2011

Foreward: Erie's Gift

Jay Tidmarsh
Notre Dame Law School, jay.h.tidmarsh.1@nd.edu

SYMPOSIUM: *ERIE* UNDER ADVISEMENT: THE DOCTRINE AFTER *SHADY GROVE*

FOREWORD: *ERIE*'S GIFT

Jay Tidmarsh[*]

Sometimes described as "one of the modern cornerstones of our federalism,"[1] *Erie*[2] stands at its narrowest for a simple proposition: When a federal court decides a claim whose source is state law, the court must apply the same substantive common-law rules that a state court would apply to the claim. Dictated by statute,[3] by policy,[4] and by the Constitution,[5] this result seems "superbly right"[6] to many. Indeed, *Erie*'s narrow holding is not controversial today.[7]

But *Erie* casts a much longer shadow than its narrow holding, and this broader influence remains contested ground. *Erie* has an important but concededly opaque bearing on the relationship between state and federal courts, the relationship between state and federal law, and the

---

* Professor of Law, Notre Dame Law School.

1. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

2. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

3. *Id.* at 71-74. The statute that *Erie* interpreted was section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1845) (presently codified as amended at 28 U.S.C. § 1652 (2008)).

4. *Erie*, 304 U.S. at 74-78. *Erie* cited discrimination against citizens whose claims allowed their opponents to seek refuge in federal court, lack of uniform application of state law within a state, and forum shopping as undesirable consequences if federal courts were not required to follow the authoritative common-law rules of a state.

5. *Id.* at 78-79. *Erie* did not identify the precise constitutional provision that was offended when federal courts did not follow the authoritative common-law rules of a state. *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 246-48 (2000) (discussing possible constitutional foundations for *Erie*).

6. *See* PURCELL, *supra* note 5, at 247, quoting Henry M. Hart, Jr., The Place of the Federal Courts in the Constitutional Plan (undated, ca. 1955).

7. *But see* PURCELL, *supra* note 5, at 201-16 (discussing the efforts of Justice Frankfurter to erode and Professor Hart to recast the constitutional foundations for *Erie*); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803458 (describing reasons why *Erie* was wrongly decided).

relationship between Congress and the federal courts.[8] *Erie* also has a complicated effect on the area that we usually call "procedure."

Erie's procedural puzzle is easy to describe. While it seems unremarkable that a federal court should apply the state's authoritative pronouncements about its *substantive* law when resolving a claim for which state law provides the rule of decision,[9] it is far more debatable whether a federal court should apply the same *procedural* law that a state court would. On the one hand, rules of procedure can influence outcomes every bit as much as substantive rules.[10] Therefore, if the federal court uses its own rules of procedure rather than those that a state court would have used, the outcome in a federal court could well be as different from the result that the state court would have reached—even if both courts use the same substantive rules.[11] Differential outcomes can lead to forum shopping, inequalities arising from the fortuity of the parties' citizenship, and disrespect for state courts as the final arbiter of their own law—exactly the concerns that *Erie* found problematic as both a policy and a constitutional matter.[12]

On the other hand, federal courts, like all courts, have reasons to apply uniform rules to process all claims (state or federal). Federal procedural rules will be more familiar to the federal courts (and therefore more efficient to apply), and these rules can also represent important choices about how much power the federal courts should exercise over the legal rights of the citizenry. Moreover, allocating power to the states to dictate the process that federal courts must apply in a segment of their caseload also raises structural concerns, for Congress, and arguably the federal courts, have their own constitutional authority to promulgate rules of federal procedure.[13]

---

8. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 457 (6th ed. 2009) (suggesting that *Erie* might influence the capacity of the United States Supreme Court to review state-law issues in cases arising out of state courts). *Id.* at 607-85 (discussing the rise of enclaves of federal common law in the wake of *Erie*).

9. *But see* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts were not bound to accept a state court's authoritative pronouncements about its common law, but were free to expound a federal general common law), *overruled by* Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938).

10. *See, e.g.*, Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (noting that the use of different rules of procedure can "significantly affect the result of a litigation for a federal court").

11. *Id.*

12. *Id.* at 111-12.

13. The constitutional authority of Congress derives from its powers to create lower federal courts, see U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1, and the Necessary and Proper Clause, see U.S. CONST. art. I, § 8, cl. 18. The authority for federal courts to create their own rules derives by implication from the nature of the "judicial Power" vested in them, see *id.* art. III, § 1. *See also*

As the last sentence suggests, the source of the federal rule complicates the puzzle. Some federal procedural rules are constitutional in origin.[14] Some derive directly[15] or indirectly[16] from congressional command. Some are judge-made.[17] Granting that federal courts must comply with constitutional constraints even when a state rule of process is different,[18] it is not obvious that federal courts have as much power to apply judge-made procedural rules in the face of contrary state rules as they have to apply procedural rules adopted or sanctioned by Congress.[19] When state law provides the substantive rule of decision, there are respectable arguments that federal judges should calibrate their procedural rules with an eye on the balance of power between the state and federal courts. But procedural rules crafted by Congress represent the democratically elected branch's judgment about the scope of federal judicial power—a judgment that federal courts are bound to accept unless unconstitutional. Federal procedural rules crafted by the Supreme Court under a delegation of authority granted by Congress present an intermediate case; close attention must be paid to the rules' compliance with the precise terms of the delegation.

Another complication arises from difficulties of interpretation. As a pragmatic matter, it makes no difference whether a federal court applies a state or federal rule of procedure when both rules are the same. Similarly, if differing state and federal procedural rules operate over different domains, then there is no conflict and no need to choose between them; both sets of rules can be given effect. Therefore, the critical first step for a federal court is to interpret the state and federal procedural rules to determine if an actual conflict between the two rules exists. A second interpretive issue arises with respect to any federal procedural rule enacted pursuant to a delegation of legislative authority.

Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846-52 (2008) (evaluating claims of federal courts' inherent constitutional authority to promulgate rules of procedure).

14. *See, e.g.*, U.S. CONST. amend. V; *id.* amend. VII.

15. *See, e.g.*, 28 U.S.C. § 1404 (2006) (describing transfer among federal districts).

16. *See* 28 U.S.C. § 2072 (2006) (delegating to the Supreme Court "the power to prescribe general rules of practice and procedure" for the federal courts as long as these rules do "not abridge, enlarge or modify any substantive right").

17. *See, e.g.*, *Guar. Trust Co.*, 326 U.S. at 122 (refusing to permit a federal court to apply the equitable, judge-made doctrine of laches).

18. *Cf.* Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 535-40 (1958) (stating that a federal jury should determine certain facts, even if the facts would have been determined by a judge in state court; further noting the influence of the Seventh Amendment on this holding).

19. *See* Hanna v. Plumer, 380 U.S. 460, 469-70 (1965) (stating that the validity of a Federal Rule of Civil Procedure is determined under a different analysis than the validity of federal common-law procedural rules).

In the procedural context, the principal legislation is the Rules Enabling Act, which allows the Supreme Court to "prescribe general rules of practice and procedure"[20] as long as they do not "abridge, enlarge or modify any substantive right."[21] The Supreme Court has used this delegation of authority to promulgate most of the Federal Rules of Civil Procedure.[22] The Enabling Act's curious language suggests that Congress sees "procedure" and "substantive rights" not as dichotomous subjects, but as overlapping. Because the Enabling Act defines neither "procedure" nor "substantive rights," however, courts must give meaning to both phrases to determine the breadth of the Act's delegation and the validity of a Federal Rule of Civil Procedure. Third, in handling these interpretive issues, a related question is how sensitive a federal court should be to the concerns for federalism, separation of powers, forum shopping, inequity, uniformity, administrability, and the independence of federal courts that animate the *Erie* field, as opposed to relying on the plain text of the statute or rules.

Another complicating factor is jurisprudential in nature. The common criticism of the pre-*Erie* regime, in which federal courts were able to develop their own rules of common law in derogation of the rules chosen by state court, is its adherence to natural-law theory, or at least to the theory that common-law adjudication ultimately yields a single best rule of decision. In this regard, *Erie* is often regarded as a victory of legal positivism over natural law.[23] In considering the application of *Erie* to procedural rules, a second jurisprudential cross-current of special significance in American law is also in play. Unless we wish federal

---

20. *See* 28 U.S.C. § 2072(a) (2006).

21. *See* 28 U.S.C. § 2072(b) (2006).

22. A few portions of some Federal Rules were enacted by statute. *See* Pub. L. No. 102-198, § 11, 105 Stat. 1626 (1991) (amending then-existent Rule 15(c)(3)); Pub. L. No. 100-690, Title VII, § 7047(b), 102 Stat. 4401 (1988) (amending portions of Rule 35); Pub. L. No. 97-462, § 2, 96 Stat. 2527 (1983) (amending portions of Rule 4); Pub. L. No. 96-481, Title II, § 205(a), 94 Stat. 2330 (1981) (amending portions of Rule 37).

23. A famous articulation of the pre-*Erie* view is Justice Frankfurter's opinion in *Guaranty Trust*:

> Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law . . . .
>
> This impulse to freedom from the rules that controlled State courts regarding State-created rights was . . . strongly rooted in the prevailing views concerning the nature of law . . . .

Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 102 (1945) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)) (some paragraphing omitted). On the extent to which *Erie* in fact accepted a legal positivist account of law, see PURCELL, *supra* note 5, at 181-85, 296.

courts to be mirror images of state courts in every jot, at some point we must acknowledge the right of federal courts to use their own rules of "procedure." But that acknowledgment raises difficult issues of definition: What is "procedure" and what is not? Is the definition of "procedure" the same under the Rules Enabling Act as it is for judge-made rules? How sensitive should courts be to the reality that procedural rules can affect the outcome of cases? In particular, should they adopt a more "formalist" definition of procedure—one that does not vary with circumstance and is not attuned to procedure's outcome-influencing capacity? Or should they adopt a more "realist" definition—one denying that "'substance' [and] 'procedure' represents the same invariants" and acknowledging the real-world influence of process on outcome?[24] Here the age-old jurisprudential argument between formalism and realism is not taking place on the periphery of some minor legal battlefield; it lies at the heart of one of the principal divisions in all of law: the distinction between substance and procedure.

Finally, and relatedly, *Erie*'s effect on procedure cuts to the heart of law as a distinct intellectual enterprise. To put it mildly, the Supreme Court's decisions in the "procedural *Erie*" area have not always appeared consistent with each other.[25] Yet the Court has never overruled any of its cases, finding distinctions or developing analytical frameworks to recast prior decisions in ways that uphold their results if not their reasoning. Although the Court has now settled on the framework given in *Hanna v. Plumer*,[26] the framework has not ended all debate: in difficult cases the framework has enough play in the joints that controversies remain about the portion of the framework that procedural rules should be shoehorned into. The raggedness of the *Erie* doctrine exposes it to the criticism that "there is no law there"—that the present framework is just a thin veneer covering judges' naked political

24. *Guar. Trust Co.*, 326 U.S. at 108. For an oft-quoted statement of the same realist perspective, see Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against.").

25. For a sampling of some of the significant cases, see Sibbach v. Wilson & Co., 312 U.S. 1 (1941); *Guar. Trust Co.*, 326 U.S. 99; Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958); Hanna v. Plumer, 380 U.S. 460 (1965); Walker v. Armco Steel Corp., 446 U.S. 740 (1980); Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533 (1991); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

26. 380 U.S. at 468-71. For a famous and influential exegesis of this framework, see John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

preferences. Unless this criticism is to be conceded, there remains a great need for lawyerly imagination that grounds the procedural *Erie* doctrine in law.

In short, in the procedural area, *Erie* raises fundamental questions about the jurisprudential, constitutional, interpretive, taxonomic, and legal commitments of the American judicial system. For this reason, the problem has occupied, and will continue to occupy, the attention of leading scholars of constitutional and procedural law. Although the Supreme Court decides procedural *Erie* cases infrequently, each new case becomes an opportunity to re-examine fundamental commitments in light of new circumstances.

The most recent case from the Supreme Court, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[27] is the occasion for the present symposium. Because a number of the articles in this symposium recount the rich details of *Shady Grove*, I can state the question with a high degree of abstraction. New York has a rule that forbids its courts from maintaining class actions when the class seeks statutory damages or penalties in excess of actual damages.[28] Rule 23, the federal class-action rule, has no comparable limitation.[29] In *Shady Grove* the defendant allegedly failed to pay insurance claims on time, thus subjecting itself under New York state law to a statutory penalty of $500. Eschewing state court, which would have barred a class action in this circumstance, the plaintiff brought a class action in federal court on behalf of all other victims of the same alleged wrongdoing—thus making the case worth more than $5 million.[30]

The choice in *Shady Grove* was stark. Either the federal court was required to adopt the New York rule and deny class treatment (a decision that likely sounded the death knell for the case, because a $500 claim was not worth litigating), or apply Rule 23 and move forward with class certification (a decision that might induce the defendant to settle for a significant amount). For thousands of alleged victims and for the defendant, the choice between the New York Rule and Rule 23 represented as "substantive" an impact as any "procedural" rule could generate.

The Supreme Court held that the federal court should apply Rule 23, not the New York rule. Its reasoning, as the contributors to this symposium explain, has left much room for continued discussion. To

27. 130 S. Ct. 1431 (2010).
28. N.Y. C.P.L.R. 901(b) (McKinney 2006).
29. FED. R. CIV. P. 23.
30. *Shady Grove*, 130 S. Ct. at 1437 & n.3.

begin, on the critical issue about why the federal court should adopt Rule 23 rather than the New York rule, there was no majority opinion;[31] Justice Stevens supplied the critical fifth vote, but his reasoning for why the federal court should apply Rule 23 was significantly different from, and narrower than, the reasoning of the plurality.[32] Moreover, the plurality was written by Justice Scalia, who had authored the dissent in the last significant procedural *Erie* case, *Gasperini v. Center for Humanities*,[33] and whose methodology for interpreting the scope of Rule 23 seems at odds with another opinion he recently authored.[34] Conversely, Justice Ginsburg, who had authored the majority opinion in *Gasperini*, found herself authoring the dissent in *Shady Grove*.[35] Confounding this switch in position is the fact that both Justices used the same methodologies that they had used in *Gasperini*—with Justice Scalia adopting a blunter, "formalist" approach that rendered the use of the Federal Rules of Civil Procedure in adjudicating state-law claims nearly impervious to *Erie* challenges, and Justice Ginsburg adopting a context-sensitive, "realist" approach that attempted to accommodate the substantive interests of state courts and the procedural interests of federal courts.

Although the range of views on the Court is great, the breadth of views expressed by the authors in this symposium is even greater. Professor Stempel[36] and Mr. Gaber[37] prefer Justice Scalia's approach, albeit for very different reasons. Professor Stempel's argument is especially interesting, examining the history of the New York ban on statutory-damage class actions and arguing that Justice Scalia's broad

---

31. *Id.* at 1436, 1442-44.

32. To make matters more complicated, Justice Stevens joined the part of Justice Scalia's holding that Rule 23 and the New York rule were in conflict with each other, thus creating a majority of five for this proposition. *Id.* at 1436-42. This conflict then required the Court to choose between Rule 23 and the New York rule. It was on the next question—why a federal court should apply Rule 23 despite the conflict in the federal and state rules—that Justice Scalia and Justice Stevens parted ways. *Compare id.* at 1442-48 (plurality opinion) *with id.* at 1448-60 (Stevens, J., concurring). The dissent argued that Rule 23 and the New York rule were not in conflict, and that the New York rule barring the class actions could therefore be given effect. *Id.* at 1460-73 (Ginsburg, J., dissenting).

33. 518 U.S. 415, 448 (1996) (Scalia, J., dissenting).

34. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001) (interpreting Rule 41 narrowly to avoid arguable *Erie* concerns).

35. *See Gasperini*, 518 U.S. at 418-39 (Ginsburg, J.); *Shady Grove*, 130 S. Ct. at 1460-73 (Ginsburg, J., dissenting).

36. Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907 (2011).

37. Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the* Shady Grove *Plurality Was Right*, 44 AKRON L. REV. 979 (2011).

decision to uphold Federal Rules that come into conflict with state rules can have an important benefit of enhancing democracy by forcing states to make substantive changes in the law openly, rather than by sneaking them into procedural provisions likely to evade notice. Professor Koppel favors Justice Stevens' moderate approach to achieving procedural uniformity in federal court,[38] and Professor Genetin favors Justice Stevens' approach to determining whether a Federal Rule and a state rule are in conflict.[39] Professor Friedenthal suggests that Justice Scalia may have taken a wrong interpretive turn in construing the New York rule, and that this turn made *Shady Grove* a far more expansive decision than any *Erie* opinion before it.[40] Finally, Professor Doernberg finds all of the opinions lacking, and suggests two alternative rules that would do a better job for determining the application of federal procedural rules to state-law claims—including his favored approach, which derives from Justice Harlan's famous concurrence in *Hanna*.[41]

The articles also explore many of the deeper issues surrounding *Erie*. All the articles manifest concern for the constitutional and structural concerns that animated *Erie* and its procedural progeny. Several articles, especially those by Professors Doernberg, Koppel, and Stempel examine the jurisprudential commitments underlying the *Erie* doctrine in general and the various opinions in *Shady Grove* in particular. Professors Genetin and Friedenthal examine the difficulties of, respectively, statutory and rule interpretation in the *Erie* context. Professor Koppel emphasizes the value of procedural uniformity. Professor Doernberg evaluates the relationship between the procedural *Erie* doctrine and concerns for federalism. Mr. Gaber brings some realpolitik to bear by assessing the relationship between *Shady Grove* and the Class Action Fairness Act, which expanded federal jurisdiction over class actions to curb the perceived liberality of state-court class-action practice.[42]

---

38. Glenn S. Koppel, *The Fruits of* Shady Grove*: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999 (2011).

39. Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in* Erie *Cases*, 44 AKRON L. REV. 1067 (2011).

40. Jack Friedenthal, *Defining the Word "Maintain"; Context Counts*, 44 AKRON L. REV. 1139 (2011).

41. Donald L. Doernberg, *"The Tempest":* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: *The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147 (2011). For Justice Harlan's opinion, see Hanna v. Plumer, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring).

42. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006)).

In the political sense, the final chapter on *Shady Grove* has yet to be written. This Term, the Court has taken up a number of cases with the potential to narrow class-action practice at the federal level.[43] If such a narrowing occurs, the combination of the Class Action Fairness Act (opening up federal courts to more class actions) and *Shady Grove* (requiring the use of a narrowed Rule 23 in federal court) will put a class-action remedy beyond the reach of many individuals injured by widespread wrongdoing. Because class actions are largely used in small-scale cases in which individual litigation is not viable,[44] such a reshaping would also put any recovery beyond the reach of some plaintiffs. But such a narrowing would also reduce a costly and potentially abusive form of litigation.[45] On the other hand, if the Court's cases this Term treats Rule 23 more expansively, the combination of the Class Action Fairness Act and *Shady Grove* will help to provide a viable remedy for many victims of wrongdoing who otherwise might have no realistic means to obtain relief—although at the risk of maintaining a modicum of needlessly costly and frivolous litigation.

Whether *Shady Grove* was the first tactical move in a grand political strategy to rein in American class actions will play out soon enough. That eventuality is not the concern of these articles, which demonstrate a commitment to analyzing *Shady Grove* as a legal matter, not a political event. And perhaps that is as it should be. Collectively, the articles show the wonderfully diverse set of legal issues that *Erie* continues to spawn. Few decisions nearing their seventy-fifth anniversary have ever retained the salience and intellectual challenge that *Erie* does. Conceived in political, economic, and legal circumstances far different from our own, *Erie* remains a mirror in

---

43. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 795 (2010) (No. 10-277); Smith v. Bayer Corp., 593 F.3d 716 (8th Cir. 2010), *cert. granted*, 131 S. Ct. 61 (2010) (No. 09-1205); Laster v. AT&T Mobility, Inc., 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (No. 09-893).

44. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 597, 617 (1997) (noting that "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights'") (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); *see also Shady Grove*, 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting) (noting that using Rule 23 can "transform a $500 case into a $5,000,000 award").

45. For cases noting that class actions can browbeat defendants to settle frivolous litigation, see, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). For an article describing the agency-cost problems that large-scale, small-stakes class actions pose, see Jonathon R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

which our modern-day constitutional and legal commitments find reflection. An undue focus on the political elements in *Shady Grove* misses *Erie*'s transcendent gift.