

## ERIE AS A WAY OF LIFE

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I'm grateful for the opportunity to commemorate 80 years of *Erie Railroad Co. v. Tompkins*.<sup>1</sup> Many of the papers in this conference explore how *Erie* bears on particular areas of law, such as administrative law, remedies, or intellectual property. I'd like to do something similar, but in much more general terms. If we're talking about the impact of *Erie* on various aspects of the law, it's appropriate to step back and think about how *Erie* has shaped the legal landscape more generally.

I'm calling this talk "*Erie* as a Way of Life." My thesis is that *Erie* is absolutely central to modern American law in several broad respects, ranging from the way we think about law jurisprudentially to the role of the federal courts to the structure of the federal system. I do not say that *Erie* necessarily *caused* the phenomena I describe here. In some respects, the decision itself has driven important kinds of change. But in others, *Erie* simply reflects broader developments in American law. Even in those areas, *Erie* serves as a central exemplar of these institutional arrangements

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

and ways of thinking. As John Hart Ely said, “*Erie* is by no means simply a case.”<sup>2</sup>

As will be clear, I think *Erie*’s influence—and the principles that *Erie* reflects—are generally salutary. But they are also under threat from a whole range of other developments in American law and culture. One distinguished Federal Courts scholar has even branded *Erie* “the worst decision of all time.”<sup>3</sup> My modest hope is that this essay, by identifying the broad range of connections to *Erie* and the values that those connections protect, can be a step toward preserving our *Erie*-grounded way of life.

### I. *ERIE* AND THE NATURE OF LAW

Let’s start with *Erie* and the nature of law itself. One of Justice Brandeis’s most famous lines in *Erie* is actually a quote from Justice Holmes:

“[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”<sup>4</sup>

Prior to *Erie*, the federal courts had felt free to disagree with state courts concerning the correct meaning of the general common law on questions such as a railroad’s duty of care toward some poor schmuck walking along the train track. Those decisions tended to suggest that there were *general* right answers to such questions, deducible from general principles of law. When the state courts got those questions wrong, the federal courts were free to disregard the state courts’ answers and decide cases falling within their own jurisdiction—typically on account of the parties’ diverse citizenship—by their own best lights. *Erie* rejected this view of the matter.

The reason, as Brandeis explained, quoting Holmes, was that there was no such thing as this “general” law. Rather, as Holmes said in another dissent that Brandeis joined 20 years before, “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some

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2. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974).

3. Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2011).

4. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928)).

sovereign or quasi sovereign that can be identified.”<sup>5</sup> This is the language of legal positivism; it insists that law derives its authority not from its logical truth (like the principles of mathematics) or consistency with natural law or God’s law, but from some form of social acceptance—typically endorsement by some sovereign governmental body.<sup>6</sup>

It is true, as Craig Green has argued, that a belief in positivism alone could not make the Court’s pre-*Erie* practice unconstitutional.<sup>7</sup> The Constitution does not itself mandate a particular theory of law, positivist or otherwise. What positivism does, however, is force the issue concerning what source of authority supports the legal rule that courts apply to decide a case. If positivism had become the dominant theory of law in the 20th century, then the *Erie* Court had to determine whether any positivist source of authority gave federal courts authority to diverge from state court views on a question of tort law.

It is also true, as Jack Goldsmith and Steven Walt have explained,<sup>8</sup> that positivism did not necessarily require a negative answer to that question. The leading pre-*Erie* case holding that federal courts need not follow state courts’ interpretation of the common law was *Swift v. Tyson*,<sup>9</sup> decided by Justice Story way back in 1842. Story was an early-adopter of positivism, and nothing in *Swift* was necessarily inconsistent with the position that law must derive its authority from some form of social acceptance, rather than from some transcendent truth. There is no straightforward causal relationship between legal positivism and *Erie*’s rejection of *Swift*.

The particular law applied in *Swift* was the *law merchant*, a body of customary principles governing dealings among sophisticated commercial actors typically operating across jurisdictional lines. The *law merchant*, also called the general commercial law, was the 19th century’s version of the Uniform Commercial Code (UCC). It sought to mirror as closely as possible the customary practices of merchants in the real world. Much like the UCC, the general commercial law gave legal sanction to customary courses of dealing that private participants in markets had worked out for themselves. It thus drew its authority from not one, but

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5. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

6. See, e.g., Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART’S POSTSCRIPT 355, 356 (Jules Coleman ed., 2001).

7. See Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 604 (2008); see also Michael Steven Green, *Erie’s Suppressed Premise*, 95 MINN. L. REV. 1111, 1113 (2011) (demonstrating that *Swift* was compatible with positivism).

8. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

9. 41 U.S. (16 Pet.) 1 (1842).

two perfectly positivist forms of social acceptance: first, from its customary acceptance by the parties to commercial transactions themselves; second, from the generally explicit decision by state governments to adopt the *law merchant* to govern transactions falling within its scope—just as all contemporary state governments have adopted the UCC.<sup>10</sup> And so when Justice Story disagreed in *Swift* with the state courts of New York on the proper interpretation of the *law merchant*, he did so secure in the knowledge that the New York courts and legislature had already agreed that disputes like *Swift*, whether they occurred in state or federal court, were governed by a body of law that was neither state nor federal but *general* in nature.<sup>11</sup>

This decentralized form of law held together better and longer than one might think,<sup>12</sup> but by the end of the 19th century it was breaking down. The *law merchant* was fairly narrow in scope, and it tended to govern matters where most would agree it was more important that the rules be settled than that they be settled *right*. In this area, which excluded tort, property, and even non-commercial contracts, states generally accepted that general law should apply in order to ensure they were included in the system of interstate commerce.<sup>13</sup> But by the late 19th century, federal courts had extended the general law to cover non-commercial matters—like the duty of care owed by a railroad to a trespasser in *Erie*—where states had stronger normative pressures.<sup>14</sup> It was more important, in these more controversial arenas, that matters be settled *right* than that they be settled the same way as in other jurisdictions. And so, the federal courts' application of *general* principles in diversity cases had the effect of displacing deliberate state policy choices.

What all this meant was that the general law could no longer be justified in positivist terms; in areas like torts, there was no argument that states had opted to be governed by general rather than particular state rules. And in fact, federal court decisions tended to justify applying general law instead by anti-positivist notions of the general law's "truth" or "justice"—not its acceptance by any particular jurisdiction.<sup>15</sup> And so

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10. See generally RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* (1977).

11. See *Swift*, 41 U.S. (16 Pet.) at 18.

12. See William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1562-63 (1984).

13. See *id.* at 1518-21; Bridwell & Whitten, *supra* note 10, at 61-97.

14. See, e.g., TONY FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* 45, 58 (1981).

15. See, e.g., *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 378 (1893) ("[T]he question is essentially one of general law. It does not depend upon any statute; it does not spring from any local

the *Erie* Court's commitment to positivism forced it to ask whether the general law could any longer be justified by the will of a relevant sovereign. For reasons I'll return to in a moment, the Court found that it could not. Only two kinds of law existed with respect to the dispute in question, and in the absence of federal authority to apply a federal rule, the Court had no choice but to apply state law.<sup>16</sup>

Before exploring that, however, I pause to stress how *Erie* is consistent with—and perhaps our most self-conscious articulation of—modern lawyers' sensibility that law is not transcendent but rather the product of authority (and in our legal system, traceable to some form of democratic choice). If I assert a legal proposition, you are likely to respond, "Says who?" That reflex goes so much without saying that we tend not to associate it with any particular case. But if we had to pick one, I submit that it would be *Erie*.

*Erie*'s rejection of general law, and the general notion that law is only law because it has been adopted as such by people authorized to do so, are both under subtle but important kinds of pressure in our modern legal culture. Law schools create a fair amount of that pressure without even meaning to do so. Those of us who are not federal jurisdiction or choice of law geeks—and I recognize the proportion of those geeks in this audience is unusually high—are used to pursuing the "best" or "right" answer to substantive law questions. What is the optimal rule for spreading losses or producing corrective justice in tort law? What is the best standard for resolving difficult questions of child custody in family law? Once we think we've puzzled out the right answer, it's easy to jump to the conclusion that every jurisdiction should apply that answer simply because it's *right* or true. And the need to persuade multiple decisionmakers—state legislatures, state courts, etc.—starts to seem like an annoying impediment.

Hence the activities of the American Law Institute, for example, which continues to develop and expand the closest thing we moderns have

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usage or custom; there is in it no rule of property, but it rests upon *those considerations of right and justice* which have been gathered into the great body of the rules and principles known as the 'common law.'" (emphasis added).

16. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 820 (1989) ("[A]t the heart of [*Erie*] was the positivistic insight that American law must be either federal law or state law. There could be no overarching or hybrid third option."). In my view, "with respect to the dispute in question" in the text is an important qualification. I have argued elsewhere that *Erie* would not forbid applying general law in certain contexts, especially where it is not supplanting otherwise-applicable state law. See Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 492-96 (2002) (suggesting that customary international law could be applied as general law to govern human rights litigation to which no state has sufficient contacts to apply its own law).

to “general” law.<sup>17</sup> At my law school, first-year criminal law students don’t learn the law of any particular jurisdiction; rather, they are taught a brooding omnipresence in the sky called the “Model Penal Code.”<sup>18</sup>

Consider also the modern version of customary international law, which makes up much of the contemporary law of human rights. Customary international law is supposed to derive from the common practice of nations, undertaken from a sense of *opinio juris* or legal obligation. In the modern era, however, customary international law has become much less about custom—what nations actually do—and much more about the legal obligation.<sup>19</sup> Customary international law is driven, in other words, by normative judgments about what rules are just. It’s a great deal like the late-stage general law that *Erie* rejected.<sup>20</sup>

Perhaps most important, however, is the increasing temptation to use the Constitution itself as a hook to impose whatever legal rules we think are just and right, overriding the positivist choices of legislatures at both the state and national levels. Last Fall, my colleague and friend, Jed Purdy, published a piece in the *New York Times* called “The Left’s Guide to Reclaiming the Constitution.”<sup>21</sup> Professor Purdy thinks that liberals should quit futzing around playing defense and go for the gusto by working “to define a jurisprudence of economic citizenship, strong democracy and inclusive justice that will help a resurgent left reclaim the Constitution.” This would include things like free higher-education, publicly-funded abortion, and felon enfranchisement as constitutional rights.<sup>22</sup> I guess I’m for some of these things and against others, but what struck me was how Purdy doesn’t even try to show how these rights can be grounded in the meaning of the Constitution we’ve ratified. For him,

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17. See, e.g., AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS (1981); see generally American Law Institute, *About ALI*, <https://www.ali.org/about-ali/> [<https://perma.cc/SGZ3-NETB>] (describing the ALI’s activities). Your humble author is a member of the ALI but remains nervous about the extent to which these projects exercise an unduly centralizing influence on state law.

18. See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW, CASES AND MATERIALS* (8<sup>th</sup> ed. 2019).

19. See Patrick J. Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 470 (2000); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRL. Y.B. INT’L L. 82, 89-90 (1992).

20. See, e.g., Young, *Sorting*, *supra* note 16, at 398-400.

21. Jedediah Purdy, *The Left’s Guide to Reclaiming the Constitution*, N.Y. TIMES (Sept. 10, 2018), <https://www.nytimes.com/2018/09/10/opinion/brett-kavanaugh-supreme-court-constitution-democrats-.html> [<https://perma.cc/Q6ZM-2MHZ>].

22. See *id.*; see also Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/5FED-TYQ9>] (arguing that liberal judges should aggressively constitutionalize a range of leftward policy aspirations).

these things are rights because they're grounded in a political theory of strong democracy and equality. They are rights because they are *true*, not because they have been endorsed by any positivist sovereign. It is a left-wing form of natural rights. As a child of *Erie*, I have hard time even beginning to think in those terms. But I think this kind of discourse is increasingly common.

I don't wish to be heard as picking on the Left exclusively—and especially not as picking on Professor Purdy. The truth is that the Right is very good at the same sort of thing. Decades before Justice Brandeis buried the general common law in *Erie*, the Court's general law jurisprudence was already morphing into a *constitutional* discourse much like Purdy's.<sup>23</sup> Cases like *Lochner v. New York*<sup>24</sup> took the contractual entitlements protected under the general common law and read them into the Fifth and Fourteenth Amendments' Due Process Clauses, so that both state legislatures and Congress itself would be unable to override them. And they did this in a way that protected big business from government regulation. There was very little historical or textual support for reading these principles into the Constitution, but that wasn't the point. As with the general common law in the first place, freedom of contract was binding because it was true and right, not because it had been adopted by some lawmaking institution in the good old positivist way.

As you all know, *Lochner*'s experiment didn't end well for the Court or for the nation.<sup>25</sup> Attempts to impose law without the institutional legitimation that positivism demands rarely do.

## II. *ERIE* AND THE FEDERAL COURTS

The second respect in which *Erie* signifies a broad way of life and law is in its view of the role of the federal courts. In *Erie*'s positivist universe, courts are not oracles or logicians; they interpret and apply the law not because it is true or deducible from universal postulates, but rather because they have a democratic mandate to do so. And it turns out that the nature of that mandate diverges between federal and state courts. *Erie* has thus come to stand for the proposition that, unlike state courts, federal courts generally lack any sort of lawmaking power.

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23. See, e.g., Lucas A. Powe, Jr., *Rehearsal for Substantive Due Process: The Municipal Bond Cases*, 53 TEX. L. REV. 738 (1975).

24. 198 U.S. 45 (1905).

25. See, e.g., Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 73 (1993) (observing that *Lochner* “stands as the very symbol, after *Dred Scott*, of the Supreme Court's periodic tendencies toward institutional suicide”).

*Erie* is sometimes described as a case about the limits of national lawmaking power, full stop.<sup>26</sup> This view would say that courts could not apply federal law in a case like *Erie* because the underlying subject matter—railroad torts—was within the reserved power of the states. But even before the Court’s 1937 switch-in-time and recognition of broad congressional power under the Commerce Clause,<sup>27</sup> which occurred after the initial round of litigation in *Erie* but before the Supreme Court’s decision in 1938, one would have been hard pressed to say the matter lay outside the limits of national legislative power.<sup>28</sup> Cases like the *Shreveport Rate Cases*<sup>29</sup> in 1914 had accorded Congress broad authority to regulate the actual instrumentalities of interstate commerce—for example, planes, trains, and automobiles. When Brandeis’s opinion said that “Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts,”<sup>30</sup> he could not have meant that Congress had no power to *legislate* upon those subjects. He could not have meant to question, for example, the validity of the Federal Employers Liability Act,<sup>31</sup> which provided federal tort rules to govern claims by railroad workers.<sup>32</sup>

Justice Brandeis was suggesting that Congress could not pass a statute making the judge-made general common law applicable in the states.<sup>33</sup> And because Congress had not, in any event, purported to do such a thing, the crucial point was Brandeis’s observation that “no clause in the Constitution purports to confer such a power upon the federal courts.”<sup>34</sup> In summarizing his constitutional objection, Brandeis again insisted that “the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an

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26. See, e.g., Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1571-73 (2008).

27. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

28. See generally Ely, *supra* note 2, at 702; Young, *General Defense*, *supra* note \*, at 67.

29. Houston East & West Texas Ry. Co. v. United States, 234 U.S. 342 (1914).

30. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

31. 45 U.S.C. § 51 et seq. (1908).

32. Justice Brandeis encountered the FELA in his first term on the Court, in *New York Central Railroad v. Winfield*, 244 U.S. 147 (1917). Although he dissented from the Court’s determination that the FELA preempted the entire field of railroad workers’ remedies, he acknowledged Congress’s broad power in the area: “That Congress could have done this is clear. The question presented is: Has Congress done so?” *Id.* at 154 (Brandeis, J., dissenting).

33. See Young, *General Defense*, *supra* note \*, at 69; see also Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L. J. 239 (2011).

34. *Erie*, 304 U.S. at 78.



unconstitutional assumption of powers by the Courts of the United States.”<sup>35</sup>

*Erie* is thus fundamentally a case about *judicial* lawmaking. The federal courts’ power to formulate common law rules is not coextensive with Congress’s power to legislate.<sup>36</sup> In recent years, *Erie*-skeptics like Suzanna Sherry and Louise Weinberg relied on scattered suggestions by members of the Founding Generation that legislative and judicial power are “coextensive.”<sup>37</sup> There are a variety of problems with this position, but the principal one is that the proposition that legislatures and courts have the power to act in a coextensive set of *circumstances* hardly proves that they have the power to act *in the same way*. Article III makes federal judicial power coextensive in the sense that federal courts can adjudicate any matter upon which Congress legislates a federal rule of decision,<sup>38</sup> but that hardly means that the courts can create a federal rule themselves if Congress has not. Likewise, Congress’s commerce power might be coextensive with Article III’s diversity jurisdiction in that Congress could regulate any transaction involving parties from different states.<sup>39</sup> But that would hardly mean that courts could create federal common law to govern such disputes.

In any event, American constitutional law is replete with examples demonstrating that federal legislative and judicial power are not coextensive. Congress, for example, does not require a “case or controversy” in order to act. The doctrines prohibiting advisory opinions, requiring a particular plaintiff with standing, and insisting a dispute must be ripe for adjudication are all about differentiating the circumstances in which federal courts may act from those in which a legislature may make law.

*Erie* likewise makes clear that the federal courts do not share the general lawmaking powers generally attributed to the state courts. State

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35. *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

36. *See* *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (“[N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.”); *see also* Alfred Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U. L. Rev. 427, 441 (1958); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1414 (2001).

37. *See* Sherry, *supra* note 3, at 145; Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 813 (1989).

38. *See* U.S. CONST. art. III, § 2 (vesting jurisdiction in the federal courts to decide cases “arising under . . . the Laws of the United States”).

39. *See, e.g.,* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (explaining that Congress’s power extends to “commerce which concerns more States than one”).

courts have long been understood as playing a broader lawmaking role than does the federal judiciary,<sup>40</sup> although the boundaries of state court lawmaking remain somewhat controversial.<sup>41</sup> It's worth noting, for example, that when one sees path-marking common law opinions by a federal judge—like Learned Hand's opinions in *The T.J. Hooper*<sup>42</sup> or *United States v. Carroll Towing Co.*<sup>43</sup>—there's usually a *boat* involved. That's because maritime law is the only area where federal judges are still accorded general lawmaking power.<sup>44</sup> *Erie* insisted, by contrast, that “[t]here is no federal general common law.”<sup>45</sup> It's true that *Erie* has been read to leave room for a more particularized form of federal common law grounded in federal statutes and federal interests; Judge Friendly called this the “new federal common law.”<sup>46</sup> But the federal courts lack any freestanding lawmaking authority apart from some prior action by the national political branches.<sup>47</sup>

*Erie*'s view of the federal judicial role has been influential far beyond the common law context in which the case arose. In particular, it profoundly shapes contemporary debates about the role of judicial review in constitutional cases. The accusation that judges are “legislating from the bench” has particular bite because we are steeped in *Erie*'s norm that federal judges are not supposed to be lawmakers. Likewise, *Erie* has powered the critique of efforts to apply customary international law to displace state law norms without action by Congress.<sup>48</sup>

*Erie*'s conception of the federal judicial role is under threat from a very different direction, however. The point of *Erie*'s particular holding was that individual states' choices about the content of their tort law

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40. See, e.g., *Black & White Taxicab*, 276 U.S. at 534-35 (Holmes, J., dissenting); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. J. 881, 896-97 (1989).

41. See, e.g., Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 980 (2013) (pointing out that “no state constitution actually includes such an explicit allocation of the state’s lawmaking authority to the state’s highest court”). I have addressed Professor Nelson’s argument at greater length elsewhere. See Young, *General Defense*, *supra* note \*, at 100-08.

42. 60 F.2d 737 (2d Cir. 1932).

43. 160 F.2d 482 (2d Cir. 1947).

44. See Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 281-82 (1999).

45. 304 U.S. 64, 78 (1938).

46. Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964).

47. See, e.g., Ernest A. Young, *Preemption and Federal Common Law*, 85 NOTRE DAME L. REV. 1639, 1659-64 (2008).

48. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 815 (1997); Young, *Sorting*, *supra* note 16.

would be respected by federal courts sitting in diversity, the expectation being that a multiplicity of jurisdictions might well arrive at a multiplicity of solutions to common problems. The reality of modern tort litigation, however, is much different. Nearly 40 percent of civil cases on the federal docket are now part of the multidistrict litigation process (MDLs); as class actions have become easier to remove to federal court but harder to actually certify, MDLs have become the dominant means of resolving mass torts.<sup>49</sup> Cases arising from a particular dangerous product or other mass tort may be filed all over the country, but the MDL process consolidates them for pretrial purposes before a single district judge.<sup>50</sup> And although these cases are nominally supposed to return to their original courts for trial, the overwhelming majority of these cases are settled in the MDL court.<sup>51</sup> It thus matters not that individual states' laws would govern these cases if they were ever remanded and tried.<sup>52</sup> As a practical matter, the MDL court will force a settlement based on a general view of the aggregate merits in all the cases.

This system of "one court to rule them all" sweeps away the limited role of the federal judge that *Erie* envisioned and the multiplicity of legal choices and decisionmakers that *Erie* sought to preserve. There are many reasons to be nervous about MDL—for instance, its near total lack of formal rules for handling the cases once they are crammed together. But one of the casualties is surely *Erie*'s modest role of federal judging.

### III. *ERIE* AND THE FEDERAL SYSTEM

The third aspect of *Erie* that I offer for consideration is *Erie* and the federal system. By holding that federal judges lack lawmaking powers of their own, *Erie* enlisted the national separation of powers in the cause of federalism. And in so doing, Justice Brandeis helped frame the basic

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49. See generally Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1165 (2018); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 74 (2015).

50. See 28 U.S.C. § 1407 (1976).

51. See Duke Law School, Center for Judicial Studies, *MDL Standards and Best Practices* xi (2014), [https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL\\_Standards\\_and\\_Best\\_Practices\\_2014-REVISED.pdf](https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf) [<https://perma.cc/VVV7-DMNA>].

52. As a matter of law, the choice of law rules applicable to MDL cases are complex and unresolved. See, e.g., Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 760 (2012). My point, however, is the simpler one that because most MDL cases are managed and settled rather than tried, their disposition is likely to be dominated by broad pragmatic judgments about the merits that are not likely to reflect the diverse laws of particular states.

structure of contemporary intergovernmental relations that has endured from the late 1930s to the present. Every year, I tell my Constitutional Law students that *Erie* is the most important case about federalism decided in the 20th century and I lament the outrageous unfairness that the case falls within their Civil Procedure professor's jurisdiction rather than mine. Even 80 years later, *Erie* represents a paradigm of federalism that is both descriptively satisfying and normatively attractive.

For much of our history, American federalism has been dominated by a different paradigm: "dual federalism." The dual federalism regime divided up the world into separate and mutually-exclusive spheres of national and state authority. The national government ruled over foreign affairs, interstate commerce, and certain specifically-enumerated specialty categories like bankruptcy and intellectual property. The states, on the other hand, enjoyed reserved authority over *intrastate* commerce and such noncommercial subjects as education and family law. It fell to the courts in this regime to determine the precise boundary between national and state power and to invalidate any intrusion by one government into the other's sphere.<sup>53</sup>

Dual federalism went largely by the boards after 1937, once the Supreme Court changed course and acknowledged broad congressional power to regulate virtually the entire economy.<sup>54</sup> Since then, American federalism has been a regime of largely concurrent regulatory jurisdiction. Although the Supreme Court continues to enforce some limits on national legislative powers, Congress can basically regulate whatever it likes. At the same time, the Court has transformed its dormant Commerce Clause jurisprudence, thereby expanding the ability of *state* governments to regulate commercial matters even though they are intertwined with the national market.<sup>55</sup>

In this concurrent sort of regime, two questions become crucial: First, how can conflicts between state and federal law be identified and resolved? This issue is largely governed by the preemption doctrine under the Supremacy Clause. And second, what are the default rules going to be in cases where Congress has not legislated? The first preface to the famous Hart and Wechsler casebook in *Federal Courts* identified this second

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53. See generally Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY 34 (James E. Fleming & Jacob T. Levy, eds., 2014).

54. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 1 (1937); *Wickard v. Filburn*, 317 U.S. 111, 118 (1942); see generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

55. See, e.g., Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 484 (1997).

question as crucial, deemphasizing cases involving the outer limits of Congress's enumerated powers:

For every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power; Congress has been silent with respect to the displacement of the normal state-created norms, leaving courts to face the problem as an issue of choice of law.<sup>56</sup>

*Erie* confronted this choice of law problem directly. Although Congress had “ultimate power” to regulate torts along the railroad right-of-way, it had “been silent with respect to the displacement” of state law. By holding that state law must control in that extremely common scenario, *Erie* carved out a lasting and significant role for state law and state courts *without* attempting to impose a categorical, dual-federalism-style limit on the scope of national legislative power.

Federal law, in this vision, is broad in its potential scope but interstitial in its basic character. As Hart and Wechsler famously put it,

Federal legislation . . . builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.<sup>57</sup>

The drawback of this interstitial model from the states' point of view, of course, is that it de-emphasizes hard-and-fast limits on the expansion of federal legislation over time. And in fact, we have seen significant expansion of the scope of federal law over the course of the last century, to the extent that federal law is now primary—not interstitial—in a number of important fields.

The primary constraints on that expansion are of two kinds. The first are political, consisting of the states' representation in Congress as well as other mechanisms by which state governments can influence national decisionmakers.<sup>58</sup> Although there are any number of reasons to question

56. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, preface (1st ed. 1953).

57. *Id.* at 435; see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954) (developing this view).

58. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954); JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* (2009) (exploring the operation of political safeguards in practice).

the efficacy of these “political safeguards” of federalism in practice,<sup>59</sup> there is little doubt that they afford the states at least some voice in the national legislative process. But the second, more *procedural* set of constraints may be more efficacious. These constraints arise from the sheer difficulty of making federal law, given the numerous contending interests, limited agenda space, and multiple veto-gates in that process.<sup>60</sup> As those of us who grew up on Schoolhouse Rock know, it’s hard for even the most deserving and persevering bill to become a federal law.<sup>61</sup>

In a federalism paradigm built on political and procedural safeguards, the primary threats to state autonomy come from modes of national lawmaking that circumvent these safeguards by bypassing Congress.<sup>62</sup> If Congress must make federal law, then there won’t be much of it. It was big news at the time of this writing when Congress even managed to pass part of a budget;<sup>63</sup> we’re certainly not holding our breath for new regulatory legislation. As the country transitioned from dual federalism to concurrent jurisdiction in the early 20th century, the primary form of federal lawmaking without Congress was judge-made general common law. The states are not represented in private diversity suits, and a common law judge confronts no supermajority requirements or veto-gates in legislating from the bench. By insisting that federal courts apply state law in the absence of a federal statute, *Erie* reaffirmed federal law’s interstitial character and shored up the political and procedural safeguards of federalism.<sup>64</sup>

Some critics of *Erie* object to it precisely because it is a relic of dual federalism,<sup>65</sup> but they could hardly be more wrong on this point. The argument seems to be that because *Erie* enforced a constitutional limit on national lawmaking, it necessarily partook of all the evils of the old regime. But such thinking conflates *dual* federalism with, well, *federalism* itself. Contemporary constitutional law has not scrapped the notion that

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59. See, e.g., Saikrishna B. Prakash & John Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (criticizing old and new versions of the political safeguards theory); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 106–33 (2001).

60. See, e.g., Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681 (2008).

61. See Schoolhouse Rock, *I’m Just a Bill*, YOUTUBE (Dec. 8, 2011), <https://www.youtube.com/watch?v=FFroMQIKiag>.

62. See generally Clark, *Separation of Powers*, *supra* note 36.

63. See Natalie Andrews & Kristina Peterson, *Lawmakers Reach Deal to Avoid Shutdown Drama Before Midterms*, WALL ST. J. (Sept. 13, 2018), <https://www.wsj.com/articles/congress-passes-minibus-spending-package-1536869066> [<https://perma.cc/HQV6-GMSK>].

64. See Young, *General Defense*, *supra* note \*, at 67-76.

65. See, e.g., Sherry, *supra* note 3, at 142-44; Green, *supra* note 8, at 607-09.

the national government is one of limited and enumerated powers. It has simply de-emphasized the subject-matter constraints built into provisions like the Commerce Clause in favor of the enumerated limits on the process of federal lawmaking—that is, the political representation of the states and the procedural gauntlet that national legislation must run.<sup>66</sup> The old dual federalism regime foundered because the subject-matter boundaries upon which it depended turned out to be indeterminate, but *Erie's* regime largely avoids that problem by focusing on how and by whom federal law is made. No legal regime is perfect in our fallen world, but arguments against *Erie* cannot simply recycle the old complaints about dual federalism.

*Erie* placed a strong limit on federal common lawmaking, and that limit has mostly stuck. As the Court said some four decades after *Erie*, “instances [of federal common law] are ‘few and restricted,’ and fall into essentially two categories: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law.”<sup>67</sup> The far more common way to circumvent Congress nowadays is through administrative agencies. One need only go down to the library and compare the size of the U.S. Code with the Code of Federal Regulations and the Federal Register to see that most federal law is now made by federal agencies. These agencies do not represent the state in any direct or automatic way, and they exist precisely because they can make federal law so much more easily than Congress.

Under conditions of polarization and legislative gridlock, the agency route of executive lawmaking becomes even more attractive.<sup>68</sup> As President Obama said, the President has a pen and a phone and if Congress doesn't act, he can act in their stead.<sup>69</sup> Not surprisingly, a primary means of state participation in the national political process is now by filing lawsuits to challenge these sorts of executive actions in the federal courts.<sup>70</sup> Those lawsuits, which have unfortunately taken on a highly

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66. See, e.g., Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 257-65 (2012).

67. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

68. See Margaret H. Lemos & Ernest A. Young, *State Public Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 46 (2018).

69. *Obama-I've Got a Pen and a Phone*, YOUTUBE, (March 31, 2016), [https://www.youtube.com/watch?v=G6tOgF\\_w-yI](https://www.youtube.com/watch?v=G6tOgF_w-yI); Kenneth S. Lowande & Sidney M. Milkis, “*We Can't Wait*”: *Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 THE FORUM 3 (2014).

70. See Lemos & Young, *supra* note 68, at 66-68; Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L. J. 1023 (2017).

partisan cast under both this administration and the last one, are unlikely to prove as effective at protecting state autonomy as *Erie*'s original model of judicial federalism.

#### IV. *ERIE* AND THE LEGAL PROCESS

Finally, *Erie* was not only central to the view of federalism taken by the generation of scholars like Henry Hart and Herbert Wechsler. As Professor Green has suggested in his contribution to this Symposium,<sup>71</sup> *Erie* nicely embodies the Legal Process School of jurisprudence that those scholars propounded as a response to (and antidote for) Legal Realism.<sup>72</sup> The realists poured cold water all over the notion that law is a fully determinate system derivable from either math-like logic or transcendent principles. They highlighted the existence of divergent perspectives and political conflict within the law.<sup>73</sup> Legal Process emerged as an effort to put the law back together again in the wake of this assault. Its central preoccupation was how to have law in the face of persistent disagreement and uncertainty. For Henry Hart and Al Sacks, who pioneered the legal process vision in their famous casebook, “[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision.”<sup>74</sup>

The key component of Legal Process jurisprudence for my purposes is the principle of institutional settlement, which holds that “decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.”<sup>75</sup> You can see the influence of Realism on this principle. It starts by conceding that the law is sometimes indeterminate and that we’re likely never to agree altogether on the “right answer” to a lot of legal questions. We still, however, have to live together and muddle through somehow. The answer, for the Legal Process School, is that we should at least try to agree on allocating the authority to make a final decision to *somebody*. And we should agree—in advance—that we’ll all accept whatever that decision turns out to be.

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71. See Craig Green, *Erie and Constitutional Structure: An Intellectual History* 52 AKRON L. REV. 257 (2019).

72. See generally Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205-99 (1995).

73. See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

74. HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994).

75. *Id.*



One important corollary to this is that the authority to decide must at least sometimes include the authority to get the decision *wrong*.<sup>76</sup> If my wife asks me to dress our daughter before she heads off to daycare, I expect her to respect my choice of the cute dress with the pink rabbits on it even if she might have preferred the dress with the rainbow stripes. The decision is institutionally settled—in the first instance—in Dear Old Dad. There are limits, of course. If I send the kid downstairs in shorts and a t-shirt when it's 20 degrees outside, that initial decision is getting reversed. But the question of whether the initial decisionmaker is to be overruled has to be different in kind from asking simply what *Mom* might have decided on the merits in the first instance. You don't send the kid back upstairs just because you like the rainbows better than the rabbits.

We see this principle throughout the law. It lies behind standards of review limiting how appellate courts revise the judgments of lower courts.<sup>77</sup> They can reverse a trial court's factual findings or discretionary judgments, for example, but only by overcoming a highly deferential standard. The same notion undergirds *Chevron* deference to agency interpretations of federal statute.<sup>78</sup> A court reviewing such an interpretation does not simply ask whether it would have reached the same conclusion in the first instance, but rather whether the agency's decision falls outside a bound of reasonableness.

I think *Erie* fits this broad Legal Process paradigm to a T. Consider how that decision requires a federal court to approach a question of tort law, like the duty of care owed by a railroad to a person walking along the right of way. *Erie* begins with the proposition that there is more than one way to skin this cat: tort law is a series of legal choices made by state jurisdictions, rather than a matter of logical deduction from first principles. We are open to the possibility that diverse views exist, and multiple approaches may be reasonable.

And *Erie* embodies a principle of institutional settlement. It vests control of the content of the common law in the state courts even if the federal court might think a different approach is more logical, better policy, or simply truer to the spirit of tort law.<sup>79</sup> Here, too, there are limits.

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76. See Fallon, *supra* note 72, at 962.

77. See generally HARRY T. EDWARDS, LINDA A. ELLIOTT, & MARIN K. LEVY, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS (2d ed. 2013).

78. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

79. *Erie* performs this office in conjunction with *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), which held that the Supreme Court ordinarily may not review state court decisions on the meaning of state law. See Martha A. Field, *Sources of Law: The Scope of Federal Common*

State legal choices may be preempted by federal statutes, and federal courts have doctrinal tools to curb state common law interpretations that retroactively undermine established rights.<sup>80</sup> But in general, *Erie* tells prestigious, life-tenured federal judges to respect state law and be guided by the principle: What would the state supreme court do?

Casting *Erie* as the poster-child for Legal Process jurisprudence may strike many of you as condemnation rather than praise—after all, the Legal Process School is not exactly stylish. I gave a talk some years ago at the University of Chicago, which considers itself a pretty cutting-edge place, about the virtues of Legal Process jurisprudence as a way to think about international adjudication.<sup>81</sup> They looked at me as if I had two heads—if, that is, it were possible to regard a person with two heads as not only weird but also utterly banal and uninteresting. In a review of Ed Purcell’s wonderful book on *Erie*, Susan Bandes condemned the Legal Process School for “advocat[ing] an insularity that sought to exclude a whole host of influences and contingencies—political, cultural, historical, and practical.”<sup>82</sup>

There are all sorts of things wrong with this vein of criticism, beginning with the fact that it depends on ignoring what the Legal Process scholars actually said and did.<sup>83</sup> But I want to focus on the more general claim that the Legal Process School is simply behind the times and has nothing to say to us today. That claim, I suggest, could hardly be more wrong.

Let’s focus on institutional settlement first. It’s not a natural human reaction to distinguish between whether I think another person is wrong and whether that person is *unreasonably* wrong. But we train lawyers that this distinction is important. This is why I tell my Federal Courts students that Hart and Wechsler can make them better people. The Legal Process School teaches that in many human situations, it’s crucial to respect and even defer to someone else’s judgment on a question notwithstanding that

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*Law*, 99 HARV. L. REV. 881, 921 (1986) (“Together *Murdock* and *Erie* give states control over their own law.”).

80. See, e.g., *Stop the Beach Renourishment v. Fla. Dep’t. of Env’t. Prot.*, 560 U.S. 702 (2010); see also Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CON. L. & PUB. POL’Y 107, 108-09 (2011).

81. See Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L. J. 1143 (2005).

82. Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L. J. 829, 830 (2001) (reviewing EDWARD A. PURCELL JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN THE TWENTIETH-CENTURY AMERICA* (2000)).

83. See Young, *General Defense*, *supra* note \*, at 87.

you'd have reached a different conclusion. To take just one example, this is surely an important key to a successful marriage.

More broadly, the Legal Process School responded to two broad and related sets of phenomena: a breakdown of social consensus and a crisis of faith in the integrity of law as separate from politics. Scholars like Hart, Sacks, and Wechsler urged a focus on fair structures of governance and decision-making procedures as a means of finding common ground in this conflict-ridden and disenchanting world.<sup>84</sup> That basic set of problems ought to sound awfully familiar to lawyers in the early 21st century. We have had our own Legal Realist-type challenges in the Critical Legal Studies movement, followed by the Attitudinalists in political science who purport to have disproven the notion that judges act according to legal principle.<sup>85</sup> In his Harvard Law Review Foreword in 2005, Judge Richard Posner accepted this claim and declared that the Supreme Court "is a political organ."<sup>86</sup> If anyone doubts that our community has lost faith in the integrity of law as distinct from politics, then I would refer them to the recent hearings on Brett Kavanaugh's nomination to the Supreme Court.<sup>87</sup>

And of course the current breakdown of political consensus hardly requires further documentation from me. Political scientists report the extent of political polarization and its tendency to render institutions of governance dysfunctional.<sup>88</sup> Legal scholars worry about the disintegration of norms.<sup>89</sup> Political psychologists document the translation of political disagreement into active dislike of one's fellow citizens.<sup>90</sup> But one need not look to the academic literature; one can simply read the news. Our President has endorsed violent responses by his supporters to hecklers.<sup>91</sup>

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84. See Fallon, *supra* note 72, at 964.

85. See, e.g., JEFFREY A. SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

86. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 34 (2005).

87. See, e.g., Tessa Berenson, *How an Emotional Day of Kavanaugh Testimonies Reinforced the Country's Polarized Views*, TIME (Sept. 28, 2018), <http://time.com/5409246/christine-ford-brett-kavanaugh-politics/> [<https://perma.cc/54AM-45AT>]; see also Associated Press, *Chief Justice Notes Kavanaugh Case, Cites Dangers of "Political Pressure,"* CBS NEWS (Oct. 17, 2018 8:06 AM), at <https://www.cbsnews.com/news/john-roberts-chief-justice-stresses-independence-minnesota-speech> [<https://perma.cc/P9LU-H3CE>].

88. See, e.g., CAMBRIDGE UNIVERSITY, *AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION* (James A. Thurber & Antoine Yoshinaka, eds., 2016).

89. See, e.g., Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L. J. 177 (2018).

90. See, e.g., LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018).

91. See, e.g., Louis Jacobson & Manuela Tobias, *Has Donald Trump Never 'Promoted or Encouraged Violence,' as Sarah Huckabee Sanders Said?* POLITIFACT (July 5, 2017, 10:31 AM),

A senior leader of a major political party has announced that one “cannot be civil” with the other party.<sup>92</sup> A senior Member of Congress has exhorted partisans to stalk and harass people who work for the Administration.<sup>93</sup> We have even seen an attempt to assassinate one party’s congressional leadership<sup>94</sup> and a series of pipe bombs mailed to major figures in the other party.<sup>95</sup> It seems reasonable to worry about the “disintegrating resort to violence” that the Legal Process scholars warned about in the event that people fail to find common ground in the rule of law.

In the current moment, *Erie*’s humility—its willingness to let people agree to disagree on questions of substance in exchange for a common ground on processes for dispute resolution—seems like precisely the sort of mindset that might help us move forward. And its commitment to federalism, which allows different jurisdictions to pursue their own vision on at least some questions, might allow us to finesse some of the most divisive questions.<sup>96</sup> No one thinks the Legal Process School represents some sort of golden age, but no one should be foolish enough to believe that our present age holds all the answers either.

## V. CONCLUSION

Both critics and defenders of *Erie* like to describe it as a myth.<sup>97</sup> They debate whether we ought to continue to believe in that myth. I’m tempted to respond to that suggestion as Mark Twain did when asked if he believed

<https://www.politifact.com/truth-o-meter/statements/2017/jul/05/sarah-huckabee-sanders/has-donald-trump-never-promoted-or-encouraged-viol/> [<https://perma.cc/GP9G-DAKF>].

92. See Rachel Ventresca, *Clinton: ‘You Cannot Be Civil with a Political Party that Wants to Destroy What You Stand For*, CNN (Oct. 9, 2018, 9:52 AM), <https://www.cnn.com/2018/10/09/politics/hillary-clinton-civility-congress-cnntv/index.html> [<https://perma.cc/95RE-8ER>].

93. Jamie Ehrlich, *Maxine Waters Encourages Supporters to Harass Trump Administration Officials*, CNN (June 25, 2018, 2:02 PM), <https://www.cnn.com/2018/06/25/politics/maxine-waters-trump-officials/index.html> [<https://perma.cc/8XGL-KGG7>].

94. See Michael D. Shear, Adam Goldman, & Emily Cochrane, *Congressman Steve Scalise Gravely Wounded in Alexandria Baseball Field Ambush*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/us/steve-scalise-congress-shot-alexandria-virginia.html> [<https://perma.cc/4C26-NECK>]; Jose Pagliery, *Suspect in Congressional Shooting Was Bernie Sanders Supporter, Strongly Anti-Trump*, CNN (June 15, 2017, 5:20 PM), <https://www.cnn.com/2017/06/14/homepage2/james-hodgkinson-profile/index.html> [<https://perma.cc/7YJ8-MDMW>].

95. See, e.g., William K. Rashbaum, *Hillary Clinton, Barack Obama and CNN Offices are Sent Pipe Bombs*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/nyregion/clinton-obama-explosive-device.html> [<https://perma.cc/7242-TUX2>].

96. See, e.g., Lemos & Young, *supra* note 68, at 51-53 (discussing federalism as a way of mitigating the effects of partisan polarization).

97. See Ely, *supra* note 2; Green, *supra* note 8.

in infant baptism. “Believe in it?” he said. “Hell, I’ve seen it done.”<sup>98</sup> I feel similarly about *Erie*: I believe in it because I’ve seen it done. *Erie* is so integral to the way we think and write and teach about the law in the modern era that it’s hard to imagine the legal landscape without it. *Erie* may not be either good or bad but simply inevitable in our current legal age. It’s a way of life.

All the same, the world turns and paradigms shift. If we find *Erie*’s way of life attractive—and I’ve suggested we should—then we need to care for it. I’ve tried to suggest some ways in which *Erie*’s worldview is under threat from quarters that may seem awfully remote from the question whether a federal court sitting in diversity must apply state law to a railroad accident on a dark night in Pennsylvania. But the fact that we sit here talking about *Erie* 80 years after it came down suggests that its principles are more resilient than one might think.

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98. Quoted in PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 104 n.154 (2011).