emphasizes, regularly use their text-based authority to deny summary judgment when a single issue of material fact is in dispute,⁷³ and they also have employed the Rule 56(f) “time out” procedure expansively to prevent premature grants of summary judgment.⁷⁴

Professor Brunet, thus, provides a central insight: the protections that will be most effective in curbing inappropriate grants of summary judgment and encouraging greater uniformity in summary judgment practice are those that are included in the text of the Rule.⁷⁵ Pragmatically, when the text of Rule 56 provides the shield against intemperate use of summary judgment, judges take heed.⁷⁶

Indeed, Professor Brunet is less sanguine about the non-text-based willingness of some courts to extend the first safeguard – denial of summary judgment if there is a single, disputed issue of material fact – to circumstances in which summary judgment submissions reveal no genuine issue of material fact and that judgment may be entered as a matter of law.⁷⁷ This is, of course, the “must, should”/judicial discretion dispute that Professor Gensler discusses and that the Advisory Committee declined to resolve.⁷⁸ Friedenthal and Gardner have established that some courts (and, they contend, the majority of courts⁷⁹) do, in fact, employ discretionary denial of summary judgment in some

73. *Id.* at 1168-69, 1186, 1188.

74. *Id.* at 1177-79, 1187-88. Professor Brunet cautions, however, that the currently effective Rule 56(f) time-out procedure may be weakened if courts respond to increasing proposals to institute a parallel “time-out” to permit discovery in Rule 12(b)(6) motion practice, in order to ameliorate the plausibility requirement of *Twombly* and *Iqbal*. Brunet, *supra* note 2, at 1180. *See also* Bone, *supra* note 68, at 932-35; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dissmissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 68-69, 108-09, 123-38 (2010); Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24, 33-36 (2010), <http://www.uiowa.edu/~ilr/bulletin.htm>.

75. Brunet, *supra* note 2, at 1169, 1178-79. *See also* Bone, *Who Decides?*, *supra* note 46, at 1964-65, 1967-70, 1986-2002 (making the case for Rule-based limits on judicial discretion, in the form of (1) eliminating unlimited discretion and replacing it, when possible, with “strict rules strictly enforced”; (2) narrowing options of trial judges, by providing factors to balance and weights respecting that balance; and (3) providing general principles to assist trial judges in making normative choices between competing values).

76. *See, e.g.*, Bone, *Who Decides?*, *supra* note 46, at 1970 (emphasizing that current Rules put too little restraint on normative decisions of trial judges, but recognizing that the tradition of trial court discretion is so strong that trial judges will sometimes act contrary to clear limits imposed in Rules or case law).

77. Brunet, *supra* note 2, at 1169-70.

78. *See supra* notes 38-55 and accompanying text.

79. Friedenthal & Gardner, *supra* note 14, at 104, 125-26.

instances in which the parties' submissions would justify its grant.⁸⁰ Moreover, they argue that, given the current judicial receptivity to granting summary judgment, it is important that judges have discretion to deny summary judgment in some cases when it would otherwise be technically available,⁸¹ and they have proposed amending Rule 56 to reflect this discretion.⁸² They also conclude that a limited discretionary authority to deny summary judgment could serve both to prevent inappropriate grant of summary judgment and to enhance the efficiency of summary judgment.⁸³ Given Professor Brunet's conclusion that Rule-based summary judgment safeguards are the most effective in preventing inappropriate denials of summary judgment, the Advisory Committee's failure to resolve the "must, should"/judicial discretion debate looms as an opportunity lost.

Professor Brunet would rank the availability of de novo review next in terms of effectiveness and of "moderate" effect in deterring inappropriate grants of summary judgment and would rank other, non-Rule-based protections as of little effect. He concludes that certainty of a nondeferential, second evaluation on appeal deters inappropriate grants of summary judgment.⁸⁴ The deterrent effect of de novo review, however, is critical because, Professor Brunet observes, the effectiveness of de novo review as a safeguard is lessened by the expense of appellate review and the general impediments to reversing judgments on appeal.⁸⁵ On the other hand, other protections not based in the text of Rule 56 – the common law requirement to weigh inferences in the light most favorable to the nonmoving party;⁸⁶ the suggestion in dicta in *Celotex Corp. v. Catrett*⁸⁷ that evidence in opposition to summary judgment need not be in admissible form;⁸⁸ and court-created cautions against unbridled

80. *Id.* at 104-09; *see also* Molot, *supra* note 50, at 993-94 & n.145.

81. Friedenthal & Gardner, *supra* note 14, at 95, 104, 125-29. Friedenthal and Gardner propose that courts considering discretionary denial should consider factors, including whether the claim involves determinations of motive, credibility, or state of mind, or complex issues and whether issues ready for summary judgment are intertwined with issues for which summary judgment is not appropriate. *Id.*

82. *Id.* at 125-30.

83. *Id.* at 115-16, 125-26, 130. In a companion article to *Must, Should, Shall*, Professor Gensler will also argue in favor of a limited discretion to deny summary judgment. *See* Gensler, *supra* note 35.

84. Brunet, *supra* note 2, at 1182.

85. *Id.* at 1182-83.

86. *Id.* at 1180-82, 1188.

87. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

88. Brunet, *supra* note 2, at 1183-85, 1188.

use of summary judgment in particular categories of cases⁸⁹ – afford little prospect for uniform judicial application in the trial or appellate courts for a variety of reasons.

Both Professor Gensler and Professor Brunet reinforce the close relationship between the text of Rule 56 and summary judgment practice. Amendments to Rule 56 and decisions not to amend the Rule will affect both summary judgment practice and uniformity of that practice. Additionally, there is ample literature establishing that decisionmaking by the Advisory Committee is superior in many instances to permitting ad hoc trial court discretion⁹⁰ and noting that, as an institutional matter, delegating normative decisionmaking to trial

89. *Id.* at 1171-77, 1188. Brunet notes that court-created “cautions” against unbridled use of summary judgment in particular categories of cases, including antitrust cases, negligence cases, and civil rights cases, provide little more than slogans or exhortations that some courts will follow but others will ignore, in part, because these substance-specific “cautions” against inappropriate use lack textual support in Rule 56. Moreover, Professor Brunet points out that courts increasingly emphasize that substance-specific cautions contradict the transsubstantive assumption of the Federal Rules that procedural rules should apply uniformly across all subjects and regardless of case size. *See, e.g.,* Subrin, *Transsubstantive Procedure*, *supra* note 55, at 378 (noting that the term “transsubstantive” encompasses “use of the same procedural rules . . . for all civil law suits . . . regardless of the substantive law underlying the claims, or “case-type” transsubstantivity [,] and . . . regardless of the size of the litigation or the stakes involved, or “case-size” transsubstantivity”); accord David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Procedure*, 59 DEPAUL L. REV. 371, 376-77 (2010). Some of these case-specific “cautions,” however, such as the “handle with care” attitude of some, but by no means all, courts regarding civil rights and employment discrimination cases, actually reduce to concern with issues that may occur across all categories of cases (and, thus, do not implicate the transsubstantive assumption of the Federal Rules). For example, case law cautions against use of summary judgment in civil rights and employment cases often focus on the appropriateness of resolution at summary judgment of issues of motive and/or credibility. Brunet, *supra* note 2, at 1175-77 (citing *Allen v. Chicago Transit Auth.*, 317 F.3d 696, 699 (7th Cir. 2003) (Posner, J.)). With this type of focus, the primary obstacle to effectiveness will be whether the issue arises to one that, as a normative matter, *should* prevent summary judgment, rather than the transsubstantive assumption of federal rulemaking. Indeed, the issues of motive and/or intent in summary judgment are issues that Friedenthal and Gardner would include in amendments to Rule 56 regarding discretion to deny summary judgment when technically applicable. *See* Friedenthal & Gardner, *supra* note 14, at 126-28. In other instances, however, such as cases espousing a “handle with care” philosophy regarding antitrust issues, the transsubstantive premise of the federal rulemaking may be in play. *But see* Wald, *supra* note 3, at 1904 (stating that the “presumptively off-limits areas [for grant of summary judgment] included antitrust, patents, negligence, civil rights, and broadly conceived categories labeled ‘important public issues’ or ‘complex cases,’ primarily because such areas disproportionately involved questions of credibility, motive state of mind, and intent”) (quoting 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2729-2732.2, at 194-365 (2d ed. 1983) (emphasis added)).

90. *See, e.g.,* Burbank, *Dilemmas of “General Rules,” supra* note 68, at 536, 543; Bone, *Who Decides?*, *supra* note 46, at 2002-18.

judges in general, results in Federal Rules that are transsubstantive in language only, bury policy choices, and privilege judicial power.⁹¹

III. SUMMARY JUDGMENT IN EVOLUTION: EMERGING ROLES FOR THE SUMMARY JUDGMENT PROCEDURE

The contributors also discuss the relation of summary judgment to other aspects of pretrial practice. Professor Burbank deepens the discussion by focusing on the recent doctrinal linking of summary judgment and motions to dismiss under Rule 12(b)(6). Professor Burbank also discusses the role that the transsubstantive assumption in federal rulemaking played in the Supreme Court's much criticized decisions in *Bell Atlantic Corp. v. Twombly*⁹² and *Ashcroft v. Iqbal*⁹³ and suggests that the case-made pleading changes ushered in by *Twombly* and *Iqbal* may have illustrated the costs of transsubstantive procedure sufficiently to move Congress to abrogate those decisions⁹⁴ and may also result in a cooperative Court-Congress rulemaking process for circumstances in which substance-specific Rules are required.⁹⁵ Professor Mullenix explores another new role for summary judgment. She advocates amending the Federal Rules to authorize explicitly the use of summary judgment before class certification in class action cases. Professor Mullenix, moreover, suggests that the time has come to abandon the notion that summary judgment is inappropriate in complex cases. Given the substantial costs in litigant and judicial resources exacted by complex litigation, Professor Mullenix concludes that the presumption ought, in some cases, to be reversed: complex litigation is, instead, particularly suitable for adjudication by summary judgment.

In *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*,⁹⁶ Professor Burbank illustrates that, through the *Twombly*⁹⁷ and *Iqbal*⁹⁸ decisions, the Rule 12(b)(6) motion and the summary judgment motion have been "assimilated

91. See, e.g., Burbank, *Dilemmas of "General Rules,"* *supra* note 68, at 536, 543, 557; Burbank, *supra* note 55, at 715-16; Burbank, *Costs of Complexity,* *supra* note 68, at 1473-75; Subrin, *Simplified Procedure,* *supra* note 55, at 182; Bone, *Who Decides?,* *supra* note 46, at 1963-65, 2002-18; Bone, *supra* note 68, at 918.

92. 550 U.S. 544 (2007).

93. 129 S. Ct. 1937 (2009).

94. Burbank, *supra* note 12, at 1194.

95. *Id.* at 1194-95.

96. *Id.* at 1189.

97. *Twombly*, 550 U.S. 544.

98. *Iqbal*, 129 S. Ct. 1937.

doctrinally.”⁹⁹ In the comparative portion of the piece, Professor Burbank draws parallels in the evolution of summary judgment and pleading practice and exposes critical differences in these pretrial devices that, until recently, had warranted different analytical treatment. Over its seventy-year history, summary judgment transformed from a device its drafters thought would be used principally by plaintiffs to parry sham defenses in debt collection cases to a device used primarily by defendants and used in the broad run of cases.¹⁰⁰ Professor Burbank emphasizes that, throughout this transformation, the summary judgment tool remained faithful to its original purpose of screening from trial factually insufficient claims and preventing unnecessary cost and delay.¹⁰¹ By contrast, in two short years, Professor Burbank observes, the Supreme Court, through its opinions in *Twombly* and *Iqbal*, conflated Rule 12(b)(6) and Rule 12(e) motions,¹⁰² transformed the Rule 12(b)(6) motion to dismiss into another factual screening device – the “new summary judgment”¹⁰³—and, in so doing, disregarded the historic role of Rule 12(b)(6) to test the legal sufficiency of claims under any set of facts.¹⁰⁴

Professor Burbank also anticipates, based on the limited available empirical data, that the plausibility standard of *Iqbal* may result in criticisms that parallel the criticisms of summary judgment – varying rates of case termination in different parts of the country and in different types of cases¹⁰⁵ and higher rates of dismissal in cases dealing with constitutional civil rights claims.¹⁰⁶ *Iqbal* has already, with its invocation of “judicial experience and common sense,” introduced in the Rule 12(b)(6) context and before time for discovery, mechanical techniques of “inference carving” similar to the factual and legal carving of summary judgment that creates less in the parts than in the sum of the

99. Burbank, *supra* note 12, at 1189, 1191-92; accord Schneider, *Disparate Impact*, *supra* note 6, at 518, 530-31, 536; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 16-17, 23-34 (2010); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1240-42 (2008).

100. Burbank, *supra* note 12, at 1189-90; Burbank, *supra* note 5, at 595-603.

101. Burbank, *supra* note 12, at 1191.

102. *Id.* at 1191-92.

103. Schneider, *Disparate Impact*, *supra* note 6, at 541; Thomas, *supra* note 99, at 16-17, 23-34.

104. Burbank, *supra* note 12, at 1192.

105. *Id.* at 1190 n.9, 1193.

106. *Id.* at 1190, 1192-93 (citing Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 555-56, 603-08, 621-22 (2010)); see also Schneider, *Disparate Impact*, *supra* note 6, at 532-36.

parts and that threatens both the right to trial and underlying substantive rights.¹⁰⁷ And just as discovery is necessary before summary judgment, commentators are finding the solution to the *Twombly/Iqbal* invitation to “inference carving” based on “judicial experience and common sense” to be permitting discovery, here, limited or targeted discovery.¹⁰⁸

Turning from the likely litigation impacts of *Twombly* and *Iqbal*, Professor Burbank probes the potential depth of their rulemaking effects, suggesting that *Twombly* and *Iqbal* may impact federal rulemaking as deeply as the developing empirical research is likely to reveal their litigation impacts to be broad. First, Professor Burbank emphasizes the Court’s disregard, in *Twombly* and *Iqbal*, of the Rules Enabling Act process for amending Federal Rules, a process the Court has consistently recognized as the sole procedure for Rule amendment.¹⁰⁹ Second, Professor Burbank emphasizes the distinct possibility of congressional action to overturn the move to plausibility pleading.¹¹⁰ Third, he suggests that the *Twombly* and *Iqbal* decisions, the lower courts’ application of those decisions, and the developing empirical data may highlight sufficiently the costs of transsubstantive general rules to lead to a partial restructuring of the Rules Enabling Act process.¹¹¹ Thus,

107. Burbank, *supra* note 12, at 1190-91, 1194 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)); *see also* Bone, *supra* note 68, at 889-90.

108. *See, e.g.*, Malveaux, *supra* note 74, at 68-69, 108-09, 123-38; Hartnett, *supra* note 74, at 33-36; Bone, *supra* note 68, at 932-35. As noted earlier, Professor Brunet suggests that the potential availability of a pre-12(b)(6) “time-out” for discovery may lessen the ability to obtain a Rule 56(f) “time-out.” *See* Brunet, *supra* note 2, at 1180.

109. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 212-14 (2007); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also* Burbank, *supra* note 12, at 1191; Burbank, *Dilemmas of “General Rules,” supra* note 68, at 537, 549.

110. S. 1504, 111th Cong. (2009); H.R. 4115, 111th Cong. (2009); Burbank, *supra* note 12, at 1194. *See also* Hartnett, *supra* note 74, at 24-33.

111. Burbank, *supra* note 12, at 1194-95. Commentators have, for some time, suggested changing the Rules Enabling Act process or changing the types of Rules that are promulgated. *See, e.g.*, Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1734-42 (2004) (calling for increased cooperation and consultation between Congress and the Court in rulemaking); Burbank, *supra* note 55, at 717-19; Subrin, *Transsubstantive Procedure*, *supra* note 55, at 394-405 (suggesting transsubstantive procedure in the “case-type sense,” but not in the “case-size sense” that would permit a “simple” or “expedited” track for smaller cases and that would put limits on delay and discovery, while retaining current procedure for larger cases); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 292-96 (2009) (suggesting changing the composition of the Advisory Committee to include a greater congressional presence; more balanced representation of judges, practitioners, and academics; and expanded experience by members); Bone, *Who Decides?*, *supra* note 46 (suggesting reduction of the current pervasive delegation of case-specific discretion to judges); Bone, *Making Effective Rules*, *supra* note 46, at 320, 328-40; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1234-36 (1996).

Professor Burbank posits that, the ultimate rulemaking upshot of *Twombly* and *Iqbal* may be dramatic – legislative creation of a new procedural rulemaking process that permits federal rulemakers to propose substance-specific rules that will become effective only if enacted by Congress.¹¹²

In his essay, Professor Burbank reminds that *Twombly* and *Iqbal* may not simply be ill-advised from a policy standpoint.¹¹³ Instead, rulemaking process matters. The Court's choice of Rule amendment by adjudication underscores the defects of a rulemaking process that has been construed to require transsubstantive,¹¹⁴ general rules for all situations, including those in which the problem at issue calls for a targeted and/or substance-specific solution,¹¹⁵ and particularly when that process has also come to require consensus.¹¹⁶ When the rulemaking process is viewed by the Court as ineffective for some categories of Rules and seeking congressional assistance is viewed as undesirable, the remaining option is Rule amendment by Court interpretation.¹¹⁷ Court rulemaking by adjudication, however, is a poor substitute for the Rules Enabling Act process because the Court must act within the bounds of interpretation in a particular case; Court access to information in the context of a particular case cannot replicate the broad-based information that can be obtained through the Rules Enabling Act process or by

112. Burbank, *supra* note 12, at 1194-95.

113. *Id.* at 1194-95. See also Stephen B. Burbank, *Time Out, in Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 150-51, 152 (2009); Bone, *supra* note 68, at 875-76, 898-935.

114. See, e.g., Burbank, *Dilemmas of "General Rules," supra* note 68, at 541-43. For a definition of "transsubstantive" procedure, see *supra* note 89. Professor Burbank has indicated that the initial Advisory Committee did not debate whether the Rules should be "transsubstantive," in the sense that Rules promulgated under the Rules Enabling Act process would apply to all subject matter and all sizes of cases. They did discuss and concluded that the Rules should be "uniform" and, thus, should apply geographically in all district courts. They, thereafter assumed that the Rules would also be "transsubstantive." See, e.g., Burbank, *Dilemmas of "General Rules," supra* note 68, at 541-42; Burbank, *supra* note 55, at 713-14 & n.140; see also Subrin, *Transsubstantive Procedure, supra* note 55, at 383-84. Others have indicated that some current Federal Rules are, in fact, nontranssubstantive, see, e.g., Catherine T. Struve, *Procedure as Palimpsest*, 158 U. Pa. L. Rev. 421, 424-25 (2010), and, of course, Professor Burbank has long noted that the pervasive tendency of the Federal Rules to create "open-textured rules" that give judges broad discretion sacrifices uniformity and predictability and results in Rules that are "transsubstantive in only the most trivial sense." See, e.g., Burbank, *supra* note 55, at 715; Burbank, *Costs of Complexity, supra* note 68, at 1473-75.

115. See, e.g., Bone, *supra* note 68, at 879, 935-36.

116. See *supra* notes 56-63 and accompanying text.

117. Burbank, *Dilemmas of "General Rules," supra* note 68, at 562.

Congress,¹¹⁸ and Court adjudication, which is less democratic and less participatory, is peculiarly inappropriate for resolving important issues of social policy.¹¹⁹ Simply put, the Court, in its adjudicative role lacks institutional capacity that it has when it acts through the Rules Enabling Act process, and it lacks the institutional authority to make broad decisions regarding social policy or, of course, substantive rights.¹²⁰ Moreover, because of the assumption that the Rules Enabling Act requires transsubstantive rules that apply to all cases, regardless of size or subject matter,¹²¹ Professor Burbank has previously observed that, Court Rules, whether created through the Rules Enabling Act process or through Court adjudication, are often crafted to deal with the fairness and efficiency calculus of the complex case and then applied to smaller cases, which may price smaller cases out of federal court.¹²² Increasingly, however, the demand is for process that addresses separately the needs of complex and noncomplex cases.¹²³

Indeed, Professor Mullenix takes aim directly at the complex case, proposing a Rule amendment that would affect complex litigation only. In *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*,¹²⁴ Professor Mullenix proposes amending the Federal Rules to authorize or require use of summary judgment before certification in class action cases and in other aggregate litigation.¹²⁵ She recommends either a “weak-form” version of Rule amendment that would specifically authorize judges to consider summary judgment before class certification or a “strong-form” version that would require consideration of summary judgment before class certification.¹²⁶ Professor Mullenix emphasizes that, at this point, Rule amendment to authorize summary judgment before class certification

118. See, e.g., Burbank, *supra* note 113, at 150-51; Burbank, *Dilemmas of “General Rules,” supra* note 68, at 537, 559-60, 561.

119. Burbank, *Dilemmas of “General Rules,” supra* note 68, at 537, 559-60, 561; Bone, *supra* note 68, at 918, 935-36.

120. Burbank, *Dilemmas of “General Rules,” supra* note 68, at 537, 559-61; Bone, *supra* note 68, at 930.

121. Burbank, *Dilemmas of “General Rules,” supra* note 68, at 541-43.

122. *Id.* at 545, 562-63; see also Bone, *supra* note 68, at 931-35.

123. Burbank, *Dilemmas of “General Rules,” supra* note 68, at 537-38, 542-43; Burbank, *supra* note 55, at 716-18; Subrin, *Transsubstantive Procedure, supra* note 55, at 394, 398-400 (advocating a “simple track” or “expedited track” for federal procedure, with restraints on delay and discovery, and emphasizing that there is no reason why the Federal Rules cannot exhibit “case-type” transsubstantive procedure, while abandoning “case-size” transsubstantivity); Bone, *supra* note 68, at 931-35.

124. Mullenix, *supra* note 10, at 1197.

125. *Id.* at 1199-02, 1242-43.

126. *Id.* at 1243.

would amount to codification of the status quo,¹²⁷ as courts and commentators have concluded that pre-certification summary judgment is not only permissible,¹²⁸ but preferable in some cases.¹²⁹

Nevertheless, Professor Mullenix recommends Rule amendment to articulate explicitly judicial authority to grant pre-certification summary judgment because it would provide judges with Rule-based, textual authority upon which to proceed.¹³⁰ Here, Professor Mullenix echoes Professor Brunet's observation, in *Six Summary Judgment Safeguards*, that inclusion of guidance in the Federal Rules results in greater effectiveness, consistency, and uniformity.¹³¹ Inclusion of authority for pre-certification summary judgment in the Federal Rules would dispel notions of some judges that pre-certification summary judgment may not, or ought not, as a discretionary matter, be granted in class litigation; that the so-called "Eisen rule"¹³² precludes pre-certification summary judgment;¹³³ or that complexity in itself should preclude use of summary judgment.¹³⁴ Rule revision, thus, would signal that consideration of summary judgment before class certification is not simply appropriate, it may be preferable.¹³⁵

In the bulk of the article, Professor Mullenix makes a compelling case for authorizing or requiring summary judgment on the named plaintiffs' claims before addressing class certification issues. Pre-certification summary judgment, Professor Mullenix emphasizes, would serve efficiency and fairness by avoiding the high transaction costs associated with class actions, including the increasingly burdensome

127. *Id.* at 1242.

128. *Id.* at 1202-03, 1207-11 & n.53 (emphasizing that the Federal Judicial Center's *Managing Class Litigation: A Pocket Guide for Judges* now instructs that federal judges may rule on motions to dismiss and for summary judgment before class certification and, in fact, encourages pre-certification ruling on dispositive motions as the "most efficient practice" and emphasizing as well that many courts in fact do rule on dispositive motions before class certification).

129. *Id.* at 1202-03, 1207-11.

130. *Id.* at 1201-03.

131. *Id.* at 1242-43; accord Subrin, *Transsubstantive Procedure*, *supra* note 55, at 391.

132. Mullenix, *supra* note 10, at 1242. The "Eisen rule," which originated in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), is not implicated by the proposal for pre-certification summary judgment. As Professor Mullenix explains, the *Eisen* rule is applicable when a judge evaluates whether to certify a class. The proposal for pre-certification summary judgment, by contrast, is for summary judgment *before* the class certification process. Thus, the *Eisen* rule is not at issue. *Id.* at 1201, 1242. Although some courts have previously applied the *Eisen* rule to pre-certification dispositive motions, Professor Mullenix illustrates that courts have moved away from this interpretation, *id.* at 1212-15, and that commentators have also concluded that *Eisen* does not present a barrier to consideration of merits issues at the class certification stage. *Id.* at 1230-33.

133. *Id.* at 1243.

134. *Id.*

135. *Id.* at 1242-43.

costs of class certification under the heightened standards now imposed by appellate courts; it would ameliorate the settlement pressure associated with class action litigation; and it would narrow the debate over the extent and nature of permissible pre-certification merits discovery since discovery regarding the merits would be available in pre-certification summary judgment.¹³⁶ Indeed, it would avoid class certification costs entirely if the defendant prevails on the pre-certification motion for summary judgment (and no other plaintiff stepped forward to “pick up the spear dropped by the named plaintiff”¹³⁷), and, conversely, it would render the incurring of certification costs meaningful if the plaintiff prevails at summary judgment.¹³⁸ It would, in other words, put the horse firmly before the cart.

Professor Mullenix underscores, as well, that this form of pre-certification merits review is consonant with the efficiency and fairness rationale underlying other recent trends in federal litigation, including (1) the new plausibility pleading requirements introduced by the Supreme Court in *Twombly* and *Iqbal*;¹³⁹ and (2) the move to significantly more rigorous class certification requirements in many circuits (which in some jurisdictions, newly requires courts to make “findings” by a preponderance that all Rule 23 requirements have been met, to resolve all factual and legal issues even if they overlap with the merits, and to resolve conflicting expert testimony).¹⁴⁰

Professor Mullenix emphasizes also the growing academic acceptance of merits review in the class action context, and she joins the conversation with a powerful suggestion for pre-certification merits review in the form of pre-certification summary judgment. There ought, many have concluded, to be an early and meaningful review of the merits during class certification or, at least, before settlement of a class action.¹⁴¹ Pre-certification summary judgment moves the debate

136. *Id.* at 1200-01, 1203, 1217.

137. *Id.* at 1214-15 (quoting *Cowen v. Bank United*, 70 F.3d 937, 941 (7th Cir. 1995) (Posner, J.)).

138. *Id.* at 1201.

139. *Id.* at 1222-23.

140. *Id.* at 1224-29 (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-23 (3d Cir. 2008)).

141. *Id.* at 1199-2000, 1229-35 (citing Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002); Roy Alan Cohen & Thomas J. Coffey, *Judicial Review of Class Certification Applications – The Compelling Case for a Merits-Based Gate-Keeper Analysis*, 76 DEF. COUNS. J. 257 (April 2009); Geoffrey C. Hazard, Jr., *Class Certification Based on the Merits of the Claims*, 69 TENN. L. REV. 1 (2001); Kozel & Rosenberg, *supra* note 10; Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis*

regarding early review of the merits to a point before the class certification stage of the litigation and, thus, provides advantages unavailable at later stages: It serves the efficiency and fairness functions of traditional summary judgment, but it does so at a time before the parties incur the tremendous costs now associated with the heightened rigor of class certification and with settlement pressure following certification. It avoids the debate in each case regarding the amount of merits discovery to permit during class certification by making the merits the main event and permitting discovery sufficient to resolve the summary judgment motion. It also coincides with the efficiency and fairness concerns underlying the Supreme Court's pleading decisions in *Twombly* and *Iqbal*. Further, this early form of merits review would end the case, if at all, only on the individual named plaintiffs' claims, thus permitting others with viable claims to carry on the litigation as individual plaintiffs or as named plaintiffs.

Of equal significance, Profess Mullenix's suggested Rule revision proposes a timing change regarding summary judgment that is targeted specifically to address the issue of the meritless class action. It would use summary judgment – early summary judgment, to be sure, but at least a process that permits discovery before case termination – to serve its traditional gatekeeping role. It would recognize judges as capable of managing discovery relevant to the pre-certification summary judgment process, and it would recognize summary judgment both as capable of performing its traditional gatekeeping function and as sufficient to prevent the tremendous settlement pressure associated with class actions. Thus, Professor Mullenix's proposed codification in the Federal Rules of the currently available pre-certification summary judgment has much to commend it.

IV. SUMMARY JUDGMENT IN DIVERSITY JURISDICTION: EVALUATING THE IMPACT OF *SHADY GROVE*

In *Summary Judgment in the Shadow of Erie*,¹⁴² Professor Cooper moves the discussion to the substantive rights prohibition of the Rules Enabling Act,¹⁴³ and he questions whether the federal summary judgment standard – the cornerstone of federal pretrial practice – must

Should Include an Assessment of the Merits, 168 F.R.D. 366 (1966); Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004); Douglas M. Towns, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001 (1992)).

142. Cooper, *supra* note 31.

143. 28 U.S.C. § 2072(b) (2006). The substantive rights prohibition provides that Court-made Rules may “not abridge, enlarge or modify any substantive right.” *Id.*

sometimes give way to state summary judgment standards in diversity actions. He pairs the Supreme Court's 2001 decision in *Semtek International, Inc. v. Lockheed Martin Corp.*¹⁴⁴ with its recent, divergent decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,¹⁴⁵ in an effort to discern whether Federal Rule 56 will control in diversity actions when a state imposes a higher threshold for the grant of summary judgment than Rule 56. Professor Cooper concludes that the Court's recent, splintered decision in *Shady Grove* makes application of Federal Rule 56 in diversity cases more likely, but the inability to garner a majority decision ensures continuing uncertainty.¹⁴⁶

Before *Shady Grove*, there were increasingly worrisome arguments (from the perspective of the continuing uniform application of Federal Rules in federal diversity actions) that, whether analyzed as a conflict between Federal Rule and state law governed by the Rules Enabling Act¹⁴⁷ or as an unguided *Erie* choice under the Rules of Decision Act,¹⁴⁸ federal courts sitting in diversity might be constrained to use state summary judgment standards when that state procedure imposed higher standards for the grant of summary judgment.¹⁴⁹ Professor Cooper notes that summary judgment practice in some states differs markedly from federal summary judgment practice. In particular, some states do not follow the relaxed burden-shifting framework of *Celotex Corp. v. Catrett*,¹⁵⁰ which permits a defendant to make a "showing" that a plaintiff cannot establish an element of her case, and then requires the plaintiff to establish a genuine issue of material fact warranting trial through introduction of evidence, including affidavits, depositions, and answers to interrogatories.¹⁵¹ In those states, defendants shoulder a

144. 531 U.S. 497 (2001). At issue in *Semtek* was whether the claim preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds should be determined by the law of the state in which the federal court sits. *Id.* at 499.

145. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

146. Cooper, *supra* note 31, at 1261-63; See Kevin M. Clermont, *The Repressible Myth of Shady Grove*, forthcoming 2010, available at SSRN: <http://ssrn.com/abstract=1633541> (concluding that *Shady Grove* "sapped . . . *Semtek's* vitality as to Rule construction" and that Rule 56 should control after *Shady Grove*).

147. See, e.g., Cooper, *supra* note 31, at 1151-52; 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, 287-93 (2008).

148. Steinman, *supra* note 147, at 282-84, 297-301.

149. Cooper, *supra* note 31, at 1250, 1254-57; Steinman, *supra* note 147, at 282-84, 287-301.

150. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

151. Cooper, *supra* note 31, at 1247-49. Professor Cooper illustrates as well that some states have not followed the lead of the Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), in which the Court, stating that the standards for summary judgment and judgment as a matter of law

higher burden – sometimes a burden reminiscent of the pre-*Celotex* burden in federal courts of offering sufficient evidence to defeat any reasonable inference in favor of the non-moving party – or plaintiffs bear a lighter burden in withstanding summary judgment.¹⁵²

Moreover, similar arguments have surfaced regarding potential disuniform application of other Federal Rules in diversity actions, including pleading rules and class action requirements.¹⁵³ In its recent decision in *Shady Grove*, the Supreme Court dealt directly with the application in a federal diversity action of New York’s statutory requirement in its Civil Practice Law and Rules (CPLR) § 901(b) prohibiting, absent specific statutory authorization, class actions suits in cases seeking either a minimum recovery set by statute or statutory penalties.¹⁵⁴ The Court’s fractured decision, however, reads as much like a debate about the continuing uniformity in diversity actions of Federal Rules in general as a decision about the applicability of New York’s CPLR § 901(b).

Before its fractured decision in *Shady Grove*, the Court’s most recent discussion of Federal Rules and the *Erie* doctrine had been in *Semtek International, Inc. v. Lockheed Martin Corp.*¹⁵⁵ Professor Cooper emphasizes that the *Semtek* opinion provides significant opportunity for argument that Federal Rules that conflict with state law might be subject to *Erie*’s “twin aims” considerations of forum shopping and inequitable administration of the laws.¹⁵⁶ This would, of course, vastly change the Rules Enabling Act analysis for conflicting Federal Rules and state law, as set forth in *Hanna v. Plumer*.¹⁵⁷ It would also, Professor Cooper concludes, provide strong argument for application of state summary judgment standards in states with higher thresholds for the grant of summary judgment since plaintiffs would inevitably seek a state forum with a more forgiving summary judgment standard and defendants would virtually uniformly opt for the federal forum.¹⁵⁸ More

under Rule 50, are the same, required that federal courts use, at the summary judgment stage, the burden of persuasion that would exist at trial. Cooper, *supra* note 31, at 1253-54. Steinman, *supra* note 147, at 278-83.

152. Cooper, *supra* note 31, at 1248-49; Steinman, *supra* note 147, at 278-79.

153. Steinman, *supra* note 147, at 285-87, 293-300.

154. N.Y. Civ. Prac. Law Ann. § 901(b) (West 2006).

155. *Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

156. Cooper, *supra* note 31, at 1254-55.

157. 380 U.S. 460, 463-64, 469-74 (1965).

158. Cooper, *supra* note 31, at 1257; *see also* Steinman, *supra* note 147, at 283-84, 298-99 (asserting that there are arguments for treating the summary judgment issue as presenting an unguided *Erie* choice and, if so construed, strong argument that the variation between federal and

broadly, as so construed, Professor Cooper concludes, *Semtek* would “affect the continued viability of the Federal Rules . . . as a uniform set of procedural rules for lawsuits brought in federal courts.”¹⁵⁹

Professor Cooper notes that courts and judges have virtually ignored the reading of *Semtek* that would incorporate the twin aims concerns into the analysis of conflicting Federal Rules and state law.¹⁶⁰ The justices of the Supreme Court, however, seem to have been acutely aware of the potential for the dicta in the unanimous *Semtek* opinion to undermine the uniformity of the Federal Rules in diversity actions, and five of them, including Justice Scalia, who authored the unanimous *Semtek* opinion, took pains in *Shady Grove* to distance themselves from the dicta in *Semtek* that might import the “twin aims” analysis into resolution of conflicts between Federal Rules and state law.¹⁶¹ In fact, Professor Cooper comments that Justice Scalia, writing in *Shady Grove* for a plurality, ignores *Semtek*’s suggestion that the twin aims considerations of forum shopping and inequitable administration of the laws might apply in the Rules Enabling Act analysis.¹⁶² In its stead, Justice Scalia would ask simply, as in *Sibbach v. Wilson & Co.*,¹⁶³ whether a Federal Rule “really regulates procedure.”¹⁶⁴ If so, it is valid, and it is valid in all states regardless of the nature or purpose of conflicting state law.¹⁶⁵ But no opinion in *Shady Grove* could command a majority on all – or even most – issues. Justice Stevens, who concurred in the judgment in *Shady Grove*, disagreed with the plurality’s

state summary judgment standards would, when the state imposes higher standards for the grant of summary judgment, encourage forum shopping, in violation of the twin aims of *Erie*).

159. Cooper, *supra* note 31, at 1255.

160. *Id.*

161. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1441 & n.7, 1447-48 (2010) (Scalia, J., Opinion of the Court)

We must acknowledge that [the plurality’s construction of the class action provision at issue] . . . will produce forum shopping. That is unacceptable when it comes as the consequence of judge-made rules But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. . . . The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping.”); *see also id.* at 1449, 1456-57, 1458, 1459 (Stevens, J., concurring in part and concurring in judgment) (“The Rules Enabling Act does not invite federal courts to engage in the ‘relatively unguided *Erie* choice,’ . . . but instead instructs only that federal rules cannot ‘abridge, enlarge or modify any substantive right.

Id.

162. Cooper, *supra* note 31, at 1261 & n.91.

163. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

164. *Shady Grove*, 130 S. Ct. at 1442-44 (Scalia, J., plurality opinion).

165. *Id.* at 1444 (Scalia, J., plurality opinion).

conclusion that Federal Rules can be categorized as “procedural” or “substantive” without reference to the state law at issue.¹⁶⁶ He would include, as part of a state’s definition of its substantive law – which would trump conflicting Federal Rules – state procedural law that “become[s] so bound up with the state-created right or remedy that it defines the scope of the substantive right or remedy.”¹⁶⁷

So, what of the future of the federal standard for summary judgment in diversity actions, after *Shady Grove*? Professor Cooper concludes that the possibility of state summary judgment procedure governing in diversity actions was always slight and, following *Shady Grove*, it is even slimmer.¹⁶⁸ Those justices agreeing with Justice Scalia’s plurality opinion would most likely conclude that the summary judgment standard is “procedural” and, hence, valid and to be uniformly applied in federal diversity actions – it is part of the means of *enforcing* the substantive rights, not a rewriting or alteration of substantive rights or remedies.¹⁶⁹ Justice Stevens’s view on the uniform application of federal summary judgment procedure is not so clear. He does admit the possibility of state procedural law so bound up with substantive rights and remedies that it forms part of the substantive state law and would overcome a conflicting Federal Rule,¹⁷⁰ but he also emphasizes that state procedural rules that are sufficiently intertwined with substantive law that they must be considered part of the state’s substantive law for *Erie* purposes will be rare. Thus, Professor Cooper concludes that, although uniform application of Rule 56 in diversity actions is much more likely given the combined plurality and concurring opinions in *Shady Grove*, the final answer remains uncertain.¹⁷¹

The uncertainty, however, does not end with summary judgment. As Professor Cooper has highlighted, at stake is the continued uniform application of the Federal Rules of Civil Procedure in diversity actions.¹⁷² The Court is reconsidering the application of its framework for conflicting Federal Rules and state law under *Erie*, and among the

166. *Id.* at 1449-50 (Stevens, J., concurring in part and concurring in judgment).

167. *Id.* at 1450, 1452 (Stevens, J., concurring in part and concurring in judgment).

168. Cooper, *supra* note 31, at 1261-63; *see also* Clermont, *supra* note 146, at 37-39.

169. *Id.* at 1261-62.

170. *Shady Grove*, 130 S. Ct. at 1450, 1452 (Stevens, J., concurring in part and concurring in judgment). Justice Stevens also acknowledges that the burdens of persuasion are substantive for *Erie* purpose. *Id.* at 1450, 1453 & nn.8-9, and Professor Cooper notes that the summary judgment burdens of production are closely aligned with burdens of persuasion. *See* Cooper, *supra* note 31, at 1262-63 & n.103.

171. Cooper, *supra* note 31, at 1263; *but see* Clermont, *supra* note 146, at 37-39.

172. Cooper, *supra* note 31, at 1255.

potential candidates are the analysis set forth in *Semtek* and those in the plurality, concurring, and dissenting opinions in *Shady Grove*. In each of these analyses, the justices seem to agree on the general framework established in *Hanna v. Plumer*¹⁷³ for determining whether a Federal Rule that is in potential conflict with state law will control under an *Erie* analysis. First, one asks whether the Federal Rule and state law conflict;¹⁷⁴ if so, then there are two additional questions: (1) whether the Rule is rationally capable of classification as procedural; and (2) whether the Rule “abridge[s], enlarge[s] or modif[ies] any substantive right.”¹⁷⁵ Professor Cooper illustrates that *Semtek* seems to define whether a Rule violates the substantive rights prohibition of the Rules Enabling Act (the requirement that a Rule not abridge, enlarge, or modify any substantive right) by reference to the twin concerns of *Erie* – whether the Rule would encourage forum shopping or inequitable administration of the laws.¹⁷⁶ This construction of *Semtek*, of course, would maintain the current framework in name only and would dramatically transform the analysis of conflicting Federal Rules and state law. It would provide an easily administered test (the “twin aims” concerns of whether a Federal Rule leads to forum shopping or inequitable administration of the laws), it would align the Rules Enabling Act and Rules of Decision Act analyses,¹⁷⁷ and it would accord respect to state law, but it would also permit Federal Rules to be overcome by state procedural law more frequently. As noted, at least five justices have taken steps in *Shady Grove* to distance themselves from any such analysis.¹⁷⁸

173. *Hanna v. Plumer*, 380 U.S. 460, 463-64, 469-74 (1965).

174. The Court, Justice Ginsburg emphasizes, has used various formulations to describe a “conflict” between Federal Rule and state law: it has stated that application of *Hanna*’s Federal Rules analysis requires a “direct collision” between a Federal Rule and state law; *Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980) (quoting, in turn, *Hanna*, 380 U.S. at 472)), and that, “when fairly construed,” a Federal Rule must be “‘sufficiently broad’ . . . to ‘control the issue’ before the court, thereby leaving *no room* for the operation of that law.” *Id.* (Ginsburg, J., dissenting) (quoting *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987) (quoting *Walker*, 446 U.S. at 749-50 & n.9) (emphasis added in *Shady Grove*)).

175. *Shady Grove*, 130 S. Ct. at 1437, 1442 (Scalia, J., plurality opinion); *Id.* at 1450-52 (Stevens, J., concurring); *Id.* at 1460-61 (Ginsburg, J., dissenting).

176. Cooper, *supra* note 31, at 1254-55; *see also Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001).

177. *See* Cooper, *supra* note 31, at 1254-55 (noting that incorporating the twin concerns of *Erie* into the Rules Enabling Act analysis, under the first prong of the *Hanna v. Plumer* framework, would make “a certain amount of historical sense” and that the question asked under the first prong of *Hanna* (under the Rules Enabling Act inquiry) bears a “a strong resemblance to the question under *Hanna*’s second prong, notwithstanding the *Hanna* Court’s insistence that the two inquiries are different”).

178. *See supra* note 161.

Each of the *Shady Grove* formulations hews more closely to the traditional Federal Rules analysis under *Hanna v. Plumer*,¹⁷⁹ but would vary in the resulting uniformity of the Federal Rules, ease of judicial administration, and recognition of important state interests. Justice Scalia's approach for the *Shady Grove* plurality, would characterize a conflicting Federal Rule as either "procedural" or "substantive," for purposes of whether it violates the substantive rights prohibition of the Rules Enabling Act, with little or no reference to the state law at issue. It would promote both uniformity of the Federal Rules and ease of judicial administration,¹⁸⁰ but it would seem to return the federal courts to a previous position of failing to take substantive rights under the Rules Enabling Act seriously.¹⁸¹ Justice Stevens, in concurrence in *Shady Grove*, agrees that Congress intended to create a uniform system of Federal Rules, but contends that Congress itself, through the substantive rights prohibition of the Rules Enabling Act, requires that Federal Rules defer to state procedural law when the state law is sufficiently bound up with state-created rights and remedies.¹⁸² Thus, under Justice Stevens's approach, a court must examine the content and purpose of state law to determine if the Federal Rule impermissibly impacts state substantive law, but Justice Stevens stresses that such instances will be rare. Justice Stevens emphasizes also that both

179. *Hanna v. Plumer*, 380 U.S. at 464, 472.

180. *Shady Grove*, 130 S. Ct. at 1442-45 (Scalia, J, plurality opinion) (emphasizing (1) that only the substantive or procedure character of the Federal Rule is at issue, not the substantive or procedural nature of the state law; (2) that, if the Federal Rule regulates procedure, it is valid in all states and not valid in some and invalid in others, which would cause "chaos"; and (3) that this approach would avoid the "impracticability of a test that turned on the idiosyncrasies of state law").

181. Compare Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1040-43 (1989) (suggesting that rulemakers do not abide by the substantive rights limitation in the Rules Enabling Act), with Burbank, *supra* note 111, at 1713-14, 1736 (observing, in 2004, that, over the past decade, Court rulemakers had exhibited "increased self-discipline" and that the rulemakers had "by and large, taken seriously the Chief Justice's assurances to Congress that they would observe the Rules Enabling Act's limitations"); Leslie M. Kelleher, *Separation of Power and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 442 (2000) (asserting that the Court has begun taking the "substantive rights limitations more seriously, particularly as a rule of construction, and to read Rules narrowly when necessary to avoid infirmity").

182. *Shady Grove*, 130 S. Ct. at 1449-50, 1452-53 & nn.8, 13 (Stevens, J., concurring) (concluding that the balance Congress has struck between uniformity of a Federal Rule and "sensitivity to important state interests and regulatory policies" requires consideration of the nature of the state law that may be displaced by a Federal Rule and that this "balance does not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural," but on whether the state law in question – whether procedural or not – "is part of a State's framework of substantive rights or remedies") (emphasis in *Shady Grove*)).

“respect for state construction of its own rights and remedies” and separation of powers concerns require this approach.¹⁸³ This approach would purchase uniformity of Federal Rules in general (Federal Rules would “rarely” be found to impermissibly impact substantive rights¹⁸⁴) and respect for state substantive law, but at what Justice Scalia deems to be too high a price in difficulty of judicial administration.¹⁸⁵ Justice Ginsburg, in dissent, suggests that greater attention should be paid to the initial question of whether the Federal Rule and state law are even in conflict and that the Court should continue its previous trend of construing Federal Rules to “avoid conflict with state laws” when significant state policies would be implicated and no countervailing federal interest is at stake.¹⁸⁶ Justice Ginsburg’s approach would privilege the state’s interest, putting less emphasis on uniform application of Federal Rules in diversity and less emphasis on avoiding difficult interpretation of state law.

Shady Grove reveals that the application of the *Erie* framework for conflicting Federal Rules and state law under the *Hanna v. Plumer* framework is at a crossroads. Five justices have backed away from the suggestion in *Semtek* that the Court might import the twin aims of *Erie* concerns for forum shopping and inequitable administration of the laws into the Federal Rules analysis. In the plurality, concurring, and dissenting opinions in *Shady Grove*, the Court debates both whether Federal Rules should be read narrowly to avoid conflicts with state law when possible (thus, implicating the Rules of Decision Act analysis) and

183. *Shady Grove*, 130 S. Ct. at 1453 (Stevens, J., concurring).

184. *Id.* at 1454 & n.10, 1455 & n.13, 1457-58. (Stevens, J., concurring).

185. *Id.* at 1445, 1447 & nn.14-15 (Scalia, J., plurality opinion); *but see id.* at 1453-54 (Stevens, J., concurring) (noting that the “difficult determinations” that Justice Scalia foresees with Justice Stevens’s approach are not necessarily “more taxing than Justice Scalia’s” approach and that, in any event, a preference for “easily administrable, bright-line rules . . . does not give . . . license to adopt a second-best interpretation of the Rules Enabling Act”).

186. *Id.* at 1460-64 (Ginsburg, J. dissenting) (noting that “in [the Court’s] prior decisions in point, . . . [the Court has] avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest”). Justice Stevens is not in general disagreement. He concludes, in general, that when a Federal Rule “appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.” *Id.* at 1452, 1456 (citing *Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001)) (Stevens, J., concurring), but he concludes that, on the facts at issue, any need to interpret Rule 23 narrowly to avoid violating the substantive rights prohibition of the Rules Enabling Act would be based on “extensive speculation” regarding the meaning of New York’s CPLR § 901(b). Given that there are two “plausible competing narratives” regarding the meaning of CPLR § 901(b) and that the meaning based a plain textual reading would not violate the Rules Enabling Act, Justice Stevens concludes that there is no need to construe Rule 23 narrowly to avoid a conflict with CPLR § 901(b). *Id.* at 1456, 1459-60.

whether, in determining if a Federal Rule violates the substantive rights prohibition, the Court will consider the content and/or purpose of conflicting state law. The Court reaches no definite conclusion on either issue, leaving the resolution of these important questions, for later cases. In short, there is much illumination in *Shady Grove*, but how the Court will ultimately apply its agreed-upon framework for resolving potential conflicts between Federal Rules and state law remains in the shadows.

V. CONCLUSION

The contributors to this symposium on the Future of Summary Judgment provide insight into (1) interpretation of the amendments to Federal Rule 56 that are set to take effect on December 1, 2010; (2) emerging safeguards to prevent improvident grant of summary judgment; (3) the potential of summary judgment to impact interrelated aspects of the pretrial process, including the 12(b)(6) motion to dismiss and class action litigation; and (4) the future of the federal standard for summary judgment in diversity cases. Prominent in the articles is the authors' recognition of the important influence of federal rulemaking and the Rules Enabling Act on the future of summary judgment. The authors invite us to wrestle not only with the critical issues of the fairness and efficiency of summary judgment, but also with often buried issues of rulemaking, rulemaking process, and institutional capacity. They remind of the important practical impact – in terms of increased uniformity, predictability, and superior policymaking – of including specific guidance for trial judges in the text of the Federal Rules. They explore the meaning of the substantive rights prohibition of the Rules Enabling Act, and they insist that we consider rulemaking process and institutional capacity in federal rulemaking.