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Magic Words and the Erie Doctrine

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It has been seventy-five years—almost to the day—since the Supreme Court decided *Erie Railroad Co. v. Tompkins*.[1] *Erie* now claims paternity over a broader doctrine that mediates whether state law or federal law will govern particular aspects of a federal court lawsuit. That doctrine has evolved over time, but there remains a core of truth to the oft-stated rule of thumb that federal courts should apply state substantive law and federal procedural law.[2]

Given *Erie*'s mystical (and mythical[3]) qualities, the subject of magic words seems particularly appropriate. In his thought-provoking article, Sergio Campos argues that magic words can play a valuable information-forcing role.[4] Rather than struggle to characterize state laws as substantive or procedural, federal courts should put the onus on states to declare explicitly that a particular rule is justified on substantive grounds. Unless the state "utter[s] the magic words," federal courts should apply their own rule, free in the constructive knowledge that they are not displacing state substantive law.[5]

For Campos, this approach hinges on the view that a state's substantive justification for adopting a particular law is important.[6] On the pages of the Supreme Court Reporter, this is a hotly contested premise—one whose validity remains unresolved, at least as to the Rules Enabling Act's (REA's) instruction that Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right."[7] That issue was on full display in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[8] the Supreme Court's most recent foray into the *Erie* doctrine.

Shady Grove concerned a New York law providing that actions to recover certain kinds of statutory penalties "may not be maintained as a class action."[9] Splitting five-to-four, the Court held that Federal Rule 23 trumped New York's § 901(b).[10] Only the five Justices in the majority

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1. 304 U.S. 64 (1938). The Court decided *Erie* on April 25, 1938. *Id.*

2. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

3. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 704–05 (1974).

4. Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1628–30 (2012).

5. *Id.* at 1628.

6. *See, e.g., id.* at 1596 (describing the "common sense view" of the Rules Enabling Act that inquires whether the state procedure has a "substantive justification") (citing Ely, *supra* note 3, at 727–28).

7. 28 U.S.C. § 2072(b). Campos argues that the state's purpose is relevant both to the REA and the test for making a "relatively unguided *Erie*" choice, where there is no conflict between state law and federal positive law. *See* Campos, *supra* note 4, at 1629.

8. 559 U.S. 393, 130 S. Ct. 1431 (2010).

9. *Id.* at 1436, n.1.

10. *Id.* at 1436, 1443–44.

considered the REA.[11] Although all five concluded that applying Rule 23 did not violate the REA, Justices Scalia and Stevens split over whether the state's purpose in adopting a particular rule was relevant to the REA inquiry. Justice Stevens' concurring opinion carefully examined New York's justification for adopting § 901(b).[12] For Justice Scalia, however, New York's purpose was irrelevant;[13] the sole question is whether the Federal Rule "really regulates procedure."[14]

To appreciate what this debate means as a practical matter, it is important to consider how *Shady Grove* handled other aspects of the *Erie* doctrine's framework—particularly the majority's threshold finding that Rule 23 and § 901(b) were in conflict with one another. As to that portion of the opinion, Justice Scalia wrote on behalf of all five Justices in the majority. He found such a conflict because both Rule 23 and § 901(b) governed whether a "class action may be maintained."[15] But he acknowledged that the conflict might have been avoided if § 901(b) had instead been framed in terms of whether statutory penalties were available *remedies* in a class action.[16]

This distinction is impossible to justify on functional grounds. To prevent certification of a class action seeking statutory penalties will necessarily make statutory penalties unavailable remedies in any class action.[17] Perhaps, then, this aspect of *Shady Grove* is about magic words. By choosing procedural magic words (whether a class action may be maintained), New York created an ultimately fatal conflict with Rule 23. But had it chosen substantive magic words (whether statutory penalties were available remedies in a class action), the conflict with Rule 23 could have been avoided. This made all the difference in *Shady Grove*, because all nine Justices would have followed § 901(b) under the test for making unguided *Erie* choices.[18]

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11. Justice Ginsburg and the dissenters concluded that there was no conflict between Rule 23 and § 901(b), and therefore applied the more state-friendly framework for making a so-called "relatively unguided *Erie* choice." *See* Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act after Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1138–39, 1141–42 (2011) (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)).

12. *See Shady Grove*, 130 S. Ct. at 1448, 1458–59 (Stevens, J., concurring) (considering the New York legislature's "intent," its "policy judgment," and what it "had in mind"); *but cf. id* at 1457–58 (stating that "the bar for finding an Enabling Act problem is a high one" and ultimately concluding that § 901(b) did not "operate as a limitation on New York's statutory damages" despite an expressed concern that awarding statutory penalties in a class action "would lead to annihilating punishment of the defendant" (citations and internal quotation marks omitted)).

13. *Id.* at 1445 (plurality opinion) (stating that the REA "leaves no room for special exemptions based on the function or purpose of a particular state rule").

14. *Id.* at 1444 (citations and internal quotation marks omitted).

15. *Id.* at 1438 (majority opinion).

16. *Id.* at 1439.

17. *See* Steinman, *supra* note 11, at 1156.

18. *Id.* at 1141–42, n.64.

Thus, there is a fascinating irony in Justice Scalia's position. He would prevent a state from vindicating its substantive purpose at the back end of the *Erie* doctrine (the REA's substantive rights provision). But his reasoning on whether a Federal Rule conflicts with state law could allow a state to effectuate its substantive purpose at the front end, simply by framing its law in substantive terms (e.g., available remedies). All this confirms that the relationship between magic words, state purpose, and the *Erie* doctrine remains a crucial, unresolved question. That relationship—and Campos's article—deserve close attention as *Erie*'s next seventy-five years gets underway.