

ERIE'S INTELLECTUAL HISTORY

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I am very honored and grateful to be included in this symposium, which encompassed two days at the vibrant University of Akron School of Law, with a corresponding privilege to meet and renew connections with other participants in the event. Only a few cases in American law have their own birthday celebrations. Over the years, there have been temporally benchmarked events to commemorate *Marbury*, *Brown*, *Miranda*, *Roe*, *Chevron*, and a few other iconic decisions.¹ This symposium for *Erie's* 80th anniversary is similarly distinctive, and I would like to start by briefly considering what qualifies judicial rulings

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1. See generally, Symposium, *Erie Railroad at Seventy-Five*, 10 J.L. ECON. & POL'Y 1 (2013); Symposium, *Law Without a Lawmaker*, 54 WM. & MARY L. REV. 655 (2013) (including several analyses of *Erie* on the decision's 75th anniversary); *The Golden Anniversary Year: Erie R.R. Co. v. Tompkins and the Federal Rules*, 1988 AALS Proceedings 1, 130 (1988); See, e.g., Symposium, *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003); Symposium, *Judging Judicial Review: Marbury in the Modern Era*, 101 MICH. L. REV. 2557 (2003); Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?*, 117 HARV. L. REV. 1302 (2004); Symposium, *Revisiting Brown v. Board of Education: 50 Years of Legal and Social Debate*, 90 CORNELL L. REV. 279 (2005); *Roe at 40: The Controversy Continues*, 71 WASH. & LEE L. REV. 817 (2014); Symposium, *50 Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS. L. REV. 513 (1995); Symposium, *The 50th Anniversary of Griswold v. Connecticut, Privacy Laws Today*, 47 CONN. L. REV. 971 (2015); Symposium, *The 50th Anniversary of Miranda v. Arizona*, 97 B.U.L. REV. 681 (2017); Symposium, *20 Years After: The Impact of the Chevron Decision Upon the Development of Federal Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005); see also, Jack B. Weinstein, *The Ghost of Process Past: The 50th Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988); Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988); James A. Gorrell & Ithamar D. Weed, *Erie Railroad: Ten Years After*, 9 OHIO ST. L.J. 276, 308 (1948); Joseph L. Lenihan, *Erie Railroad v. Tompkins—After 50 Years*, 53 KY. BENCH & B. 22 (1989); Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1988); Linda C. McClain, *Prejudice, Moral Progress, and Being 'On the Right Side of History': Reflections on Loving v. Virginia at 50*, 86 FORDHAM L. REV. 2701 (2018).

SYMPOSIUM, *ERIE* AT EIGHTY: CHOICE OF LAW ACROSS THE DISCIPLINES

for memorialization in doctrinal history. Year after year, the continuous stream of new cases never runs dry, yet some rulings hold persistent spots in the legal pantheon, with corresponding recognition on some grand historical calendar.

It may not be possible to fully explain why particular iconic cases tower over the rest, but a few general characteristics are worth mentioning. For instance, legal communities that commemorate a judicial decision almost certainly believe that it accomplished something singular and distinctive. An iconic case cannot simply represent a long line of precedent—a smooth arc of case law would not produce a specific moment to celebrate. On the contrary, there must be a dramatic break with a pre-decisional past, or some extraordinary application of existing doctrine to unconsidered facts.

Likewise, cases with anniversary celebrations must represent something larger than themselves. That is why iconic decisions often include grand or indeterminate language, which allows future generations to interpret and reinterpret doctrinal meanings under variable circumstances. Debates over iconic cases, insofar as they remain iconic, are never fully resolved, and that is partly the point. Interpretations tend to develop and cycle, raising new questions and answers, even as they shift and readjust to meet new interpretive priorities.² *Erie* satisfies all of those criteria, and insofar as this essay only has a few pages to analyze 80 years, I'd better hurry.

The most important thing to understand about *Erie* is that the iconic decision today is not what it used to be, and in the future, the case might not remain what it is right now.³ This essay proceeds in three chronologically sequenced steps that sketch how *Erie* became what it is, consider what it might become, and offer some explanation for why modern readers should care. Changes in political context, judicial personnel, economic consequences, and even academic commentary have all combined to determine *Erie*'s doctrinal meaning over time. And in turn, that process will continue onward for as long as any legal community cares enough to notice. Happy birthday *Erie*!

2. Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 383–84; 440 (2016).

3. For similarly historicized accounts of *Erie*, see *id.*; EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2nd ed. 2000); TONY FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* (1981); Daniel R. Ernst, *Thinking Like a Historian: Erie in the Dimension of Time*, 26 L. & SOC. INQ. 719 (2001) (book review).

The first step is to consider “original *Erie*” as it was decided in 1938. This symposium was convened to celebrate one of the most radical decisions in American law, though it might be hard for readers to recognize it as such. On this 80th anniversary, *Erie* looks old, respectable, and almost boring.⁴ Political struggles over corporate power and federal courts were crucial to *Erie* in 1938, when railroads, insurance companies, and corporate interests regularly schemed their way into federal jurisdiction to receive favorable substantive law.⁵ Once upon a time, those conflicts dominated legal analysis of diversity jurisdiction, but now such issues have largely dissipated and relocated to other legal fields.⁶

Modern law students know that studying *Erie* is one of law school’s universal rites of passage. But they seldom understand why people from past eras *cared so much* about the decision. The venerable octogenarian *Erie* was born a hell raiser, and one premise of this essay is that no lawyer should ever forget it.

In 1938, the Court annihilated almost 100 years of precedent with a pen stroke, declaring “[t]here is no federal general common law” even though no lawyer ever made that argument, and even though federal judges across the country had previously applied federal general common law as a matter of routine.⁷ No lawyer or commentator predicted *Erie*’s

4. For a strong call for modern observers to recognize *Erie*’s outrageousness, see Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPPERDINE L. REV. 129, 130; 149–52 (2012).

5. EDWARD A. PURCELL, LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992).

6. *But see*, 28 U.S.C. § 1369 (providing federal jurisdiction for certain multiparty, multiforum tort litigation); 28 U.S.C. § 1332(d) (codifying the Class Action Fairness Act of 2005).

7. *Compare* *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) *with, e.g.*, *Willing v. Binstock*, 302 U.S. 272, 275 (1937) (“We have no occasion to consider whether [the Rules of Decision Act] is applicable. Under *Swift v. Tyson*, it would not be.”) (unanimous opinion); *Boseman v. Conn. Gen. Life Ins. Co.*, 301 U.S. 196, 203–04 (1937) (unanimous opinion) (“We are unable to agree with decisions of the Court of Civil Appeals of Texas in cases similar to this that the certificate is a part of the contract of insurance or that its delivery is necessary to make the policy effective. Nor are we required to follow their construction.”) (quoting *Swift v. Tyson*, 41 U.S. 1 (1842)) (footnote omitted)); *Christian v. Waialua Agr. Co.*, 93 F.2d 603, 609 (9th Cir. 1937) (“If the questions of law before us are questions of general law, then we may exercise our own independent judgment in the decision thereof.”); *Glover v. State Bank of Birds*, 95 2d 151, 156 (7th Cir. 1938) (applying general commercial law in reliance on *Swift v. Tyson*); *Nat’l Exch. Bank & Trust Co. v. N.Y. Life Ins. Co.*, 19 F. Supp. 790, 791 (W.D. Pa. 1937) (“The interpretation of a life insurance policy is a question of general commercial law.”); *General Petroleum Corp. v. Seaboard Terminals Corp.*, 19 F. Supp. 882, 885 (D. Md. 1937) (discussing the applicability of *Swift v. Tyson* to judicial interpretations of state statutes); *Mattison-Geenlee Service Corp. v. Culhane*, 20 F. Supp. 882, 885 (N.D. Ill. 1937) (“While it may be true, as some have thought, that the rule of *Swift v. Tyson, supra*, will receive substantial restriction of application to the future, there is nothing in *Trainor Co. v. Aetna Casualty Co.*, 290 U.S. 47, and *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335, to suggest its nonapplication to the problems of general commercial law.”).

result, much less did anyone request or imagine the Court's constitutional rationale.⁸ Indeed, commentators at the time found the Court's unexpected and tangled explanation about the "unconstitutionality" of *Swift v. Tyson* even harder to understand than it seems today.⁹

Some modern observers cite *Erie* an example of judicial humility,¹⁰ but the opposite is also true. *Erie* represented the kind of judicial hubris that would later be called judicial activism, relying on constitutional arguments that were never litigated and that the legal mainstream could not comprehend.¹¹ *Erie* is sometimes celebrated because the application of state law in federal courts can expose federal adjudicators to new ideas, which migrate and cross-pollinate other kinds of decisions.¹² But important multicentric dialogues about common-law doctrines were transformed if not squelched by *Erie*'s decision to eliminate federal general common law. Federal courts before *Erie* had never threatened the independence of state courts to decide their own cases using their own best judgment—federal and state cases coexisted, regardless of their harmony or dissonance.¹³ By contrast, after *Erie*, federal courts simply aimed to mimic state supreme courts, without performing the kind of experimental dynamism that some modernists now seem to value. Whereas some analysts today characterize *Erie* as a gradual outgrowth of changing jurisprudential ideology, the decision in its day was the kind of violent, sudden rupture that seldom happens in American law.¹⁴

Federal courts had been collateral participants in significant swaths of common-law decision making, including commercial law, contracts, and some tort cases as well.¹⁵ *Erie* substantially reduced that role, leading some federal judges to believe in diversity cases that they were reduced to ventriloquists' dummies that could only parrot state court decisions

8. See Green, *supra* note 2, at 430–32 (collecting lawyers' briefs and other contemporaneous sources).

9. Compare *Commentary*, 51 HARV. L. REV. 1245, 1245 (1938), with Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595 (2008).

10. See *e.g.*, Ernest A. Young, *Erie as a Way of Life*, 52 AKRON L. REV. 175 (2019).

11. Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1200 (2009).

12. See, *e.g.*, Megan M. La Belle, *An Erie Approach to Privilege Doctrine*, 10 CONLAWNOW 205 (2019); Laura E. Little, *Erie's Unintended Consequence: Federal Courts Creating State Law*, 52 AKRON L. REV. 273 (2019); Ernest A. Young, *Erie as a Way of Life*, 52 AKRON L. REV. 175 (2019).

13. See Green, *supra* note 2, at 409–11 (discussing New York state courts' explicit refusal to follow the United States Supreme Court's result in *Swift v. Tyson* itself).

14. See, *e.g.*, Lawrence Earl Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L.J. 3, 3 (1941).

15. Green, *supra* note 2, at 411–26 (discussing *Swift*'s expansion, and critics' resistance thereto).

about state law.¹⁶ For better or worse, the Supreme Court explained its *Erie* decision with a scrambled hash of constitutional rhetoric, alongside dicta about statutory interpretation and judicial pragmatism.¹⁷ As an editorial sidenote, I might suggest that the pragmatic arguments which predated *Erie* were the most sensible, least controversial parts of the Court's opinion.¹⁸ And modern courts' reliance on the "twin aims of *Erie*"—forum shopping and inequitable legal administration—suggests that those same practical arguments might have provided an essential platform for much of the theorizing that emerged afterward.¹⁹

This essay's second step is to consider "mid-century *Erie*," explaining how the radical *Erie* that most lawyers ignore became the boring *Erie* that most law students study. One direct explanation lies with the Legal Process School, which included Felix Frankfurter, Herbert Wechsler, and many other people during the 1950s and 1960s.²⁰ In briefest summary, the Legal Process School was preoccupied with questions of legal purpose, function, and system.²¹ Its central constitutional issues involved questions of structure, especially including federalism and separation of powers.²² Legal Process represented a deep engagement with judicial craft and technique, with legal nooks and crannies such as abstention, passive virtues, and statutory interpretation—addressing time and again what federal courts should do under circumstances of legislative vagueness, silence, or absurdity.

Erie was an adopted hero of the Legal Process Movement. In their hands, the technical choice between state common law and federal general

16. Richardson v. Comm'r, 126 F.2d 562, 567 (2d Cir. 1942) (Frank, J.), quoted in Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 284 (1946).

17. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 73–80 (1938).

18. See, e.g., CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (Felix Frankfurter & Wilber G. Katz eds., 1931) (collecting pragmatic critiques).

19. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); Michael Steven Green, *The Twin Aims of Erie*, 88 NOTRE DAME L. REV. 1865, 1865 (2013).

20. PURCELL, *supra* note 3, at 222–84; William N. Eskridge Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2031 (1994).

21. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996); John David Ohlendorf, *Purposivism Outside Statutory Interpretation*, 21 TEX. REV. L. & POL. 235, 243–44 (2016); Ronald J. Krotosynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L. Q. 993, 999–1003 (1999).

22. See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 953 (1994); Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 993 (1994); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1021 (1994).

common law implicated big concepts and arguments about purpose, function, and system. With respect to *Erie*, all of those issues arose in a context where explicit textual authority from the Constitution, the Rules of Decision Act, and the Supreme Court itself was vanishingly rare. Nothing could be more perfect for legal process argument and analysis.

To be clear, elements of Legal Process predated Hart and Wechsler's casebook in 1953 or Hart and Sacks's teaching materials in 1948. As a political matter, Legal Process appealed to conservatives who wished to justify the status quo as a system that was intact and integrated.²³ It also appealed to liberals who sought to use their own legal sensibilities to make law work incrementally better.²⁴ But the main characteristics of Legal Process were its ostensible centrism, apolitical stability, process-based legitimacy, and institutional settlement. *Erie* was rewritten to fit the Legal Process mode, embodying a flexible allocation of responsibility between state and federal law, state and federal courts, and also between federal courts and Congress.²⁵ Most of all, Legal Process *Erie* was recharacterized as something apolitical and rational, even though in 1938 the decision was nothing like that.

The Legal Process version of *Erie* would outlast the Legal Process Movement itself as a dominant feature of American law. From the left, Legal Process scholarship was generally attacked by versions of civil rights and feminism that ultimately produced various forms of critical legal theory.²⁶ On the right, Legal Process was pressured by legal formalism—including textualism and originalism—that endorsed public choice political theory while demanding greater specificity between legal authority and identifiable text.²⁷ From both political wings of American legal culture, the 1970s and 1980s marked a period of disavowal, despair, and diminution with respect to the existence of objective purposes, entities, and systems that could exist outside of ordinary politics. The left complained that Legal Process rhetoric masked the power of rich white men, while the right criticized elite judges and cultural progressives for

23. See, e.g., Ernest A. Young, *Erie as a Way of Life*, 52 AKRON L. REV. 175 (2019).

24. Stephen Breyer, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1985).

25. PURCELL, *supra* note 3, at 222–84.

26. See, e.g., Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 819 (1989) (book review); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 601 (1993); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 288 (1973); Resnik, *supra* note 22.

27. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23 n. 99 (2006); JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 12–42 (2007).

imposing their political will instead of the law “as it is.” Lawyers on the left and the right also departed from the Legal Process Movement because both sides wanted radical reform, whether in support of self-consciously new liberties and equalities or as a return to the 18th century history of founders’ virtue.

By contrast, the Legal Process version of *Erie* stumbled on, still making good practical sense and evermore entrenched in operative judicial doctrine. The decision still lacked a satisfactory constitutional rationale, if anyone cared much about that. But so long as *Erie* stayed in its lane—concerning the allocation of federal and state lawmaking in contexts like diversity and supplemental jurisdiction—most observers did not worry about legal origins. Regardless of whether the decision was based on constitutional law, legal positivism, the Rules of Decision Act, or anything else, there has been and there remains little enthusiasm for overturning *Erie*’s result and resurrecting federal general common law that prevailed under *Swift v. Tyson*.

The third step of this essay is to consider *Erie*’s meaning today and tomorrow. This symposium’s thoughtful contributions cover an immensely wide range, analyzing *Erie*’s potential application to evidence, intellectual property, the Federal Rules of Civil Procedure, and many other contexts.²⁸ As part of that process, however, it might be worth asking whether such diverse arguments intend to rely on *Erie* at the time it was written, *Erie* from the middle 20th century, *Erie* today, or perhaps no *Erie* at all. Especially insofar as judicial pragmatism and intersystemic comity are treated as subconstitutional legal values—which earn their meaning without attachment to 18th century history, and which are necessarily subject to amendment or repeal by Congress—many of this symposium’s proposals about evidentiary privileges, the federal circuit, the Rules Advisory Committee, and other legal fields seem identically persuasive with or without a doctrinal reference to *Erie*.

Some readers might object that including *Erie* to otherwise freestanding policy proposals as a doctrinal ornament does not matter much. But indeed, *Erie*’s presence might matter, if precedents matter and if constitutional law matters. Speaking autobiographically, I first participated in 21st century *Erie* debates to counter suggestions that *Erie* constitutionally eviscerated customary international law under the Alien Tort Statute.²⁹ I remained in those debates to counter suggestions that *Erie*

28. Symposium, *Erie at Eighty: Choice of Law Across the Disciplines*, 52 AKRON L. REV. 175 (2019).

29. Green, *supra* note 9.

constitutionally eviscerated large categories of federal administrative law.³⁰ And of course, administrative law's constitutional status in the United States has been more vigorous in recent years than at any point since 1937.³¹ Every time that *Erie*'s famous name is applied to some new context, without detailed attention to what the decision means and has meant, it only amplifies the decision's doctrinal flexibility. Other potential targets for expansive interpretations of *Erie*, especially ones that include references to constitutional separation of powers, include *Bivens* remedies, and perhaps litigation under Section 1983, along with other ill-defined examples of federal common law—not federal general common law—including other statutes that authorize judicial lawmaking by implication.

What does the future hold? With Justice Kavanaugh's confirmation, there is no way to know. The current Supreme Court is more conservative than any group of justices since 1937, and other federal courts will only shift farther rightward over time. One thing I do know is that those who cannot remember the past are doomed to lose debates about it. And even as lawyers gather to celebrate *Erie*'s triumph 80 years ago in support of Brandeis's progressive politics, some of us might be wary about a newly politicized *Erie* in the hands of a new generation of legal conservatives.

30. Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 661 (2008).

31. Craig Green, *Deconstructing the Administrative State: Constitutional Debates over Chevron and Political Transformation in American Law* (Temple University Legal Studies Research Working Paper No. 2018- 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264482 [<https://perma.cc/JZG9-9NTF>].