

MAGIC WORDS AND THE *ERIE* DOCTRINE

*Adam N. Steinman**

It has been seventy-five years 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 mythical³) 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, however, 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 Indeed, the Justices' discord on 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.

* Professor of Law and Michael J. Zimmer Fellow, Seton Hall University School of Law.

1. 304 U.S. 64 (1938).

2. See, e.g., *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (“Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”).

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).

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 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 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

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

10. *Id.* at 1436, 1443–44.

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 some evidence that the New York legislature adopted § 901(b) “in response to fears that the class-action procedure, applied to statutory penalties, 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 (“We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23; that is not what § 901(b) does. By its terms, the provision precludes a plaintiff from ‘maintaining’ a class action seeking statutory penalties. Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all.” (brackets omitted)).

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 might have been avoided. This would have made all the difference in *Shady Grove*, because all nine Justices believed that the test for making unguided *Erie* choices—if it applied—would require federal courts to follow § 901(b).¹⁸

Thus, there is a potentially fascinating irony implicit in Justice Scalia's opinion. 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.

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

18. *Id.* at 1141–42, n.64 (“All nine agreed that *if* the issue was treated as a ‘relatively unguided *Erie* choice,’ then section 901(b) would apply in federal court, because to disregard it would encourage forum shopping in violation of *Erie*'s ‘twin aims.’”). The Justices' intuitions about forum shopping find support in a recent study examining changes in filing patterns for putative class actions likely to be affected by *Shady Grove*'s conclusion that New York's § 901(b) does not apply in federal court. See William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts*, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 642 (draft of April 29, 2013), available at: <http://ssrn.com/abstract=2263481>.