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# Redeeming *Erie*: A Response to Suzanna Sherry

Donald Earl Childress III\*

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## I. INTRODUCTION

I imagine that those hearty souls who have survived this April Fool's Day prosecution of the Supreme Court's "Supreme Mistakes" have now come to grips with the fact that this panel is not a joke—we really have scheduled a civil procedure case for the last panel of the day! Of course, Professor Sherry has made it worth sticking around. In her eloquent and interesting article, she has demonstrated why the Court's decision in *Erie Railroad Co. v. Tompkins*<sup>1</sup> deserves its day in the Malibu sun—with the idea being, to quote Justice Brandeis (the author of the *Erie* decision itself), that "[s]unlight is said to be the best of disinfectants."<sup>2</sup> Before we disinfect, however, we must come to some conclusion as to what the infection is that ails us. As this is a civil procedure panel, my approach as the appointed defense counsel is to plead confession and avoidance. In so doing, I will admit the facts alleged in Professor Sherry's declaration, but I will seek to show why the *Erie* opinion and Justice Brandeis should be discharged from liability.

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\* Associate Professor of Law, Pepperdine University School of Law. This article is a response to Suzanna Sherry's *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time* and part of *Pepperdine Law Review's* April 1, 2011 *Supreme Mistakes* symposium, exploring the most maligned decisions in Supreme Court history. Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2011). Thanks are due to Professor Edward J. Larson and the editors of the *Pepperdine Law Review*, in particular Blake McKay Edwards and Janelle M. White, for inviting me to offer a response. The helpful research assistance of Julia MacDonald is gratefully acknowledged.

1. 304 U.S. 64 (1938).  
2. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 92 (2d ed. 1914).

My confession and avoidance proceeds in three steps. First, I want to take stock of what can reasonably be said about the *Erie* decision. Second, I want to grapple with *Erie*'s lasting effects. Third, I will investigate whether *Erie* can be redeemed.

## II. CONFESSION: *ERIE* AS INKBLOT

As Professor Sherry explains in her article, Justice Brandeis rested the *Erie* decision on three contestable grounds.<sup>3</sup> First, that as a matter of statutory interpretation, the phrase the “laws of the several states” in the Rules of Decision Act<sup>4</sup> plainly covered state common law as well as statutory law.<sup>5</sup> Second, that uniformity of law had been thwarted and “grave discrimination by non-citizens against citizens”<sup>6</sup> had been introduced by the Court’s decision in *Swift v. Tyson*.<sup>7</sup> As the Court explained, “[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.”<sup>8</sup> In addition, the ability to forum shop by virtue of the *Swift* rule inappropriately gave nonresident plaintiffs an advantage over resident defendants.<sup>9</sup> The discriminatory advantage was that a nonresident plaintiff suing a resident defendant could forum shop between state court and federal court in hopes of finding the substantive law, as did Tompkins in the *Erie* decision itself, most favorable to his case.<sup>10</sup> While a resident plaintiff suing a nonresident defendant could similarly forum shop, if the resident plaintiff brought suit in state court in hopes of gaining more favorable substantive law, then the nonresident defendant could remove the suit to federal court under the federal removal statute.<sup>11</sup> This advantage meant that resident defendants sued by nonresident plaintiffs might be forced into not only a forum but unfavorable substantive law.

The third and final ground relied upon by the Court was one of constitutional dimension: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the

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

4. Rules of Decision Act, ch. 20, § 34, 1 Stat. 92 (1789) (codified as amended at 28 U.S.C. § 1652 (2006)).

5. *Erie*, 304 U.S. at 72–73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

6. *Id.* at 74 (referencing *Swift v. Tyson*, 41 U.S. 1 (1842)).

7. 41 U.S. 1 (1842).

8. *Erie*, 304 U.S. at 74.

9. *Id.* at 74–75.

10. *Id.*

11. 28 U.S.C. § 1441 (2006) (permitting a nonresident defendant to remove a case filed in state court to federal court but not a resident defendant sued by a nonresident plaintiff).

law of the State . . . whether . . . declared by its Legislature in a statute or by its highest court in a decision . . .”<sup>12</sup> This was so because “no clause in the Constitution purports to confer” the power to create substantive rules of common law “upon the federal courts.”<sup>13</sup> Put another way, because Congress has no power to declare substantive rules of common law applicable to the states, the federal courts similarly have no power.<sup>14</sup>

By way of confession, I think it is clear that none of these arguments in whole or in part provides a satisfactory justification for what the Court did in *Erie*. Justice Brandeis’s law office history is far from compelling, and the defects identified, and constitutional arguments made, read more like an *ex post* rationalization than an application of well-settled principles of law. As recognized by Justices Butler and McReynolds in dissent, members of the Court, including Justices Field and Holmes (whom Justice Brandeis quoted extensively in the main opinion), had come to the conclusion that the *Swift* decision should not be disturbed but should be limited in its application to new fields.<sup>15</sup> In sum, the *Erie* decision seemed neither justified nor needed to members of the Court at that historical moment.

But don’t take Professor Sherry’s and my word for it. The Supreme Court itself in subsequent decisions developing the *Erie* doctrine has favored reconceptualizing the case over applying any of these precise grounds. The decisions of the Court following *Erie* “did more than simply explicate the developing *Erie* doctrine; rather, each of them redefined the scope and thrust of *Erie* in such a manner as to yield an entirely new conceptualization of it.”<sup>16</sup> In other words, we accept *Erie* as controlling law but have very little agreement about why it is controlling law and upon which grounds the doctrine firmly rests.

What can we make, then, of *Erie*’s place as a supreme mistake in light of this? In my view, and to put it somewhat grandly, *Erie* is a Rorschach test.<sup>17</sup> The real importance of the *Erie* decision is that it provides each generation of lawyers and law professors the opportunity to perceive anew

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

13. *Id.*

14. *Id.*

15. *Id.* at 80–90.

16. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4504, at 26 (2d ed. 1996).

17. Created by Swiss psychiatrist, Hermann Rorschach, the Rorschach test is “a psychological test of personality and intelligence consisting of 10 standard black or colored inkblot designs that the subject describes in terms of what they look like to him.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1974 (2002).

Justice Brandeis's inkblots and to construct their own vision of the role of federal courts, federal and state law, and federalism in our democracy.

So, for instance, Justice Brandeis saw in the decision the progressive's hope of constraining federal expansion and protecting state prerogatives, especially in the context of corporate regulation.<sup>18</sup> Justice Frankfurter saw in it a way to short circuit the deleterious outcome of federal and state courts reaching different conclusions on questions of state law when exercising diversity jurisdiction, while at the same time preventing Justice Brandeis's constitutional language from undermining much of the New Deal.<sup>19</sup> As he stated in *Guaranty Trust Co. v. York*,

[T]he *intent* of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of . . . diversity . . . , the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.<sup>20</sup>

Notice in Justice Frankfurter's language the statement of an "intent" behind *Erie* rather than a precise focus on *Erie*'s *ratio decidendi*, which would have required him to grapple with significant constitutional problems created by New Deal legislation.<sup>21</sup>

Chief Justice Warren in *Hanna v. Plumer* believed that the "decision was also in part a reaction to the practice of 'forum-shopping.'"<sup>22</sup> As such, he conceptualized *Erie* as comprising "twin aims . . . : discouragement of forum-shopping and avoidance of inequitable administration of the laws."<sup>23</sup> The language of avoiding "inequitable administration of the laws" fits perfectly with perceptions about the Warren Court as concerned with equal justice under law.<sup>24</sup>

In light of these reformulations, it is fair to observe that *Erie* is no longer a case; it is a policy doctrine and that doctrine is "completely foreign to the decision that is its putative source."<sup>25</sup> If this is correct, Justice Brandeis has

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18. See generally Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* 21 (Kevin M. Clermont ed., 2d ed. 2008).

19. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 489–91 (1997).

20. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (emphasis added).

21. *Id.*

22. *Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

23. *Id.* at 468.

24. Suzanna Sherry, *All The Supreme Court Really Needs To Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 459 (1997).

25. Marian O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent: II*, 40 TEX. L. REV. 619, 625 (1962).

unindicted coconspirators.<sup>26</sup> If *Erie* is guilty of being a supreme mistake, then, it is not simply because the decision itself was infirm but rather because what it has become is questionable, mistaken, or both in light of the doctrine's development since the *Erie* decision.

### III. AVOIDANCE: *ERIE*'S EFFECTS

What has *Erie* become and is the doctrine mistaken? In pleading confession and avoidance, I note that there is a significant chasm between the jurisprudence of *Erie* and *Erie*'s application in actual cases. While the academy has struggled to find some rationality in the decision, the practicing bar is seldom confounded as most applications of the *Erie* doctrine in actual cases are clear. Problems do persist, however.

To begin with, there are problems associated with the so-called "*Erie* guess"—what is a federal court to do when state law is unsettled? While certification<sup>27</sup> is an obvious answer, the minimal use of that device perhaps illustrates that federal courts endeavor to faithfully apply state law as if they were state courts. Looking at *Erie* positivistically, this is problematic because in such cases federal courts are exercising state common law authority.<sup>28</sup>

Problems also remain regarding whether the enforceability of a forum-selection clause is substantive or procedural for *Erie* purposes. And questions remain concerning whether the doctrine of forum non conveniens is substantive or procedural. Even in these cases, however, this is largely a distinction without a difference because most state forum-selection and forum non conveniens law follows federal law.<sup>29</sup> Generally speaking, therefore, to the extent the *Erie* doctrine is muddied, the waters of practice are relatively clear.

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26. An "unindicted coconspirator" is "[a] person who has been identified by law enforcement as a member of a conspiracy, but who has not been named in the fellow coconspirator's indictment." BLACK'S LAW DICTIONARY 292 (9th ed. 2009).

27. Certification is "[a] procedure by which a federal appellate court asks the U.S. Supreme Court or the highest state court to review a question of law arising in a case pending before the appellate court on which it needs guidance." *Id.* at 257.

28. See David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 327 (1977) (noting that the increased use of certification could decrease federal court influence "and may in fact mark the return to state courts of autonomy in deciding substantive state law questions").

29. See Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1928–29, 1929 n.94 (2009) (stating that several circuits have come to the conclusion that applying federal or applicable state forum-selection clause law would lead to the same conclusion).

As Professor Sherry notes, however, this doctrinal clarity breaks down in the context of multistate suits.<sup>30</sup> In suits that potentially call for the application of different state laws, such as cases crossing state borders, multistate class actions, or transnational cases, the Court has favored a rigid approach to the question—basically applying the conflict of laws rules of the state in which the court sits as opposed to a more nuanced approach.<sup>31</sup> The result has been horizontal forum-shopping between the several states and forum-shopping into the United States in transnational cases.<sup>32</sup>

Finally, what of federal common law, or more precisely, the statement in *Erie* that “[t]here is no federal general common law”?<sup>33</sup> From constitutional interpretation to federal statutory construction to admiralty, federal common law remains a vibrant area of law that even Justice Holmes’s positivistic tendencies, as adapted by Justice Brandeis, cannot stamp out.

In light of the above, how can it be argued that *Erie* is one of the worst Supreme Court decisions of all time? The answer lies in what we see *Erie* to be.

According to Professor Sherry, *Erie* is “pernicious”<sup>34</sup> because it “plac[es] a murky constitutional imprimatur on judicial restraint [and] threatens to deprive us of one of our oldest and most effective tools for avoiding majority tyranny,”<sup>35</sup> namely the judiciary’s “ability to lead.”<sup>36</sup> The problem with the *Erie* decision is that it has closed the judicial imagination to the reasonable development of law and has politicized the judiciary by making every choice of law a choice of either democratic positive law or undemocratic judicial fiat.

By way of confession, again, I think Professor Sherry’s observations deserve careful consideration. *Erie* may have been wrongly decided but what makes it a “supreme mistake,” assuming *arguendo* that it is one, is that it has had effects that have rippled throughout many areas of the law and, indeed, jurisprudence. If this is right, can *Erie* be redeemed?

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30. See Sherry, *supra* note 3.

31. See, e.g., *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

32. Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1802–03 (2009) (“Federal courts increasingly refused to certify nationwide damage classes . . . on choice-of-law grounds. . . . [P]laintiffs’ attorneys responded to these developments by filing more nationwide classes in state courts and forum shopping for the most liberal certification practices and plaintiff friendly substantive laws.”).

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

34. Sherry, *supra* note 3, at 149.

35. *Id.* at 153.

36. *Id.* at 152.

IV. REDEEMING *ERIE*

I think the answer to this question is “yes.” In my view, a redeemed *Erie* doctrine would recognize first and foremost that the doctrine is about effectuating a policy of federalism. To affect that policy, we need to think more—as Professor Sherry has encouraged us—about the appropriate allocation between federal courts and state courts, and federal law and state law, in our federal system. Reflexive application of the mantras “apply state law,” “apply the conflict of laws rules of the state in which you sit,” and “there is no federal common law” may sound good, but they do little to advance a serious attempt at understanding complex decisions of law and judicial decision making generally.

Recognizing this, I think that Justice Ginsburg’s recent dissent, joined by Justices Kennedy, Breyer, and Alito, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*<sup>37</sup> deserves close attention. As Justice Ginsburg explained, the Court’s *Erie* decisions “instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute . . . or a procedural rule . . . —warrant our respectful consideration.”<sup>38</sup> Note, Justice Ginsburg does not say the *Erie* decisions “warrant our deference” or even our “our application.” Consideration implies judgment, and we need to more forthrightly engage that question of the considered judgment of the federal courts in the context of federalism in the years to come.

*Erie*, then, can be redeemed not because of what it said or what it has been interpreted to say in the last nearly seventy-three years, but rather because of the intuition it has bestowed upon us. In its best light, *Erie* requires us to take a step back and be sensitive to the federal and state issues at play in many cases and especially multistate cases that come before the federal courts. To do otherwise risks annihilating “our federalism.”<sup>39</sup>

## V. CONCLUSION

Let me end, then, on a hopeful note. What is needed is a new generation of *Erie* scholarship not focused on Justice Brandeis’s *Erie* or *Erie*’s “myth,” but rather on the tough problems created in multistate cases. As Brainerd Currie observed twenty years after *Erie* was decided, “In the history of Anglo-American law the domestic case has been normal, the conflict-of-

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37. 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting).

38. *Id.* at 1464.

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



laws case marginal.”<sup>40</sup> Seventy years after *Erie*, that is no longer the case in our national and transnational world. The answer may be, as I take Professor Sherry to argue, that the judicial imagination should be reopened in such cases. Or the answer may be that, having been alerted to the issue through *Erie*, Congress should act. Taking a position on that important debate should be the subject of another symposium.

In any event, it would be a supreme mistake to go on believing that *Erie* gives us an answer; instead it alerts us only to the question.

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40. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 231 (1958).