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## The Erie-ness of the Rules

Sergio J. Campos

*University of Miami School of Law*, [scampos@law.miami.edu](mailto:scampos@law.miami.edu)

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# The Erie-ness of the Rules

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Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. Leg. & Pub. Pol’y 187 (2013).



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In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court famously ruled that a federal court cannot displace state common law with its own common law. Justice Brandeis’s majority opinion suggested that the Constitution compelled this result, and ever since, the decision has been called everything from a “brooding omnipresence” to an “irrepressible myth.” If *Erie* means anything (and, trust me, there is a *lot* of disagreement about whether it means anything at all), it makes clear that the federal government’s powers are limited vis-à-vis the states, and these limitations extend to the judiciary’s power to make law through precedent. To borrow Justice Brandeis’s words, “there is no federal general common law.” But translating this idea into doctrine has been a difficult task.

Applying *Erie* becomes even more complicated once you throw in the Federal Rules of Civil Procedure (which, ironically, became effective the same year as *Erie*). The Rules are like a legal mythical beast. The Rules are not statutes, even though they are exercises of Congress’s power to regulate the practices and procedures of Article III inferior courts. With rare exceptions, Congress does not exercise this power directly, but rather has delegated it to the Supreme Court through the Rules Enabling Act. The Court, in turn, has delegated the primary drafting of the Rules to an ad hoc advisory committee. Finally, under the Rules Enabling Act, the Rules cannot “abridge, enlarge or modify a substantive right,” which reflects a concern by Congress that the Court will abuse this delegated power to make “substantive” law without the authorization of Congress. Consequently, the Rules introduce a separation of powers dimension on top of the federalism concerns of *Erie*.

Enter Margaret Thomas’s masterful article, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*. Thomas focuses on the limitation that the Rules must not “abridge, enlarge, or modify a substantive right,” which has been difficult to apply in practice. This is especially true in cases brought under a federal court’s diversity jurisdiction, where a federal court is required under the Rules of Decision Act (and, according to *Erie*, the Constitution) to apply state law when there is no federal law on point. On the one hand, if a Federal Rule differs from the procedure that would apply in state court, then a federal court should apply the Rule because it is arguably a federal “law” on point. On the other hand, applying the Rule instead of the state procedure most likely would have an effect on the outcome (why else would the parties care?), and thus would arguably “modify” the substantive rights at issue in the case.

So is a Rule *always* valid or *never* valid? The Court has historically chosen the former. Recently, in *Shady Grove*, the plurality (and arguably the dissent) concluded that a Rule is valid if it “really regulates procedure,”

ignoring the “abridge, enlarge, or modify” limitation altogether.

For Thomas, this will not do. Like many scholars, Thomas argues that ignoring the “abridge, enlarge, or modify” limitation allows the Rules to preempt state procedures that are designed to protect or limit substantive rights. As she puts it, ignoring the limitation “risks undermining important areas of state policymaking that Congress never intended to control through federal law.” (P. 192 & n.11). But Thomas does not argue that “the Federal Rules should never apply in diversity cases.” (P. 25).

Instead, she proposes a simple and very elegant solution to figuring out when a Rule would “abridge, enlarge or modify a substantive right.” Thomas looks to the canons of construction used by the federal courts to determine whether a federal *statute* preempts state law. These canons include (1) the presumption against the preemption of state law and (2) the “clear manifestation of intent” rule, which only permits preemption of states exercising their “historic police powers” when it is unambiguously shown that a federal statute is meant to preempt state law. As Thomas points out, these canons protect federalism because they interpret congressional silence as creating space for states to exercise their police powers. Moreover, by ensuring that Congress, rather than the courts, exercises legislative powers, the canons protect federalism because, unlike the courts, Congress “provides for the representation of state interests in the legislative process.” (P. 237). Thus, Thomas cleverly reads into the “abridge, enlarge or modify” limitation of the Rules Enabling Act an implicit concern with federalism to go along with the Act’s concern with separation of powers.

This is all somewhat abstract, but Thomas’s insight reduces the “abridge, enlarge or modify” limitation to a simple standard. The key inquiry for Thomas is whether “the law is in an area where Congress has declined to exercise federal power and the state law at issue is part of the manner in which the state governs the area.” (P. 251).

A simple example shows how Thomas’s proposal can provide much needed guidance. Suppose, as in *Shady Grove*, a state has a blanket prohibition against class actions where the damages are defined by statute. Should the prohibition apply in a diversity case, or should Rule 23, which governs federal class actions, apply? This issue divided the Court, but Thomas points out that the federalism canons provide a much easier way to address the issue. In Thomas’s view, whether the state prohibition applies depends on what the claims are meant to address. In *Shady Grove*, the statutory damages were meant to ensure that insurance companies make timely payment of their proceeds. Because insurance regulation is a traditional state concern, the state prohibition should apply. As Thomas puts it in discussing *Shady Grove*, “[l]imiting the magnitude of statutory late-payment penalties reflects a decision about New York’s regulation of its own insurance industry.” (P. 258). Here Thomas’s standard provides a compelling answer to the question of whether the “abridge, enlarge or modify” limitation has been breached. Moreover, it does so without sifting through state legislative history or giving significance to whether the prohibition was part of the state’s procedural code or part of its “substantive” statutes.

I have proposed an approach to *Erie* that differs somewhat from Thomas’s proposal, although I am not sure the differences matter. More importantly, Thomas’s proposal has the advantage of using canons of construction that have been used “since the time of the Framing . . . to identify the internal power of states to regulate matters within their own borders to promote the general welfare.” (P. 255). Thus, like another article that I liked (lots), Thomas’s article goes beyond criticizing or defending a doctrine to address how to make the doctrine work. For that reason Thomas’s excellent article is a major contribution to the already extensive scholarship on *Erie*.

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