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***ERIE* AND CONSTITUTIONAL STRUCTURE: AN INTELLECTUAL HISTORY**

*Craig Green**

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 considering what qualifies judicial rulings for such memorialization in doctrinal history. Year after year, the continuous stream of new cases never runs dry, yet

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1. *E.g.*, Symposium, *Erie Railroad at Seventy-Five*, 10 J.L. ECON. & POL'Y 1 (2013); Symposium, *Law Without Lawmakers*, 54 WM. & MARY L. REV. 655 (2013) (including several analyses of *Erie* on the decision's seventy-fifth anniversary); *The Golden Anniversary Year: Erie R.R. Co. v. Tompkins and the Federal Rules*, 1988 AALS Proceedings 1, 130 (1988); *see, e.g.*, *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), Symposium: *Brown at Fifty*, 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); Samuel W. Calhoun, *Roe at 40: The Controversy Continues*, 71 WASH. & LEE L. REV. 817 (2014); Symposium, *Fifty 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 Fiftieth Anniversary of Miranda v. Arizona*, 97 B.U. L. REV. 681 (2017); Symposium, *Twenty Years After: The Impact of the Chevron Decision Upon the Development of Federal Environmental Law*, 16 VILL. ENVTL. L. J. 1 (2005); *see also, e.g.*, Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth 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 (1948); Joseph L. Lenihan, *Erie Railroad v. Tompkins – After Fifty Years*, 53 KY. BENCH & B. 22 (1989); Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989).

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

some rulings hold persistent spots in the legal pantheon, with corresponding recognition on a grand historical calendar.

Although it may not be possible to fully explain why particular iconic cases tower over the rest, there are a few general characteristics that are worth mentioning. For instance, any legal community that commemorates a judicial decision almost certainly believes that it accomplished something singular and distinctive. An iconic case cannot simply represent a long line of precedent, and 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 truly resolved, and that is partly the point. Interpretations tend to cycle and develop, raising new questions and answers, even as they shift and readjust to meet new interpretive priorities.²

Erie satisfies all of those criteria, and this essay will sketch some of the decision's history as a jurisprudential icon before concluding with a few theoretical issues about the stability of judicial precedents as a form of legal authority. The most important thing to understand about *Erie* is that the iconic decision today is not what it used to be, and the case might not remain in the future what it is right now.³ 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*!

This essay proceeds in five steps, which will identify themselves individually as they unfold. The first step is to describe *Erie*'s original reception in 1938. Everyone knows that the Court addressed a political and pragmatic problem about judicial management, while declaring a constitutional principle that litigants and contemporary commentators

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

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

never contemplated or proposed.⁴ During the years that followed, however, the Supreme Court relied on *Erie* many times to resolve important technical issues, without mentioning *Erie*'s original holding as a matter of constitutional law.⁵

Likewise, legal commentators in *Erie*'s first decade expressed some mixture of confusion and resistance with respect to the Court's constitutional reasoning. In 1938, editors at the *Harvard Law Review* were stunned by the Court's *startling avowal* that *Swift v. Tyson* was unconstitutional, describing with remarkable charity: "the gratuitous courage of the Court *and the fluidity of the Constitution*."⁶ Only students who studied law during the New Deal Court's *switch in time* could so unequivocally celebrate the kind of radical *courage* and unprincipled

4. Green, *supra* note 3, at 430

[T]he lawyers in *Swift* argued their case as though it were a mountain, but the Court decided a molehill. The opposite was true in *Erie*. No lawyer had suggested that 'the oft-challenged doctrine of *Swift v. Tyson* should be disapproved.' Nor did anyone but the Supreme Court foresee that as even a possibility. The district judge—a Roosevelt appointee hearing his first civil case—had applied federal general common law without hesitation. And a Second Circuit panel that included Learned Hand and Thomas Swan had unanimously used federal general common law with casual confidence."

(footnotes omitted) By contrast, many pre-*Erie* commentators had objected to federal general common law on practical and political grounds. See e.g., CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (Felix Frankfurter & Wilber G. Katz eds., Callaghan & Co. 1931) (compiling pragmatic critiques); see also Green, *supra* note 2, at 424–26.

5. For an early set of post-*Erie* Supreme Court cases that applied the decision's result without invoking its constitutional rationale, see, for example, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945); *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538 (1941); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Six Companies of California v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Russell v. Todd*, 309 U.S. 280 (1940); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939); *Wichita Royalty Co. v. City Nat. Bank of Wichita Falls*, 306 U.S. 103 (1939); and *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938). Cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (applying Federal Rules of Civil Procedure without invoking constitutional limits). The only opinions that I have found from this era to explicitly discuss constitutional arguments were dissenting opinions from Justice Rutledge, and in any event, Rutledge was highly dubious of those arguments' merit. *Cohen*, 337 U.S. at 558 (Rutledge, J., dissenting)

[*Erie*] held that district courts in diversity cases must apply state law, decisional as well as statutory, in determining matters of substantive law I accept that view generally and insofar as it involves a wise rule of administration for the federal courts, though I have grave doubt that it has any solid constitutional foundation.

Guaranty Trust, 326 U.S. at 117 ("I cannot say as was said in the *Erie* case [about state negligence standards], that the matter [of state statutes of limitations in equity cases] is beyond the power of Congress to control.")

6. *Commentary*, 51 HARV. L. REV. 1245, 1217-1220 (1938) (emphasis added).

fluidity that later generations might have described as *judicial activism*.⁷ Just a few years later, a different group of Harvard student editors would express skepticism and resignation about *Erie*'s original logic, forecasting with weary sophistication that, "[d]espite attacks on its constitutional basis, queries as to its historical validity, and criticisms of its jurisprudential assumptions, *Erie R. R. v. Tompkins* is probably here to stay."⁸

The reaction of Solicitor General Robert Jackson to *Erie*'s constitutional reasoning was tepid from the start.⁹ In a public lecture, Jackson endorsed the decision's result as "one of the most dramatic episodes in the history of the Supreme Court," but he insisted that "the Court might well have avoided resort to statutory or constitutional grounds, and placed its decision solely on the grounds of sound practice for the Federal courts."¹⁰ Likewise, Charles McCormick and Elvin Hale Hewins wrote in 1938 that *Erie*'s constitutional arguments were on jurisprudentially *quaky ground* and represented a vulnerable "Achilles tendon of the opinion."¹¹ The authors criticized Justice Brandeis as a hypocrite because, despite general admonitions that judges should avoid unnecessary constitutional issues, "he seems in his anxiety to attain ends which he believes desirable, to depart from standards which he thinks should control others."¹²

In 1941, practitioner Lawrence Earl Broh-Kahn wrote an extensive article that canvassed eighteenth-century historical materials before concluding that *Erie*'s "revolution in our jurisprudence" amounted to a constitutional "amendment by [judicial] decision."¹³ In Broh-Kahn's view, that kind of radical jurisprudential action "may be wise or unwise.

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

8. *How a Federal Court Determines State Law*, 59 HARV. L. REV. 1299, 1299 (1946).

9. See Robert H. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A. J. 609 (1938).

10. *Id.* at 644; cf. T.A. Cowan, *Constitutional Aspects of the Abolition of Federal Common Law*, 1 LA. L. REV. 161 (1938) (suggesting that the only plausible constitutional argument—though paradoxical in its mixture of statutory and constitutional authority—was that federal courts under *Swift v. Tyson* had unconstitutionally failed to apply the Rules of Decision Act).

11. Charles T. McCormick & Elvin Hale Hewins, *Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 133–34 (1938).

12. *Id.* at 134–35; see also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345–48 (Brandeis, J., concurring) (1936) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). See generally *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 103 (1944) (Frankfurter, J.) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

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

It may even be an usurpation of power by the judiciary. The important thing is that it should be recognized when it occurs. If unwise, it can then be corrected.”¹⁴ Broh-Kahn thought that judicial self-correction was certainly appropriate for *Erie* because any practical problems under *Swift* should have been addressed “as a matter of comity or independent appraisal and decision rather than by reason of any non-existent constitutional . . . compulsion.”¹⁵

In 1946, Judge Charles Clark heaped more criticism on *Erie*’s constitutional reasoning: “[a]mong many troublesome features of the opinion [the Court’s constitutional argument] is perhaps the most troublesome; at least commentators have found it so.”¹⁶ Clark generalized with remarkable breadth, claiming that the Court’s constitutional objection to *Swift v. Tyson* “has always puzzled commentators, who have been wont to consider the statement as a dictum,” even as he noticed that *Erie*’s original approach “seems to have been rather carefully avoided by the Court ever since.”¹⁷ Clark obviously misread the *Erie* Court’s constitutional rhetoric in declaring that “dictum it surely seems to be.”¹⁸ But for present purposes, Clark’s interpretation also highlights how unsatisfactory he found the Court’s arguments as a matter of substantive law.

Helen Silving—who would become the United States’ first female law professor—was more resigned to *Erie*’s constitutional reasoning than Judge Clark.¹⁹ In 1946, she wrote with notable emphasis: “Clearly, constitutional provisions mean what the Supreme Court, in its latest decision, says they mean, and the [holding of the] Supreme Court in *Erie v. Tompkins*, . . . however fallacious, was thereby transformed into law.”²⁰ She continued, “[o]nce a jurisprudential doctrine has been proclaimed to be law in the proper form of the law, its fallacious doctrinal source does not impair its validity as law. By being incorporated into the law, it ceases

14. *Id.* at 57.

15. *Id.* at 60; cf. Lawrence Earl Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case*, 31 KY. L.J. 99 (1943) (offering substantive criticism of the Supreme Court’s post-*Erie* decisions, despite noting that the latter rulings did not repeat *Erie*’s constitutional rationale).

16. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 273–74 & n.27 (1946) (citing seven criticisms of *Erie*’s constitutional argument in addition to those discussed *supra*).

17. *Id.* at 278.

18. *Id.*

19. See Reut Yael Paz, *A Forgotten Kelsenian? The Story of Helen Silving-Ryu (1906-1993)*, 25 EUR. J. INTL. L. 1123 (2014).

20. Helen Silving, *Analogies Extending and Restricting Federal Jurisdiction: Erie R. Co. v. Tompkins and the Law of Conflict*, 31 IOWA L. REV. 330, 339 (1946) (footnotes omitted).

to be a jurisprudential proposition and becomes a rule of law.”²¹ Silving did not address whether *Erie*’s legal decision should continue to be described as *constitutional* if the Supreme Court deliberately chooses not to invoke constitutional law in its *latest decision[s]* applying the *Erie* doctrine—as happened for eight years prior to Silving’s article and would continue for decades afterward.²²

It would be easy enough for this essay to collect additional examples of constitutional criticism of *Erie* from this period, especially because my own doubts about *Erie*’s constitutional arguments are also well documented.²³ However, this is not the place to pursue substantive constitutional debates about *Erie*, and even Alfred Hill’s rare defense of *Erie*’s constitutional arguments twenty years after the Court’s decision acknowledged that “the constitutional basis of *Erie* has been widely regarded as dictum, and rather dubious dictum at best.”²⁴ Instead, the more immediate goal is to show that—in the years that followed *Erie*—constitutional arguments shifted from being an explicitly essential part of the Court’s holding to being a legal embarrassment that many judges, lawyers, and commentators at the time set aside with varying levels of grace and diplomacy.

21. *Id.*

22. *Id.*

23. *Compare, e.g.,* Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L. Q. 494, 524 (1949) (“Any attempt to attack *Swift v. Tyson* on constitutional grounds is untenable. The argument is so devoid of merit that even the most ardent defenders of *Erie* have abandoned it.”), and PURCELL, *supra* note 3, at 196 (“Even many of Brandeis’s friends and admirers were disturbed. ‘I really do not like the way [the Constitution] was handled by [Brandeis] and much preferred [the statutory argument of] Stanley Reed,’ Judge Augustus N. Hand confessed, and Professor Thomas Reed Powell of Harvard Law School upbraided Brandeis for ‘violating many of the canons of constitutional adjudication upon which he has often strongly insisted.’”), and *id.* at 215 (quoting a letter from Felix Frankfurter to Henry Hart: “Of course Brandeis talked of constitutionality. But is it necessary to be bound by what he said? . . . [T]he fact that Brandeis invoked constitutional considerations does not demonstrate their validity.”), and *id.* at 217 (“[Harvard Professor Zechariah Chafee, Jr.] scorned *Erie*’s constitutional language as a ‘comic element’ that was ‘probably no longer accepted,’ while Brainerd Currie, another prominent scholar, dismissed it disdainfully as ‘a bit of judicial hyperbole’ that ‘should not be permitted to mislead even the most literal-minded reader.’”), with Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595 (2008) [hereinafter Green, *Repressing Erie’s Myth*], and Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661 (2008), and Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813 (2013), and Green, *supra* note 2. See generally Symposium, Craig Green, *Black-and-White Judging in a World of Grays*, 46 TULSA L. REV. 391 (2011) (discussing the operation of non-constitutional *Erie* analysis in the context of *Shady Grove* and the Roberts Court). For extensive counter-arguments concerning *Erie*’s constitutional basis, see Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J. L. ECON. & POL’Y 17 (2013).

24. Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. L. REV. 427, 427 & n.3 (1958-1959) (collecting many sources, predominantly opposing *Erie*’s constitutional rationale).

Step two explains *Erie*'s emergence as a featured element of the legal process movement. Some scholars today use provocative phrases like *Our Federalism* and *constitutional structure* as though theories of legal process were expressions of timeless truth. Yet this essay considers *Erie*'s meaning for the legal process school as a strictly historical phenomenon. In the spring of 1938, when Justice Brandeis wrote that *Swift v. Tyson* was unconstitutional, legal process scholarship was still in its earliest stages. During the next three decades, academics voiced broad theories and principles about constitutional law that echoed legal process methods of interpreting statutes based on legislative purposes and functions.²⁵ *Erie* cohered well with all of those techniques, and it was featured in the most important teaching materials from the legal process era: Hart and Wechsler's casebook *The Federal Courts and the Federal System*.²⁶

Erie and legal process ideology were mutually supportive. During *Erie*'s first decade of jurisprudential life, the Court's holding had become immensely powerful in American law, affecting thousands of cases per year. And even though the decision's stated rationale was contested and vulnerable, post hoc rationales were not so hard to conjure using some mixture of pragmatism, legal philosophy, federalism, and separation of powers. Meanwhile, on the academic side of the ledger, many legal process scholars resisted legal positivism and its technical obsession with formal legal sources, instead emphasizing broader concepts such as legal system, purpose, and institutional effectiveness. Themes from the Hart and Wechsler paradigm simultaneously matched and reinforced *Erie*'s doctrinal reconstruction as scholars analyzed *Erie*'s meaning without granting decisive authority to its original text or history—just like many courts and lawyers had done for years. As one modern historian explained, “[f]or the generations of law students who learned federal jurisdiction from the Hart and Wechsler casebook, the meaning of *Erie* was

25. For historical accounts of the decline and resurgence of various legal process ideologies, see 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 (1994); Weinstein, *supra* note 1, at 19–21; 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'Y 235, 243–44 (2016); Ronald J. Krotoszynski, 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); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23 n.99 (2006).

26. See generally Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994); Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 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 (1994).

powerfully, if somewhat imprecisely, etched. To those who believed in neutral principles, *Erie* seemed rational and proper.”²⁷

John Hart Ely’s well-known article, *The Irrepressible Myth of Erie*, offers a particularly fine illustration of legal process thinking scholarship about *Erie*, along with responses from Abram Chayes and Paul Mishkin. Echoing the Court’s pragmatic opinion in *Hanna v. Plumer*, Ely explained that only a narrow band of *Erie* cases should be determined by the application of enforceable constitutional limits—the rest should be determined by functionalist interpretations of statutory law.²⁸

Chayes replied by disputing all of Ely’s doctrinal conclusions. Yet even as he argued that “general principles—even in definitive articles—do not decide concrete cases,” Chayes used exactly the same analytical approach as Ely: balancing systemic interests that legal process vocabulary characterized as neutral, objective, and firmly anchored in a temporally transcendent *now*.²⁹ Without any detailed attention to the Court’s original language or context, legal process arguments applying *Erie* were predominantly pragmatic and forward-looking.³⁰ Thus, Ely and Chayes both sought to describe a reasonable and workable balance between state and federal law that could claim to represent a legal consensus, despite and amid the authors’ stark disagreements about particular substantive results.

On the surface, Paul Mishkin’s commentary seemed more attentive to constitutional arguments and principles than earlier discussants. Whereas Ely saw “the Constitution as having no special view on the power of federal courts” to apply state or federal substantive law, Mishkin wrote that “the Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority

27. PURCELL, *supra* note 3, at 247.

28. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698 (1974).

29. Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 753 (1974) (“The method of our trade is to impose rational purposes on history, or at least legal history. But we are condemned to teleology, not licensed.”); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954)

The law which governs daily living in the United States is a single system of law: it speaks in relation to any particular question with only one ultimately authoritative voice, however difficult it may be on occasion to discern in advance which of two or more conflicting voices really carries authority. In the long run and in the large, this must be so.

30. So also were Henry Hart’s legal process arguments that defended *Erie* as “superbly right.” PURCELL, *supra* note 3, at 247; *see also* Hart, *supra* note 29, at 506 (“[*Erie*] put an end to [Swift’s] offense to the most basic concepts of justice according to law.”); *id.* at 512 (describing “the essential rationale of the *Erie* opinion” as a present-tense and timeless “need of recognizing state courts as organs of coordinate authority with other branches of the state government in the discharge of the constitutional functions of the states”).

of federal courts.”³¹ Mishkin’s rhetoric resonates comfortably with modern commentaries that defend *Erie*’s constitutional analysis.³² Yet it is equally important to understand that Mishkin used the term *constitutional* in a particularly flexible way that, like other aspects of legal process theory, could never satisfy the technical rigors that were later required by formalist methodologies like constitutional originalism or textualism. According to Mishkin:

*It makes no difference . . . whether the core of Erie [is] perceived as “Constitutional” in the sense that Congress could not validly enact a statute entirely contrary to the Rules of Decision Act, or merely “constitutional” in the sense that it rests upon premises related to the basic nature of our federal system which are presupposed to govern in the absence of clear congressional determination to change and reallocate power within that system.*³³

By describing the *Constitution* and the *constitution* as functionally equivalent in this context, Mishkin implied that congressional politics would have to yield to the force of legal process principles just as obediently as would a judge’s idiosyncratic beliefs. Whatever balance the eighteenth-century Framers had imagined concerning state and federal power was supposed to travel fluidly through time, with nothing more than vague and general arguments about C/constitutional principles to sustain the trip. In turn, that eighteenth-century balance was supposed to integrate seamlessly with Mishkin’s opinions two centuries later about systemic traditions, necessities, and legal functionality. Citing Hart and Sacks’s *The Legal Process* itself, Mishkin expounded his C/constitutional argument without making any explicit reference to eighteenth-century text or practice. Nor did he analyze nineteenth-century traditions and history, which would have been dominated by the putative anti-precedent *Swift v. Tyson* in any event. Like other legal process functionalists, Mishkin instead voiced an ostensibly neutral and objective C/constitution that ultimately matched his own perceptions and ideas, which remained distinctively located within his own era.³⁴

31. Paul J. Mishkin, *Some Further Last Words on Erie – The Thread*, 87 HARV. L. REV. 1682, 1682 (1974).

32. See *infra* notes 48–55 and accompanying text.

33. *Id.* at 1686 (alteration in original) (emphasis added).

34. *Id.* at 1686 n.16 (citing HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1413 (tent. ed. 1958)); *id.* at 1686–87 (noting as a timeless principle “the constitutional perception that courts are inappropriate makers of laws intruding upon the states’ views of social policy in the areas of state competence” without explicitly distinguishing one hundred years of cases under *Swift v. Tyson*); *id.* at 1687 (“[I]t is the very essence

Step three examines *Erie*'s late-twentieth-century displacement from its central position in American legal culture. Relevant factors in that phenomenon included disputes over civil and political rights and a substantial growth of federal public law, including administrative law. The legal process school also confronted political challenges, insofar as its commitments to neutral principles, reasoned discourse, and systemic function were not always enough to satisfy public demands for racial justice, gender equality, and federal legal protection.³⁵

During the 1920s and 1930s, *Swift*'s federal general common law had shared legal headlines with the Court's dramatic decisions to restrict the Commerce Clause cases and expand individual rights to contract.³⁶ By the 1960s and 1970s, however, issues surrounding *Erie* and diversity jurisdiction seemed much less important than questions about federal law and federal rights. Of course, *Erie* remained in the law school curriculum, but for most participants, studying such materials had become a necessary task more than a foundational struggle.³⁷

In 1969, the last year of Henry Hart's life, the American Law Institute, led by Herbert Wechsler, approved a report to reflect these changing dynamics of jurisdictional emphasis.³⁸ The committee proposed that federal courts should be "concentrated upon the adjudication of rights created by federal substantive law," with one commentator suggesting—despite some tension with state courts' concurrent jurisdiction—that "questions of federal law are best left to the federal courts."³⁹ An earlier draft of the report claimed as a "basic proposition that federal courts should not be called upon for the administration of state law," which, consistent with *Erie*, implied tighter statutory limits for diversity jurisdiction.⁴⁰ Only in cases that involved federal law could members of the federal judiciary "exercise the creative function which is essential to

of our system that once Congress has effectively enacted legislation, it need not begin again . . . to enforce any restrictions, but may instead rely wholly on the courts to provide such enforcement.").

35. See Hill, *supra* text accompanying note 25; PURCELL, *supra* note 3, at 272.

36. Green, *supra*, note 2, at 419–26 (documenting the chronology and institutions that produced and circulated critiques of *Swift* alongside other *Lochner*-era controversies).

37. See, e.g., CHARLES ALAN WRIGHT ET AL., FEDERAL COURTS: CASES AND MATERIALS (12th ed. 2012) (discussing *Erie* without any discussion of constitutional issues); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW (18th ed. 2013) (providing almost no discussion of *Erie*).

38. PURCELL, *supra* note 3, 273–84.

39. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968).

40. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DRAFT, PART I (1965).

their dignity and prestige.”⁴¹ By contrast, “deciding [diversity] cases under state law imposes especially laborious burdens, often greater in fact than involved in resolving issues of federal law on which these courts may speak with their own authority.”⁴²

Some modern observers might accept as self-evident the ALI’s conclusion that “[u]niformity in application of federal law and the prompt vindication of national rights require that the federal district courts have original jurisdiction” for a broad range of cases about federal law, in order to guard against “the danger that state courts will not properly apply [federal] law, either through misunderstanding or lack of sympathy.”⁴³ In 1969, however, such statements were still components of a debatable vision involving (to borrow Hart and Wechsler’s phrase) “The Federal Courts and the Federal System.”⁴⁴ Among other things, regional differences could often affect the public’s willingness to view federal courts’ enforcement of federal law as “vindication” as opposed to oppression by outsiders. As more time passed, however, the ever-increasing priority afforded to federal-law cases continued to shift attention away from *Erie* and the application of state law in federal courts.⁴⁵

Alongside changes regarding the salience of state-law cases in federal court, institutional ideas about enforcing constitutional structure were also in flux during this period. Before 1938, federalism and separation of powers were typically expressed as judicial mandates that threatened to strike down, among other things, a New Deal that conservatives saw as unacceptably *new* and not enough of a *deal*.⁴⁶ Legal process scholars like Mishkin, however, viewed constitutional structure as something that could be more broad and vague, emerging in contexts where—like *Erie*—there was not much need to search for detailed anchors in original text or history, and also where there was no immediate bite of counter-majoritarian judicial review.⁴⁷

41. AMERICAN LAW INSTITUTE, *supra* note 39, at 99.

42. *Id.* at 100.

43. *Id.* at 168.

44. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2015).

45. Twenty-first-century statutory provisions concerning mass torts and class actions are recent exceptions to that principle. 28 U.S.C. § 1369 (2019) (providing federal jurisdiction for certain multiparty, multiforum tort litigation); 28 U.S.C. § 1332(d) (2012) (codifying the “Class Action Fairness Act of 2005”).

46. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 51–77 (2017).

47. *See supra* text and accompanying notes 31–33.

Legal process thinkers were famously dissatisfied with positivism as a requirement for legal sources, and they often expressed constitutional analysis as *values* and *dialogues* instead of judicial edicts and enforcement. One reason that legal process scholars tended to view federal law as *interstitial* derived from the contexts that they choose to study, which characteristically included areas where Congress had not spoken or had done so with notable vagueness.

By contrast, civil rights jurists did seek direct judicial enforcement of constitutional law through prescriptive mandates against political branches. They were not seeking to uncover a soft-spoken network of doctrine that somehow rendered the status-quo legal system both operational and functional. Instead, civil rights lawyers self-consciously mobilized institutional force in order to challenge hierarchies and folkways, supporting ideals of equality and liberty that were often linked more closely to a results-oriented future than a big-talking past.⁴⁸

To use Mishkin's capitalization (one last time), late-twentieth-century legal struggles often involved efforts to use *Constitutional* law in order to revise or replace some established forms of *constitutional* law. Alongside the civil rights era's distinctive institutional focus on judicial enforcement, jurists during this period were substantively different from pre-New Deal constitutionalists because they focused on achieving new applications of constitutional liberty and equality instead of older visions of states' rights and restricted federal power. All of these factors tended to shift *Erie's* disputes over state law and federal courts even farther toward the sidelines.

Step four considers *Erie's* twenty-first-century development as a citable authority to support vigorous ideas from legal conservatives about judicially imposed federalism and separation of powers. Federalism came slightly earlier, which makes sense given its long history in twentieth-century politics, its explicit reference in *Erie's* text, and its featured presence in Judge Harlan's legal process concurring opinion in *Hanna v.*

48. Of course, the term "folkways" derives from much older scholarship concerning social hierarchy and the contested potential for legal change. WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF MORES, MANNERS, CUSTOMS AND MORALS* (1907). Distant and narrower echoes of such ideas can sometimes be found in modern constitutional scholarship. *Cf., e.g.,* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2006); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1993).

Plumer.⁴⁹ Over time, however, *Erie*'s separation-of-powers *new myth* has taken center stage.⁵⁰

Erie is not the only historical context from which modern conservatives have drawn newly urgent ideas about constitutional federalism and separation of power, combining legal process ideas about constitutional structure with civil rights ideas about judicial enforceability.⁵¹ Some advocates explicitly muster separation-of-powers arguments under the nondelegation doctrine's timeworn battle flag, thus earning criticism for promoting an outdated *1930s redux*.⁵² On other occasions, similar constitutional results are proposed as creative expressions of *Supremacy Clause fundamentalism*.⁵³ And of course, sometimes the legal sources of such arguments remain vague and incompletely theorized, much as legal process scholars from past generations used terms like "*Our Federalism*" and "*The Constitutional Structure*" without fully justifying their use of possessive pronouns and definite articles. *Erie* represents only one strand of a renewed emphasis on constitutional structure that is expanding rapidly throughout a new generation of legal conservatives, and such developments in constitutional law and politics have already produced an extraordinary mixture of legal process rhetoric and pre-1937 outcomes.⁵⁴

It is difficult to forecast how the full potential of *Erie*'s new myth will develop in the near future. Brett Kavanaugh's confirmation will provide America with the most politically conservative Supreme Court since 1937. Other federal courts include increasing numbers of conservative judges. And longstanding conservative calls for *judicial restraint* are now more than ever carefully targeted in order to restrict very specific kinds of legal rights. Elections have consequences, we are told,

49. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) ("We merely declare that in applying [*Swift v. Tyson*] that this Court and lower courts have invaded rights which . . . are reserved by the Constitution to the several states."); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.")

50. Green, *Repressing Erie's Myth*, *supra* note 23, at 599–644; *see also* PURCELL, *supra* note 3, at 290–92 (tracing a somewhat longer history for "new-myth" efforts to connect *Erie* with separation of powers).

51. *See, e.g., Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013); Craig Green, *Constitutional Chevron Debates and the Transformation of American Law*, __ GEO. WASH. L. REV. __ (forthcoming 2019).

52. Metzger, *supra* note 44 (criticizing such efforts).

53. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010) (criticizing such efforts).

54. *See* Green, *Repressing Erie's Myth*, *supra* note 23, at 599–644; Metzger, *supra* note 44.

and new arguments about constitutional structure might be midway toward becoming—in Jack Balkin’s evocative phrase—more *on the wall* than *off the wall*.⁵⁵ Despite requests from some authors that the legal community should “normalize *Erie*,” or at least should *repress* the decision’s sprawling mythology, constitutional defenders of *Erie* show no signs of changing course or losing steam.⁵⁶ If anything, the popularity and enthusiasm of *new Erie* arguments concerning separation of powers might grow stronger over time as American legal institutions shift even farther to the right.

Step five concludes by analyzing the implications of interpreting iconic judicial precedents for a legal system’s stability. One dramatic development in recent decades has been the rise of formal systems for interpreting legal authorities other than judicial precedents, most notably including statutory textualism and constitutional originalism. In opposition to legal process scholars, and with ardent support from Reaganite conservatives like Justice Scalia, various kinds of interpretive formalism have promised to increase law’s stability and legitimacy by applying inflexible fidelity to foundational moments of lawmaking that are thereafter deemed authoritative.

With *Erie* as a prime example, however, it should be clear that precedential interpretation has not undergone any comparably formalist shift in methodology. On the contrary, terms like *precedential textualism*, *precedential originalism*, *dynamic precedentialism*, or *living*

55. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1446–47 (2001)

During the last five years or so, I have been consistently wrong about what the Court was willing to do to promote its conservative agenda. Repeatedly—in cases [about judicially enforced federalism] like *City of Boerne v. Flores*, which struck down the Religious Freedom Restoration Act, and *United States v. Morrison*, which struck down the Violence Against Women Act—I have thought to myself: ‘They can’t possibly do that. That would be crazy.’ And each time I have been proven wrong. These recalcitrant experiences suggest to me that my own judgment about what is ‘on the wall’ and what is ‘off the wall,’ what is a good legal argument and what is wholly implausible is slowly but surely moving out of the mainstream, if that mainstream is defined by the actual holdings of the United States Supreme Court. My sense of what is possible and plausible, what is competent legal reasoning and what is simply made up out of whole cloth is probably mired in an older vision of the Constitution that owes much to the Warren and Burger Courts as well as to the predominantly liberal legal academy in which I was educated, trained, and now teach. Finally, I should note that as soon as each of these new Supreme Court decisions is handed down, dozens of bright young constitutional lawyers busily begin to rationalize it, showing how it is, after all, completely consistent with the text, structure, original intentions, values and traditions of the American Constitution. For these legal scholars, opinions like *Boerne* and *Morrison* are not off the wall. They are the wall. (footnotes omitted).

56. Compare, e.g., Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161 (2016), with, e.g., Young, *supra* note 23.

precedentialism are just as unrecognized in practice as they are unnamed in theory.⁵⁷ The absence of such vocabulary might cause some readers to find the whole project of discussing interpretative methodologies for iconic precedents somehow alienating or misplaced. However, especially given the immense power of judicial decisions to influence the content and character of American law, it might be useful to consider interpretive stability and legitimacy in this context as well. Accordingly, even as *Erie*'s eightieth birthday offers a useful occasion to further explore the iconic decision itself, it also provides a useful opportunity to think more deeply about the way that the American legal system interprets iconic precedents as a category.⁵⁸

57. *But cf.* Green, *supra* note 3, 385–91 (introducing such methods of interpreting precedents).

58. *Id.* at 484

At the very heart of our legal order, the most urgent and vital question is how judges and lawyers in 'an indeterminate world' can maintain what [Justice] Souter calls 'a state of trust,' believing that some 'way will be found leading through an uncertain future' even as the law's future-oriented trajectory is anchored by precedents from the near and distant past. This Article's interpretive methodology hopes to indirectly influence how lawyers and judges chart such paths forward. At the very least, a better understanding of precedential interpretation should help legal agents to recognize the dilemmas they face and techniques that are available along the way.

(quoting Justice David H. Souter, *Harvard University's 359th Commencement Address*, 124 HARV. L. REV. 429, 430 (2010)).