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INTRODUCTION: *ERIE RAILROAD* AT SEVENTY-FIVE

Michael S. Greve & Richard A. Epstein

INTRODUCTION

On April 25, 2013, *Erie Railroad v. Tompkins*¹ celebrated its seventy-fifth anniversary. Justice Louis Brandeis's farewell present as he departed from the Supreme Court after twenty-two years of service is a familiar staple of American law. Like Cher or Madonna, it enjoys one-named recognition (among lawyers, in any event). *Erie*'s core holding—in diversity cases where no federal constitutional or statutory rule applies, federal courts will follow state law²—is hornbook teaching. Judicial decisions over the decades have offered differing, sometimes inconsistent applications and answers to a wide range of “*Erie* questions.” Even so, the decision appears unassailable and in robust condition, as a rock-bottom foundation of American legal practice and learning. That first impression, however, may not be the whole story. A profusion of critical law review articles and books over the past few years demonstrates that much remains to be said about *Erie* after all these many decades, above and beyond what every 1L Civil Procedure student learns about the case. Hence, this issue.

The essays were first presented and discussed in a series of academic workshops, conducted at the American Enterprise Institute (AEI) and generously supported by AEI's National Research Initiative. We organized the events to contribute to a critical reexamination of *Erie*—mindful, to be sure, of its deep entrenchment in our jurisprudence, but open to the thought that not all may be well with the legal edifice erected on *Erie*'s foundation, or perhaps with the foundation itself. We did not strive for any political, ideological, or jurisprudential balance. Instead, we invited first-rate scholars who, we surmised, would have something new and important to say about *Erie Railroad*. Our lodestar, or at any rate an inspiration, was Henry J. Friendly's legendary lecture *In Praise of Erie*,³ delivered on the occasion of *Erie*'s twenty-fifth anniversary a half century ago—an essay whose staying power has, predictably, made it an object of inquiry by our authors today.

We are grateful for AEI's support and sponsorship. And we thank the authors for accepting our invitation and, above all, for rewarding the workshop participants and now their readers far beyond our hopes and expecta-

¹ 304 U.S. 64 (1938).

² *Id.* at 78.

³ Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

tions. The authors' probing, wide-ranging inquiries push far beyond the CivPro enclave in which *Erie* has often been cabined. They do so in various ways and directions but on the basis of what looks to us like a consensus: by and large, the authors understand *Erie* as a *Conflicts* case.⁴ The conflicts arise from the fact that ours is by constitutional design a federal system, which generates conflicts vertically (between the states and the national government) and horizontally (among states). Thus, *Erie* necessarily assumes constitutional proportions. This inescapable constitutional dimension in turn prompts still deeper questions about *Erie*'s jurisprudential foundations. The essays cover the full range of those questions; our brief introduction serves to develop some common themes.

Justice Brandeis's *Erie* opinion provides a convenient reference point for grouping the themes under three headings: statutory and pragmatic considerations; constitutional arguments; jurisprudential foundations. Sections II, II, and IV develop those themes, respectively. We have also arranged the essays with that thematic order in mind.⁵ Section V has a more reflective and, if you will, historicist quality. Like all key Supreme Court decisions, *Erie* reflects the political fervors of its time (several contributors place the decision in its historical context.). Something similar is true of *Erie*'s reception, interpretation, and adaptation to changing social and political conditions over the last seventy-five years. But the historical arc, punctuated by—obviously, somewhat arbitrary—quarter-century milestones, presents a bit of a puzzle.

Erie's twenty-fifth anniversary prompted Henry Friendly's famous celebration of *Erie*'s "synthesis" of federal and state law and courts and of a "new" federal common law that would adapt *Erie* to the constitutional structure and to the demands of the modern state. It reflected a moderate, domesticated New Deal Constitution, which fit the spirit of the times. *Erie*'s fiftieth anniversary in 1987 provides a striking contrast. The 1980s were a time of sharp academic and political debate over the role of courts and of a conservative "revolution" that to some minds amounted to an attempted coup against the New Deal Constitution.⁶ Somehow, however, the debate of the 1980s bypassed *Erie* entirely: *Erie*'s golden anniversary generated a few articles on its perennial Civil Procedure difficulties, but no serious examination of its foundations, its broader themes and questions, or for that matter its continued wisdom. Just those questions, though, have

⁴ *E.g.*, Gasaway & Parrish, at p. 226; Sherry, at p. 178; Erbsen, at p. 132. They are not alone. *See, e.g.*, Kim Roosevelt III, *Choice of Law in Federal Courts, From Erie to Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1 (2012).

⁵ Ernest Young's emphatic "Defense of *Erie*" appears first in this volume because it covers all three themes and, along the way, also provides a lucid and comprehensive survey and discussion of the recent scholarly literature.

⁶ *See, e.g.*, BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 391–400 (1998).

now risen to prominence. As Ernest Young observes, “*Erie* finds itself under siege . . . from a rising chorus of academic criticism.”⁷

Our explanation of this curious trajectory centers on the interplay between jurisprudential theory and real-world politics. Contrary perhaps to the insistence of legal realists and “democratic constitutionalists,” those two powerful forces do not always run parallel. Their congruity, tensions, and conflicts have powerfully shaped *Erie* itself and its reception over the decades. Our broad-brush sketch of the trajectory ends on a happy and, we trust, consensual note: the contemporary attacks on *Erie* have come from all sides of the political spectrum, as have the defenses. When political and jurisprudential commitments get scrambled, debate about law and the Constitution brings out the best in scholars, as they begin to question not only their opponents’ commitments but also their own. Along with a fair bit of confusion, much good comes from such intellectual ferment. Issues are joined with greater clarity, and once unexplored connections force their way to the surface: witness this issue.

STATUTORY AND PRAGMATIC ARGUMENTS

Justice Brandeis’s *Erie* opinion, after a brief recitation of the facts of the case, began on a low-key, statutory note: Justice Story’s opinion in *Swift v. Tyson*,⁸ it contended (“*First*”), had misinterpreted Section 34 of the 1789 Judiciary Act, subsequently codified as the Rules of Decision Act (RDA).⁹ Recent research proffered by Charles Warren, Brandeis wrote, showed that federal courts should follow state common, as well as statutory, law in diversity cases where no federal rule of decision applied. Brandeis continued (“*Second*”) that the contrary rule of *Swift* had produced practical “defects”—“unfairness” among litigants, generated by forum-shopping between state and federal law.¹⁰ (Brandeis cited the notorious *Black & White Taxicab* case¹¹ as an example.)¹² Ernest Young valiantly defends Brandeis on both points; other contributors disagree.

⁷ Young, at p. 18.

⁸ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938) (citing *Swift v. Tyson*, 41 U.S. 18 (1842)).

⁹ 28 U.S.C. § 1652 (2012) (reading, “The laws of the several States, except where the Constitution or treaties, of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

¹⁰ *Erie*, 304 U.S. at 74.

¹¹ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

¹² *Erie*, 304 U.S. at 85.

THE RULES OF DECISION ACT

Ernest Young acknowledges that Justice Brandeis's take on the RDA, and especially his reliance on Warren's research, has come under heavy fire. However, he argues that Brandeis's interpretation can stand without the support of Warren's research, based solely on the text of the act. That text commands federal courts to apply "the laws of the several states" as rules of decision, and that must be understood—and must have been understood even in the nineteenth century—to embrace unwritten law as well as statutes. In fact, Young argues, Justice Story himself did not draw the line between statutory and common law but rather between local and general law. Robert R. Gasaway and Ashley Parrish offer a very different view. The RDA, they note, speaks of state *laws* in the plural and precisely not of state *law* generically. That distinction, they say, is elided in *Erie* but remains meaningful and central. "Law" means that set of rules that govern in any society and thus includes common law rules; whereas the term "laws" (plural) refers only to enacted laws on the statute books. In their view, once one works through the implications, Justice Story turns out to have had much the better of the textual argument. Both articles make novel and important contributions to a debate that shows no sign of coming to rest any time soon.

At first impression, the agitation over the true and correct meaning of the RDA seems disproportionate to the weight of Brandeis's argument. No plausible theory of interpretation, Samuel Issacharoff notes, warranted Brandeis's decision to overturn a well-settled, century-old *statutory* understanding and practice. It is tempting to say the same of *Erie*'s interpretation of the statute: it's settled. Still, the debate continues and indeed has gained new vibrancy. Perhaps, the revival of originalist theories (especially in constitutional law) cautions against a pragmatic line. The switch from *Swift* to *Erie*, while hugely important, did not destabilize the nation. The RDA remains as it was in 1938, and so defenders of the old order can ask, perhaps justly, "What reliance interest makes it more difficult to switch back today than it was for Brandeis to switch then?" Perhaps more likely, the debate refuses to die because the statutory question is inseparable from the much larger question of how we think about law and (in Professor Young's words) "of what exactly we think courts do when they decide legal questions."¹³ We return to that question in Section IV.

¹³ Compare Young, at p. 20, with Gasaway & Parrish, at p. 235.

PRAGMATIC ARGUMENTS

On Edward A. Purcell's brilliant account, *Erie Railroad* encapsulates Louis Brandeis's Progressive ideology, and Brandeis's observations about *Swift*'s "unfairness" are the key: the true "defect" of the general common law was to offer national *corporations* an escape from the demands of state law.¹⁴ Ideology to one side, though, Brandeis's professed concerns over *Swift*-ean forum shopping raise a profound institutional question: What is the ordering capacity of *Erie*'s rule in a federal system in which vertical and horizontal conflicts of law are built in to the basic fabric of the constitutional order?

Here again, the tenor of the academic debate has often been uncharitable. Far from eliminating vertical forum shopping as Brandeis hoped, critics say, *Erie* reproduced that problem in a different guise—to wit, the vexing choice between (state) substantive law and (federal) procedure; between the RDA and the Rules Enabling Act.¹⁵ Moreover, critics continue, *Erie* amplified the potential for horizontal forum shopping. Several of the essays probe the dimensions of these connected concerns.

Allan Erbsen makes a forceful plea to distinguish more sharply between four dimensions of the "*Erie* problem" that have often been run together and therefore confused the analysis: the *creation* of a federal (substantive) rule of decision; the *interpretation* of that rule; the *prioritization* of federal law; and the *adoption* of nonfederal law. For each prong, Professor Erbsen proposes distinct judicial default settings in light of *Erie*'s principles. Two of them—a presumption against the judicial creation of federal law, and a presumption in favor of the prioritization of federal law in cases where such a rule exists and applies—are tolerably straightforward. As to the adoption of state law in cases where no federal rule governs, Professor Erbsen is sharply critical of *Klaxon*¹⁶ and its rule that federal courts must in *Erie* cases follow state choice-of-law decisions: without further argument or analysis, he notes, *Klaxon* sets a default in favor of vertical uniformity, even in settings where the attendant horizontal *dis*-uniformity may impose very high costs. The author instead favors a "hybrid" default rule that would permit a uniform choice-of-law rule—at variance with state law—in appropriate cases. The hardest questions, Professor Erbsen knows and writes, arise over the interpretation of federal rules, meaning their scope of application. The defaults for a narrow or broad interpretation will depend on what values one thinks *Erie* is supposed to serve—federalism, or the coordination of state and federal law.

¹⁴ EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 132–33 (2000).

¹⁵ 28 U.S.C. §2072 (2012).

¹⁶ *Klaxon v. Stentor Electric*, 313 U.S. 487 (1941).

That choice lurks, often unarticulated and unacknowledged, behind many difficult *Erie* cases. Barely suppressed, it lurks behind cases that pose a choice between the RDA and the Rules Enabling Act; between substance (the substantive rules of decision of state courts) and procedure (the Federal Rules of Procedure and what Suzanna Sherry calls their “transsubstantive” ambition—that is, the objective of providing a single set of rules for civil proceedings in federal courts).¹⁷ The most recent Supreme Court entry in this theater, *Shady Grove Orthopedic Associates v. Allstate Ins. Co.*¹⁸ is the subject of two very different, equally thought-provoking essays.

William H.J. Hubbard presents the first empirical study of the effect of the *Erie* doctrine on vertical forum shopping. He examines the pattern of case filings and removals over the years immediately before and after the Supreme Court’s decision in *Shady Grove*. The Supreme Court’s close, 5-4 decision produced a sharp break. Prior to *Shady Grove*, New York Civil Practice Law (with here immaterial exceptions) barred class actions in cases demanding statutory damages. *Shady Grove* held that such actions, when filed in or removed to federal court, will instead be governed by Rule 23, which lacks any such limitations.¹⁹ One would expect class action plaintiffs and attorneys to respond by filing such actions in federal rather than state court, the better to avoid the statutory damages bar and to obtain class certification. Moreover, to the extent that such actions are still filed in state court, one would expect defendants to be less likely to remove them to federal court. Hubbard’s careful examination of federal court data shows that those expected effects did in fact materialize, in a rather stark fashion.

Suzanna Sherry, who has elsewhere described *Erie* as “the worst decision of all time,”²⁰ here argues that within *Erie*’s confines, there is no way of escaping the elementary conflict between substance and procedure. Professor Sherry’s position resembles Professor Erbsen’s: both authors distrust the substance–procedure distinction as a proxy for federal or state priority, and both plead for bringing suppressed tensions and conflicts to the surface. *Shady Grove*, Suzanna Sherry argues, is but another unsuccessful attempt to deal with a tension that would be better handled if it were addressed straightforwardly. *Erie*’s staunchest defenders, and for that matter even its author, acknowledged that federal common law must be available for some purposes. Instead of identifying “enclaves” that fall outside *Erie*’s domain, Sherry says, we should acknowledge that the tension between national and

¹⁷ Professor Erbsen does not think much of the distinction and the rigid defaults in favor of federal procedure and state substantive law. See Erbsen, at 135. If a federal rule (properly interpreted) applies, he writes, it should be presumed to trump state law. *Id.* Compare this approach to Suzanna Sherry’s (briefly described *infra* starting at p. 174).

¹⁸ 130 S. Ct. 1431 (2010).

¹⁹ *Id.* at 1437.

²⁰ Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 130 (2011).

local interests is present in *every* “*Erie* case.” If the national interest—in uniformity, or economic efficiency, or other national goods—is or should be dominant, have the federal courts say so. If it isn’t, let the federal courts say *that*. The model for this approach, Suzanna Sherry writes, is “implied” (obstacle) preemption, which turns on judicially inferred “purposes and objectives” of the enacting Congress.²¹

Professor Sherry’s bold position points beyond *Erie*’s rule in two respects. First, it signals the close connection in contemporary law between *Erie* and federal preemption, especially implied preemption. Second, the proposal carries beyond procedural *Erie* cases: Professor Sherry favors a federal common law of products liability, an area where substantive state policy judgments—and horizontal forum shopping—threaten to wreak havoc on the national economy. Two essays, one by Samuel Issacharoff and the second by the team of Robert R. Gasaway and Ashley Parrish, provide further and equally intriguing perspectives on these matters, respectively.

Professor Issacharoff surveys the extent to which matters of railroad safety—including the precise questions at issue in *Erie*—have over the course of the decades become preempted by federal law. Those statutes, some predating *Erie* by many years, reflect the fact that a modern economy requires a great deal of uniformity in dealing with transportation networks that necessarily cross state lines. The *Erie* rule cannot generate that uniformity. What it *can* do is to block the *judicial* creation of prohibitory, *anti*-regulatory federal regimes. On this view, “*Erie* is the anti-*Lochner* of a revitalized faith in the regulatory power of the state.”²² As we understand the two authors, Professors Sherry and Issacharoff agree in their understanding of the basic problem—the need for uniformity in venues where the demand seemed compelling long before *Erie*. And, like Suzanna Sherry, Sam Issacharoff sees a close connection between *Erie* and modern implied preemption law: despite the doctrinal distance, that is where *Erie*’s impulses and concerns now play out.²³

Robert R. Gasaway and Ashley Parrish focus (in Part II of their essay) on *Erie*’s horizontal problems. The decision, they say, was a mistake, and they defend *Swift* as a sensible, constitutional way of handling horizontal conflicts of law. And while the authors find much to commend in Judge Friendly’s praise of *Erie*, they contend that the great judge, “together with generations of jurists, [failed] to appreciate the latent wisdom of *Swift v. Tyson*.”²⁴ Part of that “latent wisdom”—beyond providing a much better understanding of the RDA than *Erie Railroad*—was to create an ingenious balance between plaintiffs and defendants: “[T]he plaintiff could deploy its

²¹ Sherry, at p. 191 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²² Issacharoff, at p. 218.

²³ Issacharoff, at p. 222 (noting that some of Justice Thomas’s opinions make the point directly. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 583 (Thomas, J., concurring)).

²⁴ Gasaway & Parrish, at p. 233.

first mover advantage to choose either the jury pool or substantive departures from the general common law baseline, but not both.”²⁵ That balance, the authors argue, was consistent with the purpose of diversity jurisdiction, which is to soften the home court advantage in disputes between citizens of different states. *Erie*, in contrast, hands all litigation advantages to the plaintiff. Hence, today’s “anything goes” system of litigation subjects actors in interstate commerce to nonstop local bias in fifty states. That state of affairs has been amplified by modern-day changes in legal practice, such as the 1966 revisions of the federal rules on class actions, that neither Justice Brandeis nor for that matter Judge Friendly, writing in 1963, could have foreseen. However, *Erie* does nothing to contain these centrifugal tendencies and impositions. Thus, the authors insist, “there can be no rule of law for interstate businesses until *Erie* is thoughtfully reassessed and significantly curtailed.”²⁶

ERIE, THE CONSTITUTION, AND FEDERALISM

Erie’s constitutional dimension has been the subject of a long-running debate: Did Justice Brandeis *have* to go there? And what exactly *is* the constitutional holding and rationale? A quarter century later, Judge Friendly explained why Justice Brandeis did have to resort to the Constitution, and he proffered a subtle defense of *Erie*’s federalism.²⁷ In recent years, the debate over *Erie*’s constitutional dimension has become intense and extensive, producing the paradox briefly mentioned above and here engaged most directly by Ernest Young: a practically unassailable *Erie* decision that is intellectually “under siege.” Part III of Professor Young’s essay presents a detailed reply to *Erie*’s critics. For readers wishing to bone up on the current state of debate, Ernest Young’s confident, spirited, but eminently fair-minded critique is an excellent place to start.

Erie, Ernest Young holds, is indeed both a *constitutional* decision and a *federalism* decision. It is intimately tied, not to a “dual” federalism of separate federal and state spheres but rather to the post-New Deal federalism of concurrent state and federal powers over all activities that fall within the capacious scope of the modern commerce power. In that universe, federalism’s protection comes from the political process and especially the constitutional separation of powers: Congress will often fail or decline to act, in which event states remain free to do as they wish (within, of course, the bounds of the Constitution, including the dormant Commerce Clause). *Erie* plays a key role in sorting federal and state responsibilities. Specifically, it

²⁵ *Id.* at p. 238.

²⁶ Gasaway & Parrish, at p. 243.

²⁷ Friendly, *supra* note 3, at 386–95. See Gasaway & Parrish, at p. 229 for a discussion,

embodies “judicial federalism—that is, limits on the lawmaking power of courts that impose no parallel limits on the power of Congress.”²⁸

Professor Young’s contention that “*Erie* is the paradigm case of contemporary federalism doctrine”²⁹ will find cheerful acclaim among a conspicuous subset of *Erie* critics—those who believe that the entire contemporary, post-New Deal federalism doctrine is misconceived.³⁰ (A plausible response might be that it is the only federalism that can still be had.)³¹ That high-level consensus *cum* conflict to one side, Professor Young’s argument engages *Erie*’s central institutional problem: What do courts do if Congress *fails* to provide a rule of decision? The Constitution envisions the prospect and seeks to avert the most serious deleterious consequences by subjecting certain forms of state conduct and especially state-to-state conduct to direct, judicially enforceable constitutional prohibitions.³² The perennial question has been whether that regime is really enough to discipline the operation a federal system, especially a federal system whose national institutions are designed to block central intervention. Judge Friendly, for one, did not think so: that, precisely, was the point of his praise of a “new federal common law” that would help to cabin *Erie* and to compensate for its deficiencies.

To Robert Gasaway’s and Ashley Parrish’s minds, Friendly’s answer was *almost* right but in hindsight, and in contemplation of (judicial) federalism’s centrifugal tendencies over the past decades, is “no longer enough.”³³ The authors urge a revival of *Swift*-style federal common law rules. For Ernest Young, the problem is the obverse: at some point, the new federal common law—whether in the form of “enclaves,” such as admiralty law, or in the form of expansive judicial interpretations of statutory commands—runs up hard against *Erie*’s constitutional and jurisprudential premises. Clearly recognizing the problem, Professor Young defends those forms of federal judicial lawmaking—though, one senses, with no great enthusiasm.

ERIE’S JURISPRUDENCE

Justice Brandeis’s *Erie* opinion contained an explicit embrace of Holmesian positivism. Some modern scholars have questioned the centrality

²⁸ Young, at p. 67.

²⁹ *Id.* at p. 69.

³⁰ That has been our response, both jointly and separately. See, e.g., Richard A. Epstein & Michael S. Greve, *Introduction: Preemption in Context*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* (Epstein & Greve eds., 2007); MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT*, ch. 15 (forthcoming Dec. 2013).

³¹ Ernest Young proffers that rejoinder: Young, at p. 69.

³² See, e.g., U.S. CONST. art I, § 10; art. IV, § 2.

³³ Gasaway & Parrish, at p. 246.

of that commitment.³⁴ It is difficult to disentangle the debate from definitional disputes over who is or is not a “positivist” or a “natural lawyer” and in what respects. Without venturing into a deep jurisprudential debate, we note what we believe to be a point of agreement among several of the contributors: how one thinks about *Erie* has a lot to do with how one thinks about law and courts more broadly. Ernest Young articulates that proposition. Jeremy Rabkin and Robert R. Gasaway and Ashley Parrish embrace it. On different trajectories, they arrive at strikingly similar conclusions.

Professor Rabkin starts with a puzzle, or rather two. Why, he asks, is it that the same justices and theorists who supported and elaborated *Erie* over its first several decades were solicitous of state courts in domestic commerce—yet also proved highly deferential to open-ended presidential power in foreign affairs? (That latter commitment eventually produced one of *Erie*’s “enclaves,” the foreign affairs preemption doctrine of *Sabbatino*).³⁵ And why is it that in subsequent decades the worm has appeared to turn yet again, as progressives now routinely champion the importation of customary international human rights law and conservative justices and scholars champion *Erie* as a bastion against that enterprise?

On Professor Rabkin’s account, “[w]hat links *Erie* to the fumbling of recent rulings on international human rights law is a common refusal to embrace common law ordering as a solid foundation for judicial decisions.”³⁶ Prior to *Erie* (and certainly at the time of *Swift*), the law of nations, consistent with classical liberal theories of limited government, was oriented towards the twin objectives of limiting conflict and facilitating transactions, especially commercial transactions. Correspondingly, as Rabkin notes, “federal judges embraced federal common law as an alternative to—and therefore, a potential check on—localist bias in state courts. For similar reasons, they also accepted a role for state courts, in cases involving foreign assets, as a check on presidential overreaching in foreign affairs.”³⁷ That entire world and the law built to order it, however, presupposed that some legal and political orderings—public and private, domestic and international—are more natural or naturally sensible than others.³⁸

Erie’s dogmatic positivist premise upended that world. Domestically, it unleashed state courts; and that world may practically demand a backstop in the form of a preemptive foreign affairs doctrine. In a funny way, however, *Erie* also opened the door for the reimportation of international law—provided it is not the “old” law of nations but a kind of international regula-

³⁴ See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998). See Rabkin, at p. 289 for a discussion.

³⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

³⁶ Rabkin, at p. 252.

³⁷ *Id.* at p. 274.

³⁸ The position still claims some holdouts in the modern realist seas. See Richard A. Epstein, *The Natural Law Bridge between Private Law and Public International Law*, 13 CHI. J. INT’L L. 47 (2012).

tory enterprise, even if the identity of the “sovereign” from whom that enterprise emanates is a bit of a mystery. The older view, Jeremy Rabkin notes, “has been silently repudiated by advocates for international human rights regulation. Yet those justices who resist this project do not embrace the earlier outlook of the common law. Both sides remain under the spell of *Erie* and its positivist premises.”³⁹ Professor Rabkin rejects those premises and urges a reappraisal of *Swift*’s more realistic, down-to-earth vision of how the world works and of what law and courts can and cannot do.

Robert R. Gasaway and Ashley Parrish, too, urge a reappraisal of *Swift*’s “latent wisdom.”⁴⁰ Two pieces of that wisdom, noted earlier, are *Swift*’s understanding of the RDA and its capacity of ordering interstate commercial transactions and legal disputes on sensible terms, consonant with the Constitution’s national orientation on matters of trade and commerce. *Swift*’s third and decisive advantage, the authors say, was to offer a presumptive rule of decision in cases where political institutions cannot do so; where the Constitution does not expect them to do so; where territorial choice-of-law rules will inevitably break down for transactions whose key operative facts cut across state law; and where unilateral state rules, far from providing an ordering principle, invite the provincialism, conflict and mayhem that any genuine rule of decision would and should seek to forestall. That is *Swift*’s true domain. On this view, *Erie*’s mistake was its failure to recognize that “[t]he general common law is neither positive nor normative but presumptive. It is, in a word, a benevolent omnipresence on the ground.”⁴¹ Jeremy Rabkin, we strongly suspect, would agree with that proposition.

Agreement on the basics produces another congruence among the authors: caution on reform proposals. Perhaps, Professor Rabkin writes, one need not confront *Erie* directly to make sense of the international law debate. Even in *Erie*’s legal universe, it may be possible to retain a sensible, *Swift*-ean view of the international world. In support of that contention, Jeremy Rabkin cites none other than Henry Friendly, who (in a 1975 case) insisted that “a violation of the law of nations” could only be found by a court when there had been “a violation ... of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state and (b) used by those states for their common good and/or dealings inter se.”⁴² If that sounds like the old law of nations, that’s because it *is* that law. If we can get that much right, Professor Rabkin hopefully concludes, perhaps we can resist the siren song of modern inter-

³⁹ Rabkin, at p. 253.

⁴⁰ Gasaway & Parrish, at p. 233.

⁴¹ *Id.* at p. 244.

⁴² *Int’l Inv. Trust v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by Morrison v. Nat’l Australia Bank, Ltd.*, 130 S. Ct. 2869 (discussed by Rabkin, at p. 297).

national public law that succumbs to impolitic demands for social justice—and leave courts to play a more focused and constructive role in international commercial relations. In a similar vein, Robert Gasaway and Ashley Parrish urge a reaffirmation of common law baselines in an area that does not directly implicate *Erie* questions—*Bivens* actions.⁴³ Surely, the authors write, the common law tradition provides a better guide than state law or the fabrication of constitutional rights and remedies from whole cloth. It would be a “safe and sure first step” towards rehabilitating that tradition.⁴⁴

The authors’ gentle, modest reform proposals seem at variance with their bold intellectual program, but the tension reflects a perfectly intelligible logic. If *Erie* is the embodiment of an entire jurisprudence, scholars as well as practitioners will shrink from any silver-bullet “overrule it” advocacy. They will instead look for opportunities to reassert an incremental return to a more sensible jurisprudence. That enterprise raises an intriguing question that (we think) is also suggested by Allan Erbsen’s critique of *Klaxon* and Suzanna Sherry’s plea for an *Erie* jurisprudence that borrows from implied preemption law: in *Erie*’s large shadow, how far can doctrines be revamped without a frontal assault on the citadel itself?

ERIE RAILROAD, THEN AND NOW

The temptation to engage the contributors’ splendid essays directly is well-nigh irresistible. However, an after-the-fact critique would also be a tad unfair to the authors. And so we don our two ill-fitting historicist hats and ask the question flagged at the beginning: why all the *Erie* commotion now? The answer, we suggest, has to do with the interplay between real-world politics and judicial ideology or, more politely, jurisprudence.

In *Erie* itself, political and jurisprudential commitments coincided. Judicial deference and legal positivism, the celebration of state “experimentation,” and hostility to corporate power all ran together. Those orientations reflected long-held Progressive convictions. Moreover, they fit the immediate historical context. Say of *Swift*’s jurisprudential foundations what you will: it had the great practical, institutional advantage of providing coordination rules in countless instances where neither states nor the Congress could be relied on to perform that task. That virtue, though, seems negligible—and the conflicts dimension recedes into the background—to the extent that one places confidence in the ordering capacity of legislatures and especially the Congress. Louis Brandeis’s vision, Sam Issacharoff writes, was a Madisonian, deliberative national legislature that would supply ordering rules, in a forum where state and local interests would be adequately

⁴³ Gasaway & Parrish, at p. 249; see *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

⁴⁴ Gasaway & Parrish, at p. 250.

represented (unlike, of course, in the federal courts). The vision looked plausible in early 1938, when Congress looked more like the House of Commons than perhaps at any time in our history: dominated by a single party and driven by a hugely popular president of that same party. That system suffered serious body blows six months later (when the Republicans made substantial gains in the November 1938 congressional elections) and again with President Roosevelt's death in April 1945. The Republicans gained in the 1946 election, and the Congress passed two major pieces of legislation (the Administrative Procedure Act⁴⁵ and the Taft-Hartley Act⁴⁶) that cut back on the New Deal's bolder ambitions. Still, the somewhat-tamed New Deal synthesis and consensus lasted into the 1960s.

Erie never became the focus of national elections or legislation, but it followed a similar trajectory in the Supreme Court. Cases from *Clearfield Trust*⁴⁷ to *Lincoln Mills*⁴⁸ to *Hanna v. Plumer*⁴⁹ sought to establish *Erie* as a centerpiece of a responsible, mature New Deal Constitution—protective of federalism values, but attuned to the need to check centrifugal tendencies and temptations; deferential to the political branches, yet cognizant of the commanding need for the judiciary's coordinating—if nominally “interstitial”—role and function. Henry Friendly's legendary “Praise of *Erie*—and of the New Federal Common Law” was the apotheosis of that vision.

In 1963, before the Great Society, the “rights revolution,” the regulatory enthusiasms of the 1970s, and the advent of an aggressive, resourceful plaintiffs' bar, that program had a great deal of plausibility. However, it soon proved unstable. On one side, *Erie*'s premises—not so much its precise holding but its “myth,” to borrow a phrase⁵⁰—proved an irritant to political constituencies, scholars, and judges who championed a far more expansive role for the federal judiciary and whose pro-state sympathies were highly attenuated. The conflict between liberal institutional and ideological commitments produced, in one domain, a “substantive due process” formula that would give free rein to the judicial development of “personal” rights but not the “economic” rights of *Lochner* notoriety.⁵¹ In *Erie*'s domain, a very similar ordering gained ground: state law for interstate commerce, but de facto federal common law for progressive causes from libel law to gender discrimination to sexual harassment⁵²—often developed from the smallest of constitutional or statutory acorns; preemptive rather than presumptive; and covering traditional private law matters that *Swift*'s wildest, most

⁴⁵ 5 U.S.C. §551–59 (2012).

⁴⁶ 29 U.S.C. §401–531 (2012).

⁴⁷ *Clearfield Trust Co. v. U.S.*, 318 U.S. 363 (1943).

⁴⁸ *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

⁴⁹ 380 U.S. 460 (1965).

⁵⁰ John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

⁵¹ *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

⁵² See, respectively, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

reflexive practitioners a century or so ago would have recognized as purely local and thus beyond the reach of federal common law (or for that matter the powers of Congress).

Push hard enough and the attempt to reconcile rival commitments becomes intellectually threadbare and, more to our point here, politically contentious. Beginning in the 1970s, conservatives propagated an “originalist” understanding of the Constitution’s structural principles (federalism, and the separation of powers). They inveighed against the judge-led proliferation of constitutional and statutory rights, while seeking to revive textual constitutional provisions from the Takings Clause to the Commerce Clause (understood as a limitation as well as a grant of power).⁵³ They proffered very firm views about the proper scope and content of administrative law. In short, they assaulted just about every pillar of the New Deal order except one—*Erie Railroad*. Instead, *Erie* became a lodestar of conservative originalism. How come? Three reasons come to mind.

First, originalism in its initial formulation had a pronounced positivist streak and so—to borrow Sam Issacharoff’s evocative phrase—viewed *Erie* as the jurisprudential “anti-*Lochner*” par excellence.⁵⁴ Second, conservative originalism went hand in hand with a “states’ rights” orientation and a desire to free states from federal impositions, especially including federal judicial impositions. In that respect, too, *Erie* seemed congenial. And third, conservatism inherited from the New Deal a commitment to a “unitary” executive and a popular president, capable of cobbling together a workable coalition in a fractious Congress. Those conditions, as noted, are hardly universal. But, the political conditions of the Reagan era lent some plausibility to the conservative perspective.

This constellation may help to explain why *Erie*’s fiftieth anniversary passed practically unnoticed, despite the constitutional and jurisprudential contentions of the 1980s: *Erie* ran orthogonal to the frontlines. Liberals and conservatives alike found something to like in it; both remained wedded to its positivist premises. And, both sides thought that the oncoming battles would be fought in other, more directly constitutional and electorally salient arenas.

And now, another quarter century later? On the liberal–progressive side, confidence in central political and regulatory orderings has not so much given way but made room for a complementary commitment to decentralization—not a return to market orderings, but a willingness to promote state experimentation on top of federal regimes. Centralized regimes will always look incomplete, if indeed they come into existence in the first place. In that light, it makes sense to mobilize states and state courts as a

⁵³ See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

⁵⁴ Issacharoff, at p. 218.

one-way mechanism of error correction: more regulation is *ipso facto* better regulation, at least as a first approximation. *Erie Railroad* is the centerpiece of that “empowerment federalism”⁵⁵ both on account of its specific holding and its doctrinal overhang in other areas, from implied preemption to the dormant Commerce Clause to abstention doctrines. Empowerment federalists’ *Erie* is not Henry Friendly’s *Erie*, nor for that matter Sam Issacharoff’s or Allan Erbsen’s or Suzanna Sherry’s or Ernest Young’s *Erie*. It is Brandeis’s *Erie* as described by Edward Purcell—a program to bring corporate interests to heel.

On the conservative side, the “old” originalism of judicial restraint, positivism, and clause-bound interpretation has been supplemented with a “new” originalism that is much more open to constitutional “construction” and (normative) presumptions.⁵⁶ At the same time, states’ rights federalism has run headlong into the rival commitment to make American commerce work as well as it will and to protect it against federalism’s centrifugal forces and cascading state impositions. And, that imperative, many believe and have argued, cannot be met by a feckless, dilatory, hopelessly divided Congress. Congress has a hard time even articulating vertical, federal–state rules of decision.⁵⁷ (Countless preemption cases illustrate the impossibility of ordering federal and state domains without a great deal of nominally interstitial judge-made rules of decision.) Congress is yet more incapable of providing horizontal ordering rules of decision to ordain *which* state gets to govern *what* transaction.⁵⁸ In that predicament, only federal courts can supply ordering rules. *Erie* stands as an obstacle to that task. It seems to leave one branch of the national government practically incompetent to solve the coordination problems that prompted union in the first place, both on account of its holding and, as noted, its overhang.

Under such conditions, the fault lines begin to move on all sides. The contributions to this issue illustrate the point. Allan Erbsen, Sam Issacharoff, and Suzanna Sherry are hardly conservative partisans. But, they place a premium on coherent national orderings of stuff that by all rights ought to be national. And so, Allan Erbsen takes aim at *Klaxon* and argues for a firmer prioritization of federal law. Sam Issacharoff doubts whether the

⁵⁵ ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* 145–224 (2008).

⁵⁶ *See, e.g.*, KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

⁵⁷ For example, ever since the 1789 Judiciary Act and its famed “savings to suitors” provision. *See* 28 U.S.C. § 41(3), 371(3) (2012). Congress has preempted states by providing that federal law shall be exclusive, except when it’s not. Numerous federal statutes couple an express preemption provision with an explicit savings clause in favor of state law.

⁵⁸ Congress has sought to compartmentalize government authority along state lines only on a few highly salient and conflictual issues where no uniform rule appears viable, such as liquor sales and gay marriage. *See* Defense of Marriage Act, 1 U.S.C. § 7 (2012); Webb–Kenyon Act, 27 U.S.C. § 122 (2012).

progressive commitment to economic or rather regulatory localism was plausible even in 1938, let alone now. Suzanna Sherry pleads for a more direct and expansive assertion of national interests. Jeremy Rabkin *is* a conservative, and Robert Gasaway and Ashley Parrish are corporate defense lawyers; yet they assail a conservative jurisprudence that clings to *Erie*'s presumptions. Ernest Young, too, is a conservative—and he will have none of it. *Erie*, he insists, is really the only constitutional answer to federalism's dilemmas. The proposed cures strike him as worse than the disease. The discontent with *Erie*, left and right, "reflect[s] a basic loss of faith in the political branches to solve national problems."⁵⁹

That may well be right. And, especially if it is right, one should expect the contentious, blissfully jumbled *Erie* debate to continue in the years ahead. In that debate, the splendid contributions to this issue will surely take their rightful, prominent place.

⁵⁹ Young, at p. 99.

A GENERAL DEFENSE OF *ERIE RAILROAD CO. V. TOMPKINS*

*Ernest A. Young**

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Erie is by no means simply a case.

—John Hart Ely¹

*Erie Railroad Co. v. Tompkins*² was the most important federalism decision of the twentieth century. Justice Brandeis’s opinion for the Court stated unequivocally that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law.”³ Although law schools generally teach *Erie* in Civil Procedure—not Constitutional Law—and American lawyers most often think of it as simply governing the law applied by federal courts in their diversity jurisdiction, *Erie*’s core holding states a fundamental truth about the allocation of lawmaking power in our contemporary federal system. Federal law must be grounded in the Constitution or in statutes enacted by Congress; when neither source of law (nor any federal treaty) applies, state law governs.

As we celebrate its 75th anniversary, however, *Erie* finds itself under siege. The most obvious threat comes from a rising chorus of academic criticism. Michael Greve sees *Erie* as not only “bereft of serious intellectual or constitutional support” but also as a cornerstone of a “cartel” federalism that suppresses beneficial competition among the states.⁴ Craig Green has described *Erie*’s rationale as a “myth” that must be “repressed,”⁵ and Suzanna Sherry has even gone so far as to brand *Erie* “the worst decision of all time.”⁶ Outside the ivory tower, *Erie*’s restrictive vision of fed-

¹ John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974). Although Professor Ely’s landmark article generally defended the *Erie* decision, the statement quoted above was part of the “myth” that he was criticizing. See *id.* at 697–98 (complaining that “the indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of ‘the Erie doctrine’ or ‘the Erie problem,’ has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation”). As will be evident, I am considerably more sympathetic to this mythology, as I think *Erie* does represent a fundamental point about the nature of our federal system.

² 304 U.S. 64 (1938).

³ *Id.* at 78.

⁴ MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 373, 378–79 (2012). Professor Greve’s market-oriented critique resonates with criticism of *Erie* by representatives of the defense bar. See, e.g., Robert R. Gasaway & Ashley C. Parrish, *In Praise of Erie—And Its Eventual Demise*, 10 J. L., ECON. & POL’Y 225 (2013).

⁵ Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 596 (2008) [hereinafter Green, *Repressing*].

⁶ Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 130 (2011) [hereinafter Sherry, *Wrong*]. Somewhat surprisingly, Professor Sherry is not the first to engage in this particular hyperbole. See Arthur John Keefe, *In Praise of Joseph*

eral lawmaking has been extensively circumvented by unfettered executive lawmaking⁷ and expansive theories of federal common law.⁸

Although Ed Purcell noted over a decade ago that the *Erie* literature had reached “staggering proportions,”⁹ *Erie* is worth revisiting. Concluding that *Erie* reached the wrong result—or even the right result for the wrong reasons—would upset many foundational premises of modern American law. By holding that state law ordinarily governs any question not touched by positive federal enactments, *Erie* articulated a view of federal law as fundamentally interstitial in its nature; where Congress has not acted, the laws of the several states remain “the great and immensely valuable reservoirs of underlying law in the United States, available for the resolution of controversies for which otherwise there would be no law.”¹⁰ This view has shifted the focus of federalism doctrine from what Congress *can* do to what it *has* done, paving the way for an extensive jurisprudence limiting national power not by way of constitutional prohibition but through “clear statement rules” and other canons of statutory construction.¹¹

Story, *Swift v. Tyson* and “The” *True National Common Law*, 18 AM. U. L. REV. 316, 316 (1969) (“I regard [*Erie*] as the worst [decision] by the Supreme Court in this Century, ranking with *Dred Scott* in the last.”); 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 916 (1953) (insisting that *Erie* “stands revealed . . . as one of the most grossly unconstitutional governmental acts in the nation’s entire history”). African-Americans subjected to Jim Crow laws under *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the Japanese-Americans interned during World War II under *Korematsu v. United States*, 323 U.S. 214 (1944), might be surprised by these assessments. For a more measured critique of *Erie*, see generally Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013) [hereinafter Nelson, *Erie*].

⁷ See, e.g., *Fidelity Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 153 (1982) (stating that “[f]ederal regulations have no less pre-emptive effect than federal statutes”); see generally Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008) (discussing preemption of state regulatory authority by federal executive agencies).

⁸ See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988) (fashioning a federal common law “military contractor’s defense” to block state tort suits against defense contractors); see generally Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008) (describing the creation and application of federal common law) [hereinafter Young, *Federal Common Law*].

⁹ EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 2 (2000).

¹⁰ Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954).

¹¹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that Congress must speak clearly before altering the ordinary balance between the nation and the states); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229–36 (1947) (adopting a presumption against preemption of state law); see generally Ernest A. Young, *The Story of Gregory v. Ashcroft: Clear Statement Rules and the Statutory Constitution of American Federalism*, in *STATUTORY INTERPRETATION STORIES* 197, 206–24 (William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, eds., 2010); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

Not only does *Erie* provide much of the structural underpinning for contemporary federalism doctrine, it also addresses—perhaps more than any other decision in the federal courts canon—foundational questions about the nature of law and the judicial function.¹² Rejecting notions of a “transcendental body of law,” Justice Brandeis purported to adopt contemporary theories of legal positivism; “law in the sense in which courts speak of it today,” he insisted, “does not exist without some definite authority behind it.”¹³ Although the extent to which *Erie* necessarily implicated issues of positivism and legal realism remains disputed,¹⁴ there is no doubt that those issues have, in fact, played out on *Erie*’s terrain. Defending *Erie* will require an exploration of what exactly we think courts do when they decide legal questions.

This article seeks primarily to rescue *Erie* from its academic critics. More ambitiously, I hope that by shoring up *Erie*’s intellectual foundations this essay may lend support to the vision of limited federal lawmaking that *Erie* embodied—that is, one in which the federal separation of powers reinforces federalism by limiting when federal lawmaking may displace state law.¹⁵ That vision is of more than theoretical import. Its implications may govern practical controversies ranging from the domestic force of customary international law to the preemptive effect of federal regulatory policies on state tort law.¹⁶ Likewise, in an era of resurgent dynamism at the state level,¹⁷ *Erie*’s respect for the preservation of state prerogatives in the absence of a federal legislative consensus takes on renewed importance.

¹² See, e.g., Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 201 (1982) (book review) (“Few pairs of decisions expose, manipulate, or challenge a wider range of American values than do *Swift* and *Erie*.”).

¹³ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

¹⁴ See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

¹⁵ See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321 (2001).

¹⁶ On customary international law, see, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726–28 (2004) (looking to *Erie* to constrain the scope of implied rights of action to enforce customary international law); Bradley, Goldsmith & Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007). On preemption of state tort law, see, e.g., *Wyeth v. Levine*, 555 U.S. 555, 586–87 (2009) (Thomas, J., concurring in the judgment) (arguing that preemptive effect should be limited to products of the Article I lawmaking process); see also Brief of Public Law Scholars as *Amici Curiae* in Support of Respondents at 29, *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013) (No. 12-142), 2013 WL 749936, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-0142_resp_amcupls.authcheckdam.pdf (invoking *Erie* to govern federal courts’ construction of state law for purposes of preemption analysis).

¹⁷ See, e.g., PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *State Governments Viewed Favorably as Federal Rating Hits New Low* (April 15, 2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/> (“Even as

The literature on *Erie* long ago passed the point at which anyone could offer a truly comprehensive assessment. This essay focuses on the structural side of *Erie*—in particular, on what *Erie* has to say about federal law-making power. It gives relatively short shrift to debates, primarily in civil procedure circles, about *Erie*'s day-to-day application.¹⁸ And even within the structural conversation, I have surely overlooked important contributions. Such are the inherent risks of synthesis. Nonetheless, it is worth pulling together the most prominent strands of criticism and seeing if they can be answered.

I believe they can. My defense of *Erie* proceeds in four parts. Part I offers a refresher on the *Erie* decision and its rationale, as well as on the case that *Erie* overruled—Justice Joseph Story's landmark decision in *Swift v. Tyson*.¹⁹ Part II considers *Erie*'s statutory and pragmatic arguments, rehabilitating *Erie*'s interpretation of the Rules of Decision Act²⁰ without insisting that Justice Story got that statute wrong at the time *Swift* was decided. Part III turns to the main event—*Erie*'s constitutional rationale. That rationale, I submit, correctly wove together notions of federalism and separation of powers by insisting that Congress, not the federal courts, must act in order to displace state law. Finally, Part IV situates *Erie* within the broader context of contemporary federalism doctrine. *Erie* is far from an anachronism, as some critics have suggested; rather, I argue that, federalism-wise, we are living in the Age of *Erie*.

I. THE *ERIE* AND *SWIFT* DECISIONS

On a “dark night” in Pennsylvania, an Erie Railroad Company freight train struck Harry Tompkins, a twenty-seven-year-old factory worker who was walking on a footpath alongside the train tracks.²¹ The impact severed

public views of the federal government in Washington have fallen to another new low, the public continues to see their state and local governments in a favorable light. . . . 57% express a favorable view of their state government – a five-point uptick from last year. By contrast, just 28% rate the federal government in Washington favorably. That is down five points from a year ago and the lowest percentage ever in a Pew Research Center survey.”); Carl E. Van Horn, *Power, Politics, and Public Policy in the States*, in *THE STATE OF THE STATES* 1 (Carl E. Van Horn ed., 4th ed. 2006) (“Today, at the beginning of the twenty-first century, state governments are at the cutting edge of political and public policy reform. . . . From health care, education, and homeland security to stem cell research, the right to die, and election reform, states are leading the way.”). By contrast, as this article goes to press, the Federal Government recently has shutdown (again) and come close to defaulting on its debt.

¹⁸ “Procedural” though they may be, those debates not infrequently turn on deeply theorized views about *Erie*'s structural meaning. See, e.g., Michael Steven Green, *The Twin Aims of Erie*, 88 *NOTRE DAME L. REV.* 1865 (2013) [hereinafter Green, *Twin Aims*]. I hope the present discussion may be useful to these debates even if it does not engage them fully.

¹⁹ 41 U.S. (16 Pet.) 1 (1842).

²⁰ Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 73, 92 (1789).

²¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938); PURCELL, *supra* note 9, at 95.

Tompkins's arm, and when he had recovered he filed a personal injury suit against the railroad. Because Tompkins was a citizen of Pennsylvania and the railroad was incorporated in New York, he had access to federal court on account of diversity of citizenship. Edward Purcell has explained that Tompkins's choice of federal rather than state court was in order "to avoid what appeared to be a settled and highly unfavorable rule of Pennsylvania common law," which held that Tompkins was a trespasser on the railroad's right-of-way and, as a result, the railroad owed him no duty of care.²² Similarly, Tompkins filed in the United States District Court for the Southern District of New York—rather than in a federal district court sitting in Pennsylvania—to take advantage of the Second Circuit Court of Appeals' tendency to readily apply general common law rather than state law in diversity cases.²³ Tompkins was, in a word, forum-shopping.

The trial court accepted Tompkins's argument that the general law, not state law, applied, and the jury awarded him \$30,000 in damages. The Second Circuit affirmed, agreeing that "it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law."²⁴ This meant that although the parties disagreed about whether Pennsylvania law really cut off the railroad's duties to the plaintiff, the court "need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary."²⁵ The court of appeals thus divined the content of this "general law" from an assortment of federal decisions from other federal circuits; state court decisions from Texas, Kentucky, North Carolina, and Missouri; and the American Law Institute's Restatement of Torts.²⁶ The Supreme Court granted certiorari "[b]ecause of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law."²⁷

Justice Louis Brandeis's majority opinion opened by framing the "question for decision" as "whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."²⁸ *Erie* thus cannot be understood apart from *Swift*, decided by Justice Story in 1842.²⁹ That case arose out of a complicated series of credit transactions involving a shady land speculation in Maine and some businessmen in New York City.³⁰ Basically, Norton

²² PURCELL, *supra* note 9, at 96.

²³ *See id.* at 96–97. The Third Circuit, by contrast "tended to push the district courts in its circuit to defer to local common law and apply divergent federal rules only sparingly." *Id.* at 96.

²⁴ *Tompkins v. Erie R. Co.*, 90 F.2d 603, 604 (2d. Cir. 1937). Judge Swan wrote for a unanimous panel, which included Learned Hand.

²⁵ *Id.*

²⁶ *See id.*

²⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938).

²⁸ *Id.* at 69.

²⁹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

³⁰ Tony Freyer has attempted to untangle the transactions in some detail in his extremely helpful book, *see* TONY FREYER, *HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN*

owed Swift some money on a previous debt. Norton paid Swift by signing over to him a bill of exchange that Norton had received from Tyson in payment for some land.³¹ When Swift tried to collect the bill from Tyson, Tyson refused to pay on the ground that Norton defrauded him; it turned out that Norton didn't really own the land he had purported to sell to Tyson. The substantive issue in the case boiled down to whether there was any consideration when Norton gave Swift the bill. If there was, then Swift would be a *bona fide* holder and therefore not subject to any fraud defense that Tyson might raise.³²

Swift sued Tyson on the bill in the federal circuit court for the Southern District of New York. Swift being from Maine and Tyson from New York, federal jurisdiction rested on diversity of citizenship. The New York courts had generally held that settlement of a preexisting debt was *not* valid consideration, thus raising the question whether a federal court sitting in diversity was obligated to follow those courts or make its own independent judgment of the applicable commercial principles.³³ Tyson argued that the federal courts were bound by § 34 of the Judiciary Act of 1789—now known as the Rules of Decision Act—which provided that “[t]he laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”³⁴ Justice Joseph Story’s opinion for the Court rejected that argument, concluding that “the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality.”³⁵

Justice Story denied that the Rule of Decision Act applied “to questions of a more general nature . . . as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law.”³⁶ On these more general questions, the federal court’s obligation was “to ascertain, upon general reasoning and legal ana-

FEDERALISM 4–6 (1981). Herbert Hovenkamp has similarly undertaken to explain the significance of bills of exchange in antebellum commercial law, *see* Hovenkamp, *supra* note 12, at 216–23. One of the unpleasant realities confronting constitutional scholars drawn to the subject of Federal Jurisdiction is that the merits of a disconcerting proportion of the critical cases turn on dizzying questions of commercial law.

³¹ George W. Tysen actually spelled his last name with an “e”, but the Court’s opinion misspelled it. *See* Hovenkamp, *supra* note 12, at 204 n.20. I will stick with the Court’s more familiar spelling here.

³² *See Swift*, 41 U.S. (16 Pet.) at 15–16.

³³ *Id.* at 16–18.

³⁴ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (2012)).

³⁵ *Swift*, 41 U.S. (16 Pet.) at 18.

³⁶ *Id.* at 18–19.

logie, . . . the just rule furnished by the principles of commercial law.”³⁷ Although “the decisions of the local tribunals upon such subjects are entitled to . . . the most deliberate attention and respect of this court,” the federal courts were not bound to follow them.³⁸ Having determined that the federal court was free “to express [its] own opinion of the true result of the commercial law,” Justice Story had “no hesitation in saying, that a pre-existing debt does constitute a valuable consideration” so that Tyson could not assert Norton’s fraud as a ground for not paying Swift.³⁹

Nearly a century later, Justice Brandeis read *Swift* as holding “that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court” and that “they are free to exercise an independent judgment as to what the common law of the State is—or should be.”⁴⁰ Brandeis offered three distinct arguments for rejecting *Swift*’s conclusion. First, he argued that *Swift* had misconstrued the Rules of Decision Act. Although *Swift* had confined the Act to “state laws strictly local,”⁴¹ Justice Brandeis read it to govern “all matters except those in which some federal law is controlling.”⁴² Second, Brandeis said that “[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social”; these defects included disuniformity of applicable laws between federal and state courts sitting in the same jurisdiction, the difficulty of drawing a boundary “between the province of general law and that of local law,” and “grave discrimination by noncitizens against citizens” of particular states based on asymmetry of their access to federal court.⁴³ Finally, Brandeis insisted that “the unconstitutionality of the course pursued [in *Swift*] has now been made clear”; “in applying the doctrine this Court and the lower courts have invaded rights which . . . are reserved by the Constitution to the several States.”⁴⁴

Each of these sets of arguments has proven controversial. I discuss Justice Brandeis’s construction of the Rules of Decision Act in Part II, along with his pragmatic arguments about uniformity and discrimination. Part III addresses Brandeis’s constitutional argument, which I take to be grounded in principles of judicial federalism. Let me kill any suspense at the outset: On each point, I think Justice Brandeis got it basically right.

³⁷ *Id.* at 19.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938).

⁴¹ *Swift*, 41 U.S. (16 Pet.) at 18.

⁴² *Erie*, 304 U.S. at 72.

⁴³ *Id.* at 74.

⁴⁴ *Id.* at 77–78, 80.

II. THE STATUTORY AND PRAGMATIC ARGUMENTS

Although Justice Brandeis insisted that the dispositive arguments in *Erie* were constitutional in nature, he also made important statements about the governing statute, the Rules of Decision Act, and the pragmatic consequences of interpreting it to permit federal courts to apply their own “general law” rules of decision in diversity cases. This part canvasses those arguments.

A. *The Rules of Decision Act*

Both friends and foes of *Erie* tend to discount its statutory argument, largely because Justice Brandeis relied prominently on a famously weak argument about Section 34’s drafting history. I do not defend that particular argument, but I do contend that Section 34’s enacted text is best read to foreclose the “general federal common law” rejected in *Erie*. That does not mean that *Swift* itself was wrong. But as Ed Purcell has noted, “whatever the First Congress intended with Section 34, it surely did not intend the large-scale social practice that had evolved under *Swift* by the end of the nineteenth century.”⁴⁵ *Erie* was thus right on the statutory question, even if some of Brandeis’s arguments are more persuasive than others.

1. The Text of Section 34

Section 34 of the 1789 Judiciary Act provided:

The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.⁴⁶

Justice Story’s opinion in *Swift* had construed the “laws of the several States” to include only “state laws strictly local, that is to say, . . . the positive statutes of the state, and the construction thereof adopted by the local tribunals,” as well as “rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable

⁴⁵ PURCELL, *supra* note 9, at 306; *see also* Hovenkamp, *supra* note 12, at 215–16 (suggesting that both *Swift* and *Erie* were appropriate within the contexts of their respective times).

⁴⁶ Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 73, 92 (1789). The current version is codified at 28 U.S.C. § 1652 (2012) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”). The only arguably significant change is the substitution of “civil actions” for the older “trials at common law.”

and intraterritorial in their nature and character.”⁴⁷ The distinction was not—as law students are sometimes taught—between written and unwritten or judge-made law,⁴⁸ but rather between “local” and “general” law, with both classes including bodies of law embodied in judicial decisions and statutes conclusively falling in the former category.⁴⁹

In *Erie*, Justice Brandeis’s opinion rejected Story’s reading. He noted that *Swift*’s interpretation of Section 34 had been criticized, both for incorrectly interpreting the intent of the First Congress and for “the soundness of the rule which it introduced.”⁵⁰ But the dispositive factor, he said, was “the more recent research of a competent scholar”—Brandeis’s friend and coauthor Charles Warren—“which established that the construction given to [Section 34] by the Court was erroneous.”⁵¹

Professor Warren had unearthed an earlier draft of the Judiciary Act, as well as a paper—apparently in the handwriting of Oliver Ellsworth—that contained a draft of the amendment that became Section 34. This draft referred to “the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same, or otherwise.”⁵² Although the provision was amended to employ the somewhat catchier “laws of the several States” language, Warren surmised that these changes were purely stylistic and that the later language was supposed to encompass the more specific categories laid out in Ellsworth’s draft.⁵³ Brandeis concluded from this that “the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.”⁵⁴

Erie’s critics have, with considerable justification, jumped all over this argument. The most obvious problem is that when Congress alters the original draft of a measure and adopts somewhat different language, there are virtually always two possible explanations: (1) Congress meant to keep the original meaning and the changes are merely stylistic, and (2) Congress

⁴⁷ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

⁴⁸ See, e.g., Sherry, *Wrong*, *supra* note 6, at 132–33 (asserting that *Swift* “interpreted the Act as requiring the application of only state statutory law, and not state common law”).

⁴⁹ See, e.g., Anthony J. Bellia, Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 664–93 (2013).

⁵⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938).

⁵¹ *Id.*

⁵² See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 87 (1923).

⁵³ See *id.* at 86–88.

⁵⁴ *Erie*, 304 U.S. at 72–73. Whatever one thinks of this particular argument, one cannot help but be a little wistful at the extent to which, in the 1930s, doctrinal and historical work was respected in the academy and actually relied upon by the Court. Styles are different now, in both quarters.

meant to *change* the original meaning. The mere fact that the language changed generally cannot assist us in choosing between these possibilities.⁵⁵ Critics like Suzanna Sherry have thus rightly pointed out that “[i]n the absence of any further evidence . . . there is no way to determine whether the change in . . . language was or was not intended to change the substantive meaning of the statute.”⁵⁶ As Judge Friendly observed, “the debate only demonstrates on whatquicksand any attempt to interpret so venerable a statute on thebasis of an unexplained change from an earlier draft must rest.”⁵⁷

The question remains, however, whether Justice Brandeis’s reading of the Rules of Decision Act can stand without the support of Professor Warren’s drafting history. I think that it can. Fascination with Warren’s rummaging through the attic and cellars of the Capitol has distracted both *Erie*’s defenders and its critics from the text of the statute Congress actually adopted. That text requires federal courts to apply the “laws of the several states” as “rules of decision” except in cases “where the Constitution, treaties, or statutes of the United States otherwise require or provide.”⁵⁸ The

⁵⁵ See, e.g., FREYER, *supra* note 30, at 112–13 (concluding that Warren’s discovery was “inconclusive[.]”); Sherry, *Wrong*, *supra* note 6, at 134; Nelson, *Erie*, *supra* note 6, at 954–55. Professor Field has also pointed out that the earlier draft referred only to state statutes and common law rules in force at the time; hence, “[t]o accept Warren’s conclusion, one would have to believe that the omission of this language in the final version of the Act was only stylistic . . . with respect to the equation of statutory and common law, but not with respect to its application only to preexisting law.” Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 904 (1986) [hereinafter Field, *Sources of Law*].

⁵⁶ Sherry, *Wrong*, *supra* note 6, at 134; see also Hovenkamp, *supra* note 12, at 207 & n.38 (collecting citations to contemporaneous criticism of Brandeis’s opinion on this point). Professor Sherry is not quite right to say, with respect to “further evidence,” that “Warren had none.” Sherry, *Wrong*, *supra* note 6, at 134. As Professor Nelson points out, Warren did offer one further argument to support his conclusion: Ellsworth struck the word “statute” from the original draft, which had referred to the “Statute laws of the several states.” See Nelson, *Erie*, *supra* note 6, at 955 n.100 (discussing this point); Warren, *supra* note 52, at 86. That does suggest that the adopted language did not address *only* statutes, but it hardly proves that *all* the other forms of law discussed in the original draft were included in the adopted text. See Nelson, *Erie*, *supra* note 6, at 955 n.100.

⁵⁷ Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 390 (1964).

⁵⁸ Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 73, 92 (1789). Louise Weinberg thinks that this language is irrelevant to the lawmaking powers of the federal courts for two reasons: First, that the Constitution—in particular, the Supremacy Clause—actually “requires” courts to make and apply federal common law, and, second, that Section 34 must be irrelevant to the federal common law issue because that law is supreme in both federal and state courts, while Section 34 applies only to federal courts. See Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 862, 865, & 867 (1989) [hereinafter Weinberg, *Rules of Decision Act*]. But while the Supremacy Clause renders unconstitutional state laws that contravene federal ones, nothing in the Clause generally empowers courts to fashion federal rules of decision; that Clause does not speak to federal judicial powers at all. See generally Young, *Federal Common Law*, *supra* note 8, at 1655–56. And even if the Supremacy Clause could be said to countenance federal common lawmaking in certain instances, those instances are driven by a specific interpretation of underlying federal constitutional or statutory norms. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376

text makes no distinction between state statutes and state unwritten law, and no one disputes that unwritten law was considered “law” in the late eighteenth century.⁵⁹ Indeed, as I have already noted, Justice Story did not draw the line here in *Swift*.⁶⁰

What Story rejected was the proposition that “the word ‘laws,’ in [Section 34], includes within the scope of its meaning, the decisions of the local tribunals.”⁶¹ He explained:

In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.⁶²

Although this passage is sometimes read to distinguish between written and unwritten law, that cannot be right. Story alludes to “long-established local customs,” even though those customs were likely to be unwritten, as laws.⁶³ Moreover, if a state decision is only “evidence of what

U.S. 398 (1964) (inferring federal common lawmaking powers in foreign affairs cases from particularly strong federal interests and separation of powers principles unique to that context); Young, *Federal Common Law*, *supra* note 8, at 1674–78 (questioning inferences of lawmaking power from mere “interests” but pointing out that those interests are limited to particular contexts). These instances, to the extent that they are legitimate at all, are exceptions to the Rules of Decision Act’s mandate.

As to the second point, it is fair to say that the Rules of Decision Act mirrors the language of the Supremacy Clause itself—that is, it limits the categories of federal law that can supplant state law. So viewed, it makes sense that the Act is limited to the federal courts both because Congress does not share the same responsibility to provide detailed rules for the operation of state courts that it has for federal courts and because the Supremacy Clause itself applies the same principle directly to the state courts. *See* U.S. CONST. Art. VI, cl. 2 (providing not only that federal law is not only “the supreme law of the land” but also that “the judges in every state shall be bound thereby”).

⁵⁹ Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 73, 92 (1789); *see also* FREYER, *supra* note 30, at 23–26 (explaining that antebellum lawyers accepted non-statutory commercial law principles as “law” but noting that the debate concerned “whether commercial practice or judicial precedent was the surest guide” to that law’s meaning); *id.* at 35 (finding “little room for doubt that the ‘laws of the several states’ included statutes, decisions by state courts, and vaguely defined ‘local customs’”).

⁶⁰ *See* text accompanying notes 35–36. As Jack Goldsmith and Steven Walt have pointed out, “[i]t is doubtful that *Swift* represented a commitment to or belief in the ‘brooding omnipresence’ theory later attributed to it by Holmes and *Erie*.” Goldsmith & Walt, *supra* note 14, at 682. Justice Story was himself a legal positivist and would have had no doubt that courts deciding common law cases are making “law.” *See* Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 224–25 (1982) (book review) (“Story himself had a positivistic view of the rule of law.”).

⁶¹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

⁶² *Id.*

⁶³ *See, e.g.*, RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 107 (1977) (“[T]here has been much misunderstanding generated by commentators who have suggested that *Swift* provided for binding weight to be given by federal courts only to state cases construing state statutes. This, of course, was not true. . . .”); Nelson, *Erie*, *supra* note 6, at 925–26 (noting

the laws are” in a case involving contracts or property, for example, it remains the case that the underlying “laws” were generally unwritten. Story is thus better read as distinguishing between the federal courts’ obligation to follow state law and their obligation to follow state *courts*. Caleb Nelson has observed that when the Judiciary Act of 1789 was drafted, “people did not automatically treat the phrase ‘unwritten or common law’ as a synonym for ‘judicial decisions.’”⁶⁴ Hence, even if Section 34 required federal judges to apply state unwritten law in diversity cases, it would not necessarily require them to take the interpretation of that law by state *courts* as conclusive of its meaning.⁶⁵

And yet this is not actually the line that the *Swift* Court drew either. The Court had made clear that it was obligated to follow not only state law, but also state court *constructions* of that law, in cases involving state statutes.⁶⁶ As Justice Story was wellaware, the Court had held fifteen years prior to *Swift* that it must also follow the state supreme courts on matters involving the unwritten law of testamentary disposition.⁶⁷ Acknowledging that “many of the cases in which this Court has deemed itself bound to conform to State decisions, have arisen on the construction of statutes,” the Court had pointed out that “the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property.”⁶⁸ “This Court adopts the State decisions,” the Court had said, “because they settle the *law* applicable to the case.”⁶⁹ Hence, in *Swift*, Story acknowledged the federal courts’ obligation to follow the state courts’ construction of the *local*, as opposed to general, law—whether those laws were written or unwritten.⁷⁰

that, in *Swift*, “Justice Story took for granted that not only ‘the positive statutes of the state’ but also ‘local customs having the force of laws’ supplied rules of decision for federal courts”).

⁶⁴ Nelson, *Erie*, *supra* note 6, at 955.

⁶⁵ *Id.* at 955–56.

⁶⁶ *See, e.g.*, *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159–60 (1825); *Green v. Neal’s Lessee*, 31 U.S. (6 Pet.) 291 (1832); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 554, n.2 (6th ed. 2009) [hereinafter HART & WECHSLER].

⁶⁷ *Jackson v. Chew*, 25 U.S. (12 Wheat.) 153, 168–69 (1827). Justice Story, who joined the Court in 1811, would have been part of the Court that decided *Jackson*.

⁶⁸ *Id.* at 167.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *See Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842); HART & WECHSLER, *supra* note 66, at 554 (observing that Justice Story “drew a distinction between ‘local’ law (statutes and usages), on the one hand, and ‘general commercial law’ on the other”); BRIDWELL & WHITTEN, *supra* note 63, at 107 (“Justice Story . . . did not simply hold that the Rules of Decision Act bound federal courts to follow state statutes and the decisions of the state courts construing those statutes. He also pointed out that the Act was equally obligatory on all other ‘local’ matters, especially in matters affecting title to real property.”); *see also* Nelson, *Erie*, *supra* note 6, at 925 (explaining that “[t]he ‘local’ law of a particular state included both its *written* laws (such as the state constitution and statutes enacted by the state legislature)

The critical point is that Justice Story thought this distinction—between local and general law—captured the meaning of the Rules of Decision Act.⁷¹ Where that Act applied, in other words, the federal courts were obligated not only to follow state law, but also to follow the decisions of state courts construing that law. And the reason appears to have been grounded in the different functions being performed by a state court in local and general cases.

In cases “not at all dependent upon local statutes or local usages of a fixed and permanent operation” but rather involving “questions of general commercial law,” Story observed, “the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case.”⁷² Although Story did not spell out what he viewed the state courts as doing in *local* cases, the implication is clear that state courts did *not* share “the like functions as ourselves” in those cases—that is, that state courts bear a special authoritative relationship to local law that they do not share with the federal courts. Much of the confusion about *Swift*—and therefore about *Erie*—stems from misunderstanding the “like function” that state and federal courts exercised in general law cases.

2. General and Local Law in the Nineteenth Century

The “general law” applied in *Swift* raises two conceptual difficulties for contemporary lawyers. First, it was often thought to be *customary* law, which differs not only from statute law but also from common law as modern lawyers conceive it.⁷³ Second, it was neither state nor federal in nature, and thus contemporary lawyers, accustomed to thinking that those are the only two choices, struggle to categorize it.⁷⁴ Both these qualities eroded by the end of the nineteenth century, and that erosion set the stage for *Erie*.

and at least a portion of its *unwritten* law (such as rules grounded in peculiar local customs and rules about the status of land and other things with a fixed locality in the state”).

⁷¹ See FREYER, *supra* note 30, at 35–36 (“[Justice Story’s] construction of section 34 rested upon a distinction between general and local law which was familiar to antebellum lawyers and judges.”).

⁷² *Swift*, 41 U.S. (16 Pet.) at 19.

⁷³ See, e.g., FREYER, *supra* note 30, at 38 (noting that Justice Story “said that business necessity and usage were the best guides” to the content of the general commercial law). On customary law, see generally DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* (2010).

⁷⁴ See generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006) [hereinafter Nelson, *General Law*] (noting the persistence of law that is neither state nor federal); Bellia & Clark, *supra* note 49, at 658 (rejecting the notion that “the Constitution prohibits federal courts from applying general law under any circumstances”).

But so long as they each held true, it is possible to say that *Swift* was entirely consistent with the Rules of Decision Act—and with the Constitution.⁷⁵

Customary law is “bottom-up” law—that is, it arises out of the practices of predominantly private actors rather than a “top-down” normative command of the sovereign.⁷⁶ It is true that for custom to become binding *law* there must be an “extra ingredient,” such as a demonstration that private actors follow the custom from a sense of legal obligation (*opiniojuris*), the endurance of the custom from “time immemorial,” or a conclusion that the custom is consistent with right reason.⁷⁷ But the basic norms emerge from practice. Hence, although Justice Story relied on a wide range of judicial authorities in *Swift*, the underlying commercial law principles rested on the customary practices of merchants.⁷⁸

Tony Freyer has demonstrated that American jurists disputed the relative importance of reason and practice under the general commercial law.⁷⁹ The important point for present purposes, however, is that a court enforcing a customary rule of commercial law is engaged in a quite different enterprise than, say, a court formulating a common law doctrine of products liability. The former inquiry will focus on the practices and legitimate expectations of the parties to the transaction,⁸⁰ while the latter (if the question is an open one) will engage more normative policy considerations about optimal deterrence, loss-spreading, and fairness.⁸¹

⁷⁵ See, e.g., Bellia & Clark, *supra* note 49, at 662 (rejecting “modern suggestions that the *Swift* Court misconstrued section 34 of the Judiciary Act of 1789 or usurped state authority under the Constitution”).

⁷⁶ See, e.g., BRIDWELL & WHITTEN, *supra* note 63, at 13 (“[T]he original source of customary law is the behavior of individuals. It depends for its authority upon regular and continued practice and acceptance by individuals.”); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 465 (2000) (“Customary law’s authority comes from the internalized normative beliefs of the political community and not from a defined process or ritual through which law is determined.”).

⁷⁷ See BEDERMAN, *supra* note 73, at 3–4; Emily E. Kadens & Ernest A. Young, *How Customary is Customary International Law?* 54 WM. & MARY L. REV. 885, 907–11 (2013).

⁷⁸ See, e.g., Lawrence Lessig, *Erie-effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1791 (1997) (“The common law at issue in *Swift* was the law merchant. The law merchant was *customary* law. Customary law was constituted by the usual or ordinary understandings of parties to a commercial transaction.”); Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 156 (1984) (“The customary origin of the commercial law . . . meant that courts did not . . . create descriptive categories of legal wrongs and remedies. Rather, the merchants created the patterns of customary behavior that were most efficient . . . and the courts adopted rules to enforce these customs.”). As one English jurist put it, “[t]he law merchant thus spoken of with reference to bills of exchange and other negotiable securities . . . is neither more nor less than the usages of merchants and traders . . . ratified by the decisions of Courts of law.” *Goodwin v. Robarts*, L.R. 10 Exch. 337, 346 (1875).

⁷⁹ FREYER, *supra* note 30, at 23–25.

⁸⁰ See, e.g., BRIDWELL & WHITTEN, *supra* note 63, at 4.

⁸¹ See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 403-04 (1959) (asserting, in a products liability case, that “[p]ublic policy . . . finds expression” not only “in the Constitution” and “the

One might concede that a court is “making law” in either case. Much as Heisenberg’s Uncertainty Principle suggests that an observer cannot simply observe a phenomenon without altering what is being observed,⁸² a court cannot articulate a legal rule reflecting the practices of private actors without also, to at least some degree, shaping those practices.⁸³ Moreover, customary law’s binding force must still derive from the decision of the legitimate legal authorities to apply it; in this sense, customary law is generally traceable to some sovereign’s command.⁸⁴ Nonetheless, a critical distinction remains between the two modes of judging: it is the difference between trying to follow the practices of others and choosing the best practice by one’s own lights.⁸⁵ That distinction exists even in contemporary practice prescribed by *Erie* itself, as federal courts must try to follow state law in diversity cases while enjoying greater autonomy in enclaves of federal common law.⁸⁶

statutory law,” but also “in judicial decisions” and “[t]he task of the judiciary” includes weighing policy considerations in order effectively “to protect the ordinary man against the loss of important rights”).

⁸² “According to Heisenberg, the more accurately you measure where a particle is, the less accurately you are able to measure where it’s going.” Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17 (1989) (citing WERNER HEISENBERG, *PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE* 47–48 (1958)). This principle “relies generally on two premises: first, that any observation necessarily requires intervention into the system being studied; and second, that we can never be certain that the intervention did not itself change the system in some unknown way.” *Id.* at 18.

⁸³ *See id.* at 20–23 (“[C]ourts must take account of how the very process of legal ‘observation’ (i.e., judging) shapes both the judges themselves and the materials being judged.”).

⁸⁴ *See, e.g.*, Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42VA. J. INT’L L. 365, 491–92 (2002) [hereinafter Young, *CIL*] (arguing that the *Swift* regime was consistent in theory with legal positivism); Goldsmith & Walt, *supra* note 14, at 695 (pointing out that many of *Swift*’s defenders justified the application of general law as authorized by Article III); BRIDWELL & WHITTEN, *supra* note 63, at 95–97, 110–11 (reading the Rules of Decision Act as a choice of law principle mandating application of general law in commercial cases).

⁸⁵ *See, e.g.*, BRIDWELL & WHITTEN, *supra* note 63, at 115 (arguing that, under *Swift*, “federal judges . . . ‘searched for’ the legal rules they enforced in the parties’ own conduct, rather than creating and imposing them from on high out of ‘competing social policies’”).

⁸⁶ For a typical statement of a federal court’s obligation to follow—not construct—state law under *Erie*, see *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 661 (3d Cir. 1980) (stating that a federal court deciding an issue of state law under *Erie* must follow any interpretation of state law articulated by the state supreme court and, if no such interpretation exists, “predict[] . . . how the state’s highest court would decide were it confronted with the problem”). Commentators have disagreed as to the precise nature of this obligation. *Compare, e.g.*, Bradford R. Clark, *Ascertaining the Law of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459 (1997) (arguing that *Erie* forecloses federal courts from trying to predict how the state supreme court would resolve unsettled questions of state law), with Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237 (2006) (arguing federal courts should make their own judgment based on all available state law sources as to the content of state law). But no one argues that federal courts in this situation exercise the same sort of lawmaking function that they might within an established enclave of federal common lawmaking authority. *See, e.g.*, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952) (“To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law

Courts applying the general commercial law decided cases according to the custom of merchants in order to protect party expectations. As Professors Bridwell and Whitten explain, “[t]he primary function of a customary system [is] to preserve a context in which autonomous party behavior has its maximum possible range without defeating the widespread, legitimate expectations of others.”⁸⁷ As part of this regime, “a wide range of customary rules were designed to clarify or settle the intent of private contracting parties when they had made no unequivocal, express agreement.”⁸⁸ Hence, “the critical feature of the *Swift* common law system was a decisional process or function that was designed to vindicate the legitimate and discernable expectations of the parties to any given dispute.”⁸⁹

A strong scholarly consensus agrees that the general commercial law was *not* considered to be federal in nature,⁹⁰ and that conclusion finds further support in the founding generation’s refusal to incorporate the common law into the Constitution.⁹¹ In *Wheaton v. Peters*, the Marshall Court announced that “[i]t is clear, there can be no common law of the United States.”⁹² As Justice McClean explained,

courts in fashioning rules”); Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661,718 (1963)(“From the beginning admiralty judges have retained the inventiveness and initiative characteristic of common law courts in private law areas.”).

⁸⁷ BRIDWELL & WHITTEN, *supra* note 63, at 58; *see also* Conant, *supra* note 78, at 153–54; Andrew P. Morriss, *Hayek and Cowboys: Customary Law in the American West*, 1 N.Y.U. J. L. & LIBERTY 35, 39 (2005) (describing Friedrich Hayek’s theory of customary law and observing that “[t]he key characteristic of a Hayekian legal institution’s generation of rules . . . rests on a connection between a rule and individual expectations regarding the outcome of an interaction.”).

⁸⁸ BRIDWELL & WHITTEN, *supra* note 63, at 58.

⁸⁹ *Id.* at 4. They explain that under this approach, “the federal courts were able to avoid ‘making’ law in the only sense in which the term ‘making’ is important to the parties in a lawsuit—that is, the application, *ex post facto*, of a rule or principle not within the legitimate anticipations of the parties to the transaction or event in question.” *Id.* at 5.

⁹⁰ *See, e.g.*, 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, 1521–25 (1984); FREYER, *supra* note 30, at 137–43; HART & WECHSLER, *supra* note 66, at 554–56, 655; Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289, 1292–93 (2007) [hereinafter Clark, *Erie’s Source*]; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819,832–33 (1989); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 740 (2004) (Scalia, J., concurring in part and in the judgment) (“General common law was not federal law under the Supremacy Clause.”). Chief Justice Roberts and Justice Thomas joined Justice Scalia’s opinion, and although the majority opinion did not address this point directly, it did not appear to disagree.

⁹¹ *See* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (rejecting the notion of federal common law crimes); *see generally* *Seminole Tribe v. Florida*, 517 U.S. 44, 131–42 (1996) (Souter, J., dissenting) (chronicling the Framers’ reluctance to federalize the common law); HART & WECHSLER, *supra* note 66, at 610–12; Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1069–72 (1985) [hereinafter Jay, *Part One*]; Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1254–57 (1985) [hereinafter Jay, *Part Two*].

⁹² 33 U.S. (8 Pet.) 591, 658 (1834).

[t]here is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system, only by legislative adoption. When, therefore, a common law right is asserted, we must look to the state in which the controversy originated.⁹³

It was not necessary to apply state law, however, where “the states themselves purported to adhere to an extraterritorial body of customary principle.”⁹⁴ As Justice Story noted in *Swift*, state judges in commercial cases were “called upon to perform the like functions as ourselves”—that is, to apply general law.⁹⁵ General law was thus “shared law” among the federal and state courts.⁹⁶ As Judge Fletcher has demonstrated, all American courts tried to interpret commercial custom in such a way as to maintain uniformity across jurisdictions, but no court exercised supreme interpretive authority and courts did, from time to time, simply disagree about the content of general law.⁹⁷ In the first half of the nineteenth century, this arrangement managed to maintain an impressive degree of uniformity in the commercial law despite the absence of “one court to rule them all,” as it were.⁹⁸

The distinctively “national” aspect of the *Swift* regime derived not from any notion of federal supremacy, but rather from the federal courts’ ability to provide a neutral forum for litigation among citizens of different states. As Professors Bridwell and Whitten explain, “[i]n a customary law system in which the purpose of a grant of subject matter jurisdiction is to protect nonresidents from local bias, the intentions and expectations of the parties to every dispute had to be determined by a tribunal independent of the apprehended local prejudice.”⁹⁹ In addition to interpreting the meaning of the general law where it applied, the federal courts also provided an independent determination of whether that law had been superseded by local rules and, in some cases, whether local law was sufficiently settled to bind other courts.¹⁰⁰

⁹³ *Id.*

⁹⁴ BRIDWELL & WHITTEN, *supra* note 63, at 99.

⁹⁵ 41 U. S. (16 Pet.) 1, 19 (1842).

⁹⁶ *See, e.g.*, FREYER, *supra* note 30, at 39–40 (noting that state judges shared independent authority to develop commercial law with the federal courts); Fletcher, *supra* note 90, at 1515 (“In marine insurance cases, deviations by individual state courts from the general law were sufficiently rare that these courts, even when they disagreed, considered themselves engaged in the joint endeavor of deciding cases under a general common law.”).

⁹⁷ *Seeid.*, at 1539–42; *see also* FREYER, *supra* note 30, at 40.

⁹⁸ *See* Fletcher, *supra* note 90, at 1562–63.

⁹⁹ BRIDWELL & WHITTEN, *supra* note 63, at 67; *see also id.* at 67–68 (pointing out that, because the purpose of the diversity grant was simply to provide a neutral forum, there was no need for federal court interpretations of the general law to preempt divergent interpretations of that law in the state courts).

¹⁰⁰ *See* *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 291, 298 (1832); BRIDWELL & WHITTEN, *supra* note 63, at 70–73.

As the last point suggests, however, states retained the power to “localize” the general law by promulgating distinctive rules of their own, even in the commercial area.¹⁰¹ And when the states did so, the federal courts respected that decision. As Alfred Hill has explained, “even under *Swift v. Tyson* the federal courts recognized their duty to follow state law which was recognizable as such.”¹⁰² The result was that “once the state made it clear that its law in the particular matter was something other than the ‘general law,’ as when a statute was enacted, this manifestation of a new and distinctively local law was followed by the federal courts without question, even when Congress did not direct them to do so.”¹⁰³ States generally chose *not* to localize commercial rules because “it would have constituted commercial suicide for them to do so beyond certain boundaries.”¹⁰⁴ But this pragmatic judgment did not depend on any notion that the general commercial law was “supreme” in an Article VI sense. Participation in the *Swift* regime was ultimately up to the state.¹⁰⁵

All of this history ought to shed some light on Section 34’s limitation of the obligation to follow state laws (and state court interpretations of those laws) to “cases where they apply.” Some commentators have read this language as basically draining Section 34 of any determinate meaning.¹⁰⁶ But the phrase need not be tautological; instead, it may fairly be read

¹⁰¹ See *id.* at 70; see also Fletcher, *supra* note 90, at 1527–28 (“[S]tate courts and legislatures could, at least in theory, establish local law that federal courts would be obliged to follow in any area of law. In practice, however, federal courts usually felt obliged to comply with state law only in subject areas of peculiarly local concern Although federal courts sometimes found local law to be dispositive in matters of more national concern, such as commercial law, such cases were relatively rare.”).

¹⁰² Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 443 (1958).

¹⁰³ *Id.*

¹⁰⁴ BRIDWELL & WHITTEN, *supra* note 63, at 91.

¹⁰⁵ Herbert Hovenkamp has suggested a more mandatory view of *Swift*. He argues that [t]he theory that Justice Story developed . . . contained an implicit constitutional limitation on the state’s power to impose its law on a transaction that exceeded the geographic boundaries of the state. Such a limit was essential to the creation of a unified American economy out of balkanized and self-interested sovereigns.

Hovenkamp, *supra* note 12, at 223. Professor Hovenkamp admits that this constitutional limit was at best “implicit,” and his suggestion is inconsistent with the evidence just canvassed concerning the states’ power to localize the general law. See also *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 378 (1893) (acknowledging, with respect to a point of general law, that “[t]here is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others”). In any event, Hovenkamp’s view does not ground *Swift* in any notion that general norms were themselves federal in character, but rather in a sharp limit on state law’s extraterritorial effect. As he acknowledges, those limits did not survive far into the twentieth century. See Hovenkamp, *supra* note 12, at 223; see also Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997) (describing the loosening of dormant Commerce Clause constraints on state law after 1937). Despite occasional decisions suggesting limits on extraterritorial state regulation, see, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996), no one thinks that the states simply lack power to regulate commercial transactions that cross state lines.

¹⁰⁶ See, e.g., Field, *Sources of Law*, *supra* note 55, at 903 (observing that “the last clause, ‘in cases where they apply,’ without any specification of what those cases might be, leaves the provision open to

as referring to the two boundaries of the general law. In many areas, such as real property, the law had always been “localized”; in others a state might choose to abrogate its prior commitment to the general customary rules. In either scenario, however, the question of state law’s scope was itself a question of state law. Recall that Justice Story begins the critical passage in *Swift* not simply by noting the commercial nature of the question presented, but by observing the stance taken by the state’s courts: “[T]he courts of New York do not found their decisions upon . . . any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law.”¹⁰⁷ In other words, Story did not derive the general law’s applicability in *Swift* from some categorical federal choice of law principle, but rather from the decision of the New York state courts to follow the general law in cases like *Swift*. It is, on this view, always a matter of local law whether general law applies.¹⁰⁸ Hence Section 34’s language referred to state law rules about the choice between local and general law.¹⁰⁹

Professors Bridwell and Whitten offer a slightly different reading of Section 34 that nonetheless ends up in the same place. They argue that

the ‘in cases where they apply’ language of the Act was effectively treated as limiting the operation of state laws, both statutory and common law, to intraterritorial situations. State laws would thus be treated as ‘rules of decision’ . . . only when traditional conflict of laws principles would permit them to control.¹¹⁰

Under this reading, “[g]eneral commercial law disputes were treated independently by the federal courts because they were cases in which the states themselves purported to adhere to an extraterritorial body of customary principle.”¹¹¹ The only difference between the Bridwell/Whitten view and the one I advanced in the previous paragraph is that they view Section 34 as “a statute to be applied in strict accord with private international conflict of laws principles—that is, state law applied under the statute when

very flexible interpretation”); Weinberg, *Rules of Decision Act*, *supra* note 58, at 867 (pointing out that “[n]othing in this neatly tautological legislation tells us state laws must be applied where they do *not* apply”).

¹⁰⁷ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

¹⁰⁸ *See, e.g.*, *Bellia & Clark*, *supra* note 49, at 658 (“[W]hen federal courts applied general commercial law, they did not displace state law, but rather acted in accord with a state’s choice to apply general commercial law.”); Hill, *supra* note 102, at 443 (“In equity no less than at common law the federal courts tended to apply state law which was cognizable as such, resorting to independent applications of the ‘general law’ insofar as the ‘general law’ was understood to be the law of the state.”).

¹⁰⁹ That language also presumably incorporated the Supremacy Clause’s principle that state law cannot apply where it has been displaced by a validly enacted federal rule. But as already explained, no such rules were present in cases like *Swift* or *Erie*.

¹¹⁰ BRIDWELL & WHITTEN, *supra* note 63, at 99.

¹¹¹ *Id.*

such conflict principles dictated that it apply, but not otherwise.”¹¹² In other words, Section 34 referred not to state choice of law rules to determine when general law would apply, but rather incorporated general international conflicts rules for that purpose. But this distinction makes little practical difference, because—as Bridwell and Whitten acknowledge—the general conflicts rules themselves permitted individual states to “localize” their law on particular points by departing from the general commercial law.¹¹³ At the end of the day, then, Section 34 required courts to look to state law to determine whether general law applied.

This reading of Section 34 operates in tandem with Professors Bridwell and Whitten’s interpretation of the Diversity Clause in Article III. They point out that the general willingness of states to apply the general commercial law “led citizens of other states to develop expectations that could only be protected by an independent federal determination of what the extraterritorial custom was.”¹¹⁴ States would not be permitted to localize their law retroactively to the detriment of out-of-staters.¹¹⁵ But on this view, the issue was protection of private expectations against retroactive change, *not* a categorical limit on state departures from general law.

The federal courts would gradually depart from *Swift*’s nuanced approach in the late nineteenth century, substituting general law for state law even in cases where the state courts would have applied the latter.¹¹⁶ In *Baltimore & Ohio Railroad Co. v. Baugh*, for example, the Court upheld a fellow-servant defense to tort liability in a diversity case, even though the state courts had expressed a different view of the law.¹¹⁷ The problem with such an extension is that whereas commercial law seeks to protect the expectations of private parties to a consensual transaction, tort law imposes normative rules of conduct grounded in sovereign authority.¹¹⁸ As Larry Lessig has explained,

¹¹² *Id.* at 81. Professors Bridwell and Whitten base this reading on Justice Story’s opinion on circuit in *Van Reimsdyk v. Kane*, 28 F. Cas. 1062 (C.C. D.R.I. 1812) (No. 16,871), *rev’d on other grounds sub nom.* *Clark v. Van Reimsdyk*, 13 U.S. (9 Cranch) 153 (1815). See BRIDWELL & WHITTEN, *supra* note 63, at 79–82.

¹¹³ See *id.* at 86 (“The commercial conflict rules thus protected the general expectations of the commercial community, while permitting ‘localization’ of commercial law by both the sovereign and private parties.”).

¹¹⁴ *Id.* at 99.

¹¹⁵ See *id.* at 129.

¹¹⁶ See generally FREYER, *supra* note 30, at 51–75; see also GREVE, *supra* note 4, at 145; BRIDWELL & WHITTEN, *supra* note 63, at 115–22.

¹¹⁷ 149 U.S. 368 (1893). The Court had ventured to apply *Swift* to a tort case as early as 1862. See *Chicago v. Robbins*, 67 U.S. (2 Black) 418 (1862).

¹¹⁸ See, e.g., PAGE KEETON, ROBERT E. KEETON, LEWIS D. SARGENTICH & HENRY J. STEINER, *TORT AND ACCIDENT LAW: CASES AND MATERIALS* 1 (2d ed. 1989) (“Tort . . . is a body of legal principles aiming to control or regulate harmful behavior; to assign responsibility for injuries that arise in social interaction; and to provide recompense for victims with meritorious claims.”); BRIDWELL & WHITTEN, *supra* note 63, at 121 (“[T]ort law was vastly different in kind from the general customs of

[t]his change in scope in turn changed the nature of the common law practice: federal general common law was less the practice of gap-filling for parties to a commercial transaction, and more a practice of norm-enforcement, covering a substantial scope of sovereign authority. The common law was no longer reflective, or mirroring of private understandings; it had become directive, or normative over those private understandings.¹¹⁹

Baugh made clear that the Court's criteria for which issues were governed by general law had expanded considerably:

[T]he question is essentially one of general law. It does not depend upon any statute; it does not spring from any local 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." There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country.¹²⁰

Other cases went still further, applying general law to trump state statutes and constitutional provisions,¹²¹ as well as state judicial decisions construing quintessentially local property rights.¹²² The expansion of the general law regime to areas in which the states had *not* accepted its applicability raised serious questions under both the Rules of Decision Act and the Constitution itself. But nothing in *Swift* itself is inconsistent with a reading of Section 34 that looks to state law to regulate the reach of general commercial principles.

3. Does the Rules of Decision Act Mandate Federal Common Law?

Some revisionist scholars have argued that *Swift* was simply wrong about the meaning of Section 34—not because it construed the federal court's powers of independent judgment too broadly, as Justice Brandeis thought, but because *Swift* failed to read Section 34 as a broad mandate "for federal courts sitting in diversity . . . to apply federal common law."¹²³ This argument, which relies on the work of the late Wilfred Ritz,¹²⁴ focuses not on the word "laws" but on the meaning of "the several states." Professor

the commercial world, and . . . it should have been treated as a local matter to be controlled by state law as defined in state decisions.")

¹¹⁹ Lessig, *supra* note 78, at 1792.

¹²⁰ 149 U.S. at 378.

¹²¹ See, e.g., *Town of Venice v. Murdock*, 92 U.S. 494 (1875); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863).

¹²² See, e.g., *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1870).

¹²³ Sherry, *Wrong*, *supra* note 6, at 135.

¹²⁴ See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Wyth Holt & H. H. LaRue eds., 1990).

Ritz pointed to usage by eighteenth century legal draftsman that frequently employed “the several states” to mean “the states as a group” rather than each state individually.¹²⁵ That suggested that Section 34 should be read to require federal courts to apply “American law generally” rather than “the law of a particular state.”¹²⁶ Adopting Ritz’s reading, Professor Sherry concludes that “the instruction in Section 34 to apply ‘the laws of the several states’ directed courts not to the law of any individual state, but rather to the law of all states—in other words, to federally-developed common law. The purpose was to ensure that *American* law, not *British* law, would apply in the federal courts.”¹²⁷ Sherry’s view seems to be that this law was plainly federal—not “general”—in nature.¹²⁸

A wide range of *Erie*’s critics—and even some of its supporters—have endorsed Professor Ritz’s reasoning.¹²⁹ It is therefore worth taking the time to consider both his argument and his evidence. Putting it mildly, Ritz’s view has all kinds of problems. Ritz claimed that the founding generation used “the phrase ‘the several states’ when referring to the states as a group and the phrase ‘the respective states’ when referring to them individually.”¹³⁰ His evidence, however, is quite thin: As evidence of general usage, for ex-

¹²⁵ See *id.* at 83; see also Nelson, *Erie*, *supra* note 6, at 956–57 (summarizing Ritz’s argument).

¹²⁶ RITZ, *supra* note 124, at 140–41.

¹²⁷ Sherry, *Wrong*, *supra* note 6, at 134.

¹²⁸ It seems unlikely that Professor Ritz himself meant to go this far. He states in his introduction that “Section 34 was not meant to be a major and fundamental section,” and that “thus downgraded, the section’s reference to ‘the laws of the several states’ probably was meant to say nothing more remarkable than that the national courts should use American law, and not British law.” RITZ, *supra* note 124, at 11. If Section 34 were a delegation of broad authority to make federal common law, supreme within the meaning of the Supremacy Clause, that would make the Rules of Decision Act “a major and fundamental section” indeed. Although Ritz is hardly clear on this point, it seems more likely that “American law” meant a form of general law that was simply distinct from British law.

¹²⁹ In addition to Professor Sherry, see, e.g., GREVE, *supra* note 4, at 226 (relying on Ritz and William Crosskey to support the assertion that “Charles Warren’s purported evidence has been proven wrong to the point of certainty”); PURCELL, *supra* note 9, at 306 (citing Ritz as having “made a strong case that the framers could not have intended the section to have the meaning Brandeis attributed to it”); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 81 (1993) (stating that “the validity of the historical orthodoxy has been exploded by the recent writings of Professor Wilfred Ritz and others”); George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285, 286 (1993) (endorsing Ritz’s reasoning); Jay Tidmarsh, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 615–16, 615 n.193, 616 n.194 (2006) (relying on Ritz’s conclusions); see also PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 9–11 (7th ed, 2011) (offering an extended and uncritical summary of Ritz’s evidence and argument); Green, *Twin Aims*, *supra* note 18, at 1889 (also endorsing Ritz’s reading but concluding that it simply makes the Rules of Decision Act irrelevant to “the division of common lawmaking power between federal and state courts”).

¹³⁰ RITZ, *supra* note 124, at 83. Significantly, Professor Ritz admitted that “there is no hard-and-fast rule requiring” this distinction and that even within the Judiciary Act itself, “[i]n some contexts either word may be appropriate and one may disagree as to which is the most felicitous.” *Id.* at 83, 87.

ample, he cites a handful of isolated early state laws, as well as a couple of statements and actions by federal officials, but none establishes the sort of collective meaning that Ritz's argument attributes to "several." Consider this order issued by the Continental Congress in 1777:

Ordered, That the resolution of Congress of 10th of September last . . . be without delay transmitted to the executive powers of the *several* states, with a request, that they will order the same to be published in their *respective* gazettes for six months, successively.¹³¹

What does this prove? Certainly "respective" is used, as Ritz suggests, to refer to individual states. But although "several" indicates all the states are to receive Congress's order, it hardly refers to them in some undifferentiated collective capacity. There was not then, and is not now, any such thing as a collective "executive power" of the states for Congress to send messages to.¹³² The statement can only mean *each* state.

Professor Ritz's other evidence is similar. He cites the federal Constitution's statement that "[t]he President shall be commander in chief . . . of the militia of the *several* states,"¹³³ but this plainly means the militia of *each* state—there was no combined national militia. He also relies upon the Commerce Clause's reference to "commerce . . . among the *several* states,"¹³⁴ but this must likewise convey a sense of the states as *distinct* entities. Ritz goes out of his way to reject William Crosskey's famous view that this provision empowered Congress to regulate both intrastate and interstate commerce, reasoning that this would "read 'the several states' as though it were 'the United States.'"¹³⁵ But Professor Crosskey's mistake is precisely the approach that Ritz prescribes for the Rules of Decision Act: both approaches read "several" not just to be collective, but also combined and undifferentiated. At least in the present context, this is a simple category mistake. In common usage today, lawyers frequently use a phrase like "state law" collectively to refer to *all* state law, but no one thinks that phrase refers to some merged and undifferentiated "American" law distinct from the laws of each state.¹³⁶

¹³¹ 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 777–78 (Worthington Chauncey Ford ed. 1907) (quoted in RITZ, *supra* note 124, at 83) (Ritz's italics).

¹³² The closest thing today would be the National Association of Attorneys General, but it is not an official body and in any event was not founded until 1907. See *About NAAG*, NAT'L ASS'N OF ATTORNEYS GEN., http://www.naag.org/about_naag.php (last visited Sept. 29, 2013).

¹³³ U.S. CONST. art. II, § 2, cl. 1 (cited in RITZ, *supra* note 124, at 84) (Ritz's italics).

¹³⁴ U.S. CONST. art. I, § 8, cl. 3 (cited in RITZ, *supra* note 124, at 85) (Ritz's italics).

¹³⁵ RITZ, *supra* note 124, at 85 (discussing 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 50–53 (1953)).

¹³⁶ Again, the closest thing to this idea would be the work product of the various unofficial organizations working to coordinate and harmonize state laws, such as the American Law Institution's "restatement" projects or the model statutes promulgated by the Commission on Uniform State Laws. Caleb Nelson has demonstrated that these efforts may comprise part of a "general" law that is available for

This usage is hardly unique to the present era. As Caleb Nelson has demonstrated, dictionaries from the founding era use “several” to “convey[] a sense of ‘separation or partition.’”¹³⁷ Professor Nelson has likewise shown that eighteenth century draftsmen frequently used “the several states” in its more differentiated connotation, both in statutes and in the Constitution itself.¹³⁸ The Privileges and Immunities Clause of Article IV, for example, provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹³⁹ Nelson concludes that

[n]ot only is that reading [that “the adjective ‘several’ can be used to refer serially to each discrete unit in a composite group”] consistent with the drafting habits of the late eighteenth century, but I am not aware of any persuasive evidence that Ritz’s contrary reading of § 34 even occurred to a single lawyer or judge in the early Republic.¹⁴⁰

In any event, Professor Ritz’s claims about eighteenth century usage do not support the inferences he draws from them. Ritz says that in the Judiciary Act, “‘several’ is used to refer to a fungible group, or as a collective

incorporation by courts in various contexts. See generally Nelson, *General Law*, *supra* note 74, at 505–25. But Professor Nelson never equates this sort of thing with “the laws of the several states” in the Rules of Decision Act. See Nelson, *Erie*, *supra* note 6, at 958–59 (refuting Ritz’s argument).

¹³⁷ Nelson, *Erie*, *supra* note 6, at 958 (citing 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 504–05 (2d ed. 1843)) (“The first good American law dictionary, originally published in 1839.”); see also 15 THE OXFORD ENGLISH DICTIONARY 97 (2d ed. 1991) (providing examples from the fifteenth through the nineteenth centuries to the effect that “several” can mean “[i]ndividually separate” when it qualifies a plural noun). Even the title of Bouvier’s dictionary demonstrates that lawyers in the early Republic did not invariably use “several” as Ritz insists.

¹³⁸ See Nelson, *Erie*, *supra* note 6, at 958–59. Professor Nelson cites a resolution of the First Congress that the Secretary of State should “procure from time to time such of the statutes of the several states as may not be in his office,” Res. of Sept. 23, 1789, 1st Cong., 1 Stat. 97, as well as an appropriation of money “[f]or paying salaries to the late loan officers of the several states,” Act of Mar. 26, 1790, ch. 4, § 5, 1 Stat. 104, 105. See also U.S. CONST. Art. I, § 2, cl. 1 (providing that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States”). If Professor Ritz were right, this provision would require each Member of the House to be elected at large in a national election.

¹³⁹ U.S. CONST. art. IV, § 2, cl. 1. Professor Ritz did read this language to mean “the privileges and immunities . . . that are common . . . to *all* the states.” RITZ, *supra* note 124, at 85. That reading would come close to collapsing the broad category of rights generally thought to be protected against state governmental discrimination under Article IV into the much narrower category of privileges and immunities of national citizenship recognized under the Fourteenth Amendment. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). In any event, privileges and immunities claims brought under Article IV do not depend on showing that the privilege invoked is common to all the states. See generally 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-37, at 1255–70 (3d ed. 2000). And even if they did, the basic protection for those rights would still stem from the laws of individual states, not some collective “American” law.

¹⁴⁰ Nelson, *Erie*, *supra* note 6, at 959.

reference, for example, ‘the courts of the several states.’”¹⁴¹ That seems right so far as it goes: In Ritz’s example, the courts are fungible in the sense that no particular court is distinguished, and they are collective in that they are all included. But that is not nearly enough to support his claim that “Section 34 is a direction to the national courts to apply American law, as distinguished from English law,”¹⁴² much less Professor Sherry’s more aggressive assertion that Section 34 is a delegation of broad federal common lawmaking power.¹⁴³ Semantically, a collective and fungible usage may nonetheless refer to a grouping of distinctive entities. Moreover, for Ritz’s and Sherry’s claims to be true, there would have to be some sort of general *American* common law, distinct from the common law of England or other jurisdictions, and for Sherry at least that law would have to be *federal* within the meaning of the Supremacy Clause. Both propositions are demonstrably false.

The common law that the several states received and adopted by positive acts or judicial decisions was avowedly English, and although it became American upon reception, it did so as the law of each particular state.¹⁴⁴ The noncommercial common law varied considerably from state to state, which suggests there was no unified body of “American” common law principles available for federal courts to apply under Section 34.¹⁴⁵ Moreover, as Stewart Jay has recounted, the delegates at Philadelphia debated whether to include in the Constitution a general reception similar to those adopted by the states, but decided not to do so.¹⁴⁶ When the federal courts—and state courts, too—*did* apply legal principles not tied to the law of particular states, that general law was not distinctively American at all.¹⁴⁷ As Justice Story observed in *Swift*, “[t]he law respecting negotiable

¹⁴¹ RITZ, *supra* note 124, at 87.

¹⁴² *Id.* at 148.

¹⁴³ See Sherry, *Wrong*, *supra* note 6, at 135.

¹⁴⁴ See, e.g., James Madison, *Report on Resolutions, House of Delegates, Session of 1799–1800, Concerning Alien and Sedition Laws*, in 6 THE WRITINGS OF JAMES MADISON 373 (Gaillard Hunt ed., 1906) (“The common law was not the same in any two of the Colonies,” and that “in some the modifications were materially and extensively different.”). And at least one state opted out of the common law altogether. See LA. CIV. CODE ANN. art. I (2013) (“[T]he sources of law . . . are legislation and custom.”).

¹⁴⁵ See, e.g., William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 401 (1968) (“The assumption that colonial law was essentially the same in all colonies is wholly without foundation.”).

¹⁴⁶ See generally Jay, *Part Two*, *supra* note 91, at 1254–62 (discussing the Convention’s debates and concluding that “[i]t would have been untenable to maintain that the body of British common law had been adopted by the Constitution, or that the federal judiciary possessed a jurisdiction equivalent to that of the central courts in England”).

¹⁴⁷ See, e.g., FREYER, *supra* note 30, at 38 (“In determining commercial principles, federal courts were not to confine themselves to precedents of any local jurisdiction, but should scan the entire landscape of American, English, and civil law.”); Fletcher, *supra* note 90, at 1517 (observing that “[t]he law merchant . . . was the general law governing transactions among merchants in most of the trading na-

instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield . . . to be in a great measure, not the law of a single country only, but of the commercial world."¹⁴⁸ This cosmopolitan character was critical, as the use of general law was meant to integrate American courts into the broader commercial world.¹⁴⁹ Professor Ritz provides no explanation whatsoever as to why the Framers of the Judiciary Act would have wanted to thwart that development.¹⁵⁰

It is equally clear that the Rules of Decision Act was not understood to authorize a general *federal* common law. As I have already noted, the Marshall Court plainly rejected that notion in *Wheaton v. Peters*, stating unequivocally that “there can be no common law of the United States.”¹⁵¹ The overwhelming majority of scholars have concluded that the general law applied under *Swift* was not federal in character,¹⁵² state court decisions applying it were not appealable to the U.S. Supreme Court, and it generally did not preempt state decisions to “localize” the law on particular points.¹⁵³ Moreover, the Adams Administration’s effort to establish a federal common law of *crimes* led to a political crisis that emphatically rejected any such notion.¹⁵⁴ The late eighteenth and early nineteenth centuries simply did not

tions in the world”). It was, indeed, one of the most prominent forms of customary international law. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1280–83 (1996) [hereinafter Clark, *Federal Common Law*](stating that the general commercial law was part of customary international law).

¹⁴⁸ 41 U.S. (16 Pet.) 1, 19 (1842); see also BRIDWELL & WHITTEN, *supra* note 63, at 61 (“Commercial law was also originally customary law, which was received by all nations, and whose principles were uniformly enforced throughout the civilized world.”). The revisionists thus find themselves in the unenviable position of accusing Joseph Story of being insufficiently nationalist.

¹⁴⁹ See, e.g., FREYER, *supra* note 30, at 33–43; Paul B. Stephan, *What Story Got Wrong—Federalism, Localist Opportunism and International Law*, 73 MO. L. REV. 1041, 1041–42 (2008).

¹⁵⁰ Professor Ritz insists, moreover, that for various reasons—the lack of American judicial decisions in print, the non-hierarchical organization of the state courts, and the role of the jury in finding the law as well as the facts—state common law was “nonexistent” and even state statute law was “virtually inaccessible.” RITZ, *supra* note 124, at 10. If that is right, however, then there could have been no distinctively “American” law to apply under Section 34 either, because that law would have had to be distilled from the aggregate corpus of the several states. It seems more sensible to assume that the drafters of the Judiciary Act anticipated a future in which “the laws of the several states” would be more readily available.

¹⁵¹ 33 U.S. (8 Pet.) 591, 658 (1834); see *supra* text accompanying notes 92–93.

¹⁵² See sources cited in *supra* note 90.

¹⁵³ See, e.g., Fletcher, *supra* note 90, at 1560–61; BRIDWELL & WHITTEN, *supra* note 63, at 7.

¹⁵⁴ Professor Ritz argues that the most likely interpretation of the Rules of Decision Act is that it pertained *only* to criminal cases. See RITZ, *supra* note 124, at 11. On this view, Section 34 was “a temporary measure to provide an applicable American law for national criminal prosecutions . . . pending the time that Congress would provide by statute for the definition and punishment of national crimes.” *Id.* at 148. As he points out, “[t]his interpretation seems to raise only one problem with Section 34. It did not use the word ‘criminal’ in referring to its application.” *Id.* at 147. That strikes me as a rather large problem, as is his inability to cite *any* contemporary describing Section 34 as a purely criminal measure. Moreover, Ritz insists that once the First Congress enacted the Crimes Act in 1790, 1 Stat. 112, Section

furnish a hospitable climate for broad notions of federal common lawmaking authority.¹⁵⁵

In view of all this, it is frankly surprising how many scholars seem to rely on Professor Ritz without considering the obvious weaknesses of his position.¹⁵⁶ Once we set aside the revisionist Ritz/Sherry view, I suggest that the most plausible reading of the Rules of Decision Act is that it requires federal courts to follow state law, including state choice-of-law rules that mandate application of general law, as in *Swift*, but also state rules mandating a departure from general law in favor of local policy, as in *Erie*.¹⁵⁷ This argument will not persuade those who, like my friend Louise Weinberg, believe that “the [Rules of Decision] Act comes down to us as a relic of a prepositivist, prerealist time, with scant relevance for us to-

34’s “purpose had been served” and it “should have been repealed”; after 1790, “Section 34 was a statute without any apparent reason or purpose.” RITZ, *supra* note 124, at 149. Frankly, it seems a little late in the day to simply read Section 34 out of the Judiciary Act.

It is worth emphasizing, however, that this criminal-only interpretation represents Professor Ritz’s preferred reading of Section 34. He proffers the reading upon which Professor Sherry relies—“that the section was intended as a direction to the national courts to apply American law in all judicial proceedings at common law, both civil and criminal”—only as a “less likely” “alternative possibility.” *Id.* at 148. As such, Ritz’s broader reading is an exceptionally weak reed to bear the weight of Sherry’s claims.

¹⁵⁵ See, e.g., Jay, *Part Two*, *supra* note 91, at 1233 (observing that “the common-law authority of federal courts was seen by the Republicans as a vital component in their quarrel with Federalists over the national union”; moreover, “the nature of jurisdictional theory at this time was unreceptive to the development of an understanding of ‘federal common law’ in the modern sense of the term”).

¹⁵⁶ See, e.g., Borchers, *supra* note 129, at 98 n.142, 105–06 (praising Ritz’s “brilliant new book” and repeating his conclusions about the meaning of “several” without any critical probing of the underlying evidence or reasoning); see also sources cited in note 129, *supra*. It is unclear to what extent these scholars would be willing to adopt Professor Ritz’s more exotic conclusions. Would they agree, for instance, with Ritz’s contention that Section 34’s reference to “trials at common law” means only “that part of a judicial proceeding that was held in open court and when witnesses were examined and their testimony taken”? RITZ, *supra* note 124, at 143. How exactly would that work? Would federal courts apply a *different* law at summary judgment or on appeal? At the end of the day, Ritz’s close textual analysis simply unravels the statute into an unworkable mess. But those scholars who have adopted part of his reasoning need to provide some rationale for why they leave other implications aside.

¹⁵⁷ Additional textual arguments exist against Justice Brandeis’s reading, but they need not detain us long. Professor Sherry argues that because “Section 34 was placed . . . among other sections dealing with *all* suits in *any* federal courts, and [it] was most likely a general direction about how federal courts should go about their adjudicatory business rather than a specific direction about the law applicable to state claims in diversity cases.” Sherry, *Wrong*, *supra* note 6, at 134. But it has long been accepted that *Erie* applies, at least presumptively, to all issues arising in federal court that are not governed by positive federal law, regardless of the basis for the federal court’s jurisdiction. See, e.g., *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540–41 n.1 (2d Cir. 1956) (Friendly, J.) (“[T]he *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.”); HART & WECHSLER, *supra* note 66, at 563.

day.”¹⁵⁸ But unless we engage in some sort of neo-Calabresian “sunsetting” of obsolescent statutes,¹⁵⁹ we must find a way to make sense of the Act.

B. *Uniformity and Discrimination*

Justice Brandeis’s opinion in *Erie* also emphasized that “[e]xperience in applying the doctrine of *Swift v. Tyson* had revealed its defects, political and social.”¹⁶⁰ These difficulties had to do with the lack of legal uniformity that *Swift* engendered, as well as the discriminatory impact of that situation on parties with asymmetrical access to federal court. *Erie*’s modern critics, by contrast, complain that *Erie* swapped one form of disuniformity for another, more damaging one—in particular, one with a particularly vexatious tendency to discriminate against out-of-state businesses.¹⁶¹ It is certainly true that *Erie* did not put an end to concerns about uniformity. However, my conclusion here is that any more effective cure for those concerns would be worse than the disease.

Erie aimed to promote what we have come to call *vertical* uniformity—that is, to ensure that the same law would apply to similar suits brought within a particular state, whether those suits were brought in state or federal court.¹⁶² In so doing, Justice Brandeis hoped to minimize forum-shopping by out-of-state parties for the most advantageous substantive law.¹⁶³ As Professor Sherry points out, however, “*Erie* simply replaced the vertical forum-shopping of *Swift* with horizontal forum-shopping.”¹⁶⁴ She explains that “[i]nstead of choosing between state and federal courts in order to obtain the benefit of state or federal law, litigants now choose among courts (state and federal) located in different states in order to obtain the benefit of a particular state’s law.”¹⁶⁵

To some extent, horizontal disuniformity is inevitable in a federal system—indeed, it is the *essence* of a federal system.¹⁶⁶ Different states get to

¹⁵⁸ Weinberg, *Rules of Decision Act*, *supra* note 58, at 866.

¹⁵⁹ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 59–65 (1982).

¹⁶⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

¹⁶¹ See GREVE, *supra* note 4, at 234–35; Sherry, *Wrong*, *supra* note 6, at 138.

¹⁶² See 304 U.S. at 74–75 (complaining that *Swift* “made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court” and that this doctrine “rendered impossible equal protection of the law”).

¹⁶³ Out-of-staters had an advantage in forum-shopping because the federal removal statute barred a defendant sued in its home state’s courts from removing the case to federal court. See, e.g., Ely, *supra* note 1, at 712 n.111 (providing a particularly lucid account of the discrimination argument).

¹⁶⁴ Sherry, *Wrong*, *supra* note 6, at 138.

¹⁶⁵ *Id.* at 138–39. But see Ely, *supra* note 1, at 715 n.125 (suggesting reasons why vertical forum-shopping may be more likely than the horizontal kind).

¹⁶⁶ The Court acknowledged as much in holding that federal courts must apply the choice of law rules of the state in which they sit:

have different laws, and these disuniformities are generally thought to be a feature, not a bug, in the system.¹⁶⁷ The question is how much federalism we want. If we think that these disuniformities are undesirable in the context of diversity litigation, there are at least two possible ways to minimize them. But neither option, in my view, is likely to solve the problem.

The first alternative emphasizes the importance of uniform choice of law rules that, in principle, would guarantee that the same law would govern a case regardless of which state it was brought in. The editors of the *Hart & Wechsler* casebook, for example, laid blame for the horizontal disuniformity problem not at *Erie*'s door, but rather at the door of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹⁶⁸ which the Court decided three years later.¹⁶⁹ *Klaxon* held that a federal court sitting in diversity must apply the choice of law rules of the state in which it sits.¹⁷⁰ The argument is that *Klaxon* facilitates horizontal forum-shopping because litigants can get different choice of law rules by suing in federal courts sitting in different states, and those different choice of law rules will presumably yield different substantive law.¹⁷¹ The critics contend that, if federal courts applied a uniform set of federal choice of law principles, then any federal court would end up applying the same state's substantive law to a dispute, regardless of the federal court's location.¹⁷² The disuniformities resulting from *Klaxon*, moreover, are often not party-neutral: as Michael Greve has explained, "*Erie* guaranteed plaintiffs their choice of a state law, to the exclusion of federal general common law. *Klaxon* effectively guaranteed them

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941).

¹⁶⁷ See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (exploring policy benefits of state-by-state legal diversity); Richard A. Epstein, *Exit Rights under Federalism*, 55 L. & CONTEMP. PROBS. 147 (1992) (explaining the benefit of state policy diversity making exit rights possible); Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* (unpublished manuscript) (on file with author) (exploring the extent to which states in fact adopt divergent legal regimes as a measure of the health of our federal system).

¹⁶⁸ 313 U.S. 487 (1941).

¹⁶⁹ See HART & WECHSLER, *supra* note 66, at 566–67.

¹⁷⁰ 313 U.S. at 496–97.

¹⁷¹ See, e.g., LOW, JEFFRIES, & BRADLEY, *supra* note 129, at 12–13.

¹⁷² See, e.g., Borchers, *supra* note 129, at 121; Hart, *supra* note 10, at 513–15. As Professor Ely points out, Professor Hart's proposal would cause vertical disuniformity problems of its own. See Ely, *supra* note 1, at 714–15 n.125; see also Donald F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 L. & CONTEMP. PROBS. 732 (1963) (defending *Klaxon*).

the state law of their chosen forum” and thus “reinforces *Erie*’s proplaintiff orientation.”¹⁷³

An important premise of the anti-*Klaxon* argument is that, although federal courts generally lack constitutional power to make substantive law, they do *not* lack such power to formulate federal choice of law rules.¹⁷⁴ That seems right. If there is any constitutionally acceptable scope for federal common law, it would include the unavoidable task of reconciling the claims of different jurisdictions’ substantive law within a federal system.¹⁷⁵ And there may be certain benefits to allowing the federal courts to do so.¹⁷⁶ But there is no guarantee that federal choice of law rules would solve the horizontal disuniformity problem. Much would depend on the content of the choice of law rules that the federal courts adopted. Under current doctrine, the Constitution would have relatively little to say about what precise sorts of conflicts rules the federal courts could adopt.¹⁷⁷ But if the federal courts followed the general tendency of the state jurisprudence, as they often do, then it is likely that they would adopt some form of interest analysis.

¹⁷³ GREVE, *supra* note 4, at 233. There is, as Professor Greve points out, another important piece of the puzzle: expansive rules of personal jurisdiction that allow plaintiffs to choose among a wide variety of states in which to sue defendants operating in interstate commerce. See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that the Due Process Clause requires only that a defendant have “minimum contacts” with a particular jurisdiction). Greve argues that “[t]he rules of *Klaxon* and *International Shoe*, operating in tandem, expose parties in interstate commerce to suit virtually anywhere, in a forum and under a state law of the plaintiff’s choosing.” GREVE, *supra* note 4, at 234. Of course, Greve’s point also raises the possibility that the deleterious impact on interstate business that he laments could be redressed by rethinking *International Shoe* rather than *Erie* or *Klaxon*.

¹⁷⁴ See Hart, *supra* note 10, at 517–25.

¹⁷⁵ See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 282 (1992); but see GREVE, *supra* note 4, at 235 (noting that “the justices who decided *Klaxon* . . . viewed it as a natural extension” of *Erie*, and offering arguments that “on balance, that is the better view”); Ely, *supra* note 1, at 715 n.125 (arguing that *Klaxon* was compelled by the Rules of Decision Act); William H. Danne, Jr., Comment, *A Resurgence of the Klaxon Controversy—Contemporary Legal Trends Revitalize an Old Principle*, 12 VILL. L. REV. 603, 610 (1967) (arguing that, under contemporary approaches to choice of law, “a forum state’s choice of law rule is but a delimitation of the policy underlying the pertinent local law and a determination of the extent to which that policy is to be given extraterritorial application,” and that “[o]nce a choice of law rule is considered as part and parcel of a substantive law, the assumed gap between the *Erie* principle and the *Klaxon* rule appears to vanish, and the latter tends to become as constitutionally compelled as the former”). Although Mr. Danne’s point strikes me as a neglected and important one, I am less pessimistic about courts’ ability to distinguish between choice of law rules and the substantive law, especially because I am also inclined to favor territorial choice of law rules that merge less fully with the underlying substantive norms.

¹⁷⁶ See Hart, *supra* note 10, at 513–15 (arguing that the federal courts are uniquely suited for this task).

¹⁷⁷ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–23 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–09 (1981); Laycock, *supra* note 175, at 257–58.

And under interest analysis, courts are more likely than not to apply forum law.¹⁷⁸

If that is right, then abandoning *Klaxon* will not solve the horizontal uniformity problem. If the federal courts apply interest analysis—along with its preference for forum law—then the state in which the plaintiff’s chosen federal court sits will still be a critical factor in determining which state’s law applies to a given dispute. Consider the facts of *Klaxon* itself. Stentor, a New York corporation, transferred its business to Klaxon, a Delaware corporation, with the latter promising to use its best efforts to promote the sale of Stentor’s device and to give Stentor a share of the profits. Ten years later, Stentor sued in a federal district court sitting in Delaware, alleging breach of that agreement. Jurisdiction rested on diversity of citizenship. After Stentor won a jury verdict, it moved for addition of pre-judgment interest under New York law—a right that it would not have under Delaware law. The court of appeals had concluded that, under its independent view of the applicable conflicts principles, New York’s statute would apply; the parties disagreed about whether, under Delaware choice of law rules, the Delaware courts would refuse to apply the New York pre-judgment interest statute.¹⁷⁹

My point is simply that a federal set of choice of law rules might be uniform in their content but nonuniform in the outcomes that they generate. If the federal courts in *Klaxon* had adopted some form of interest analysis, then each of the various federal district courts in which Stentor could have filed would have applied forum law. The federal district court in Delaware would most likely have applied Delaware law to the prejudgment interest question, while if Stentor had filed in federal district court in New York,

¹⁷⁸ There are three primary options in contemporary choice of law: interest analysis, the Restatement (Second) approach, and a more old-fashioned reliance on territorial rules. See Laycock, *supra* note 175, at 252–59. Interest analysis seeks to balance the claims of each potentially interested state in applying its own law to the dispute in question. In practice, however, this approach heavily favors allowing the forum to apply its own law. See, e.g., John B. Corr, *The Frailty of Interest Analysis*, 11 *GEO. MASON L. REV.* 299, 301 (2002) (noting that, despite scholarly criticism, “the strong bias in favor of forum law remains a fact of life in courts applying the various forms of interest analysis”); Aaron D. Twerski, *Neumeier v. Kuehner: Where are the Emperor’s Clothes?*, 1 *HOFSTRA L. REV.* 104, 121 (1973) (concluding that interest analysis generally results in the application of forum law). The Restatement has been criticized for attempting to be all things to all people, and it tried to pair a general incorporation of interest analysis with more specific territory-based presumptions for particular kinds of cases. See Laycock, *supra* note 175, at 253. Much of the time, analysis under the Restatement collapses back into interest analysis. See Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 *BUFF. L. REV.* 329, 362 (1997) (noting that, “in reading opinions purporting to follow the second Restatement, one cannot help but be struck by how often the courts shift into undiluted interest analysis”); see generally Corr, *supra*, at 299 (“[I]n the area of conflict of laws, interest analysis is now the predominant approach.”). Hence, a new federal choice-of-law regime would lack a strong preference for forum law only if it followed the minority of states that have clung to a territory-based regime.

¹⁷⁹ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495–96, 497 (1941).

that federal court would most likely have applied New York law. The plaintiff's forum choice would remain critical even under a uniform federal choice of law rule.

This fact does tend to mitigate the vertical disuniformity that the *Klaxon* Court feared from applying different choice of law rules in federal and state courts within the same jurisdiction.¹⁸⁰ After all, in my example, the federal and state courts in each state would most likely end up choosing the same law most of the time. Except, that is, in those brave states that have held on or returned to a more territorial set of choice of law rules. No one desiring rationality in conflicts jurisprudence ought to want to discourage that development.¹⁸¹ But the bottom line is that, without reforming the choice of law rules that courts actually apply, postulating one set of federal common law choice of law principles will not solve the horizontal uniformity problem.¹⁸² And as long as plaintiffs can alter the applicable law by filing in one federal court rather than another, the "proplaintiff" discrimination that Professor Greve laments will persist.

The second, and more effective, way to deal with horizontal disuniformities engendered by *Erie* would be to federalize the law applied in diversity cases. That seems to be the upshot of Professor Sherry's reading of the Rules of Decision Act, which views that statute as a broad mandate to apply *federal*—not *general*—common law in cases in federal court.¹⁸³ And it is at least the implication of Professor Greve's position, which argues that interstate commercial enterprises should be able to count on one law applicable to their far-flung operations, no matter in what state they end up being sued.¹⁸⁴ After all, those enterprises can always be sued, without right of removal, in state court in their own home jurisdictions. The only way to

¹⁸⁰ See *id.* at 496 (worrying that, if federal courts applied their own choice of law rules, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side").

¹⁸¹ See Laycock, *supra* note 175, at 337 (arguing for a return to territorial rules).

¹⁸² Donald Cavers made a somewhat similar point in his report on *Klaxon* to the American Law Institute. He noted that, if *Klaxon* were rejected based on the need to achieve horizontal uniformity among federal courts sitting in different states, that would create pressure for those courts to return to the sort of territorial choice of law rules in the first *Restatement*. Donald F. Cavers, *Memorandum on Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, in ALI STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 186–88 (Tent. Draft No. 1, 1963). Because Professor Cavers viewed interest analysis as preferable to territorial rules, he saw this as a reason to stick with *Klaxon*. See *id.* My concern, by contrast, is that federal courts in a post-*Klaxon* world would *not* return to a territorial view of choice of law, leaving us with basically the same horizontal uniformity problem that currently inspires *Klaxon*'s critics.

¹⁸³ See Sherry, *Wrong*, *supra* note 6, at 135; see also *supra* Section II.A.3 (criticizing this argument).

¹⁸⁴ See GREVE, *supra* note 4, at 134–36; see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368–69 (2006) (arguing for a similar result through federal preemption of state law).

truly provide one uniform rule of decision—one law to rule them all—would be to federalize the rule.

One can see what this might look like by turning to maritime law, where the Supreme Court confronted an issue similar to *Erie*'s two decades earlier and came out the opposite way. It is settled that “early Americans understood admiralty and maritime law to be of the same genus of ‘general law’ as the ‘law merchant’ applied in diversity” in *Swift*.¹⁸⁵ In *Southern Pacific Co. v. Jensen*, the Court considered whether state law, applied in state court, could modify the principles of the general maritime law.¹⁸⁶ Jensen was a longshoreman killed while loading a vessel in port, and his next of kin sought to recover under a state workers’ compensation statute. The Supreme Court said that he could not. Despite acknowledging that “the general maritime law may be changed, modified, or affected by state legislation . . . to some extent,” Justice McReynolds’s majority opinion held that “no such legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.”¹⁸⁷ The upshot was that “in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.”¹⁸⁸ This holding elicited Justice Holmes’s famous comment that “[t]he common law is not a brooding omnipresence in the sky”¹⁸⁹—one of the better one-liners in American jurisprudence—but Holmes remains in dissent to this day as far as admiralty law is concerned.

Jensen and *Erie* both illustrate the difficulty in maintaining a viable category of “general” law—neither state nor federal in nature—at the dawn of the twentieth century. The two cases reached diametrically opposed solutions, however: *Jensen* federalized the general maritime law, rendering that law supreme not only in cases in federal court but also in state court as well. *Erie*, on the other hand, assimilated the general common law to state law, holding that it could not supplant state law even in cases in federal court.¹⁹⁰ If Professors Sherry and Greve had their way, the nonwatery world would look much like *Jensen*.

¹⁸⁵ HART & WECHSLER, *supra* note 66, at 655; *see also* Clark, *Federal Common Law*, *supra* note 147, at 1280–81; Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 318–22 (1999).

¹⁸⁶ 244 U.S. 205, 207 (1917).

¹⁸⁷ *Id.* at 216.

¹⁸⁸ *Id.* at 215; *see also* *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 383–84 (1918) (holding, in a case in diversity jurisdiction, that federal maritime law preempted state tort remedies).

¹⁸⁹ *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting).

¹⁹⁰ *See generally* Hart, *supra* note 10, at 531 (arguing that *Jensen* embodied “[t]he same logic of federalism which underlay *Erie*”).

Although *Jensen*'s solution may seem attractive to *Erie*'s critics, there are several reasons to treat it as a cautionary tale.¹⁹¹ First, the *Jensen* rule has never been clean, and "courts have faced vexing questions in trying to define what matters are governed by uniform federal admiralty law and in what areas state law remains free to operate"¹⁹²—a dilemma that David Currie aptly described as the "Devil's Own Mess."¹⁹³ Extending *Jensen*'s rule to the much broader class of cases implicated in *Erie* would exacerbate these problems beyond all measure; indeed, it is difficult even to define the class of cases that would have to be federalized. The category could not be confined to the commercial law cases contemplated by *Swift* because the general law overflowed those banks by the end of the nineteenth century; similarly, it could not be limited to common law cases, because a truly federal general common law would trump state statutes as well.¹⁹⁴ Federal maritime law works, to the extent that it does, because the jurisdictional scope of maritime law is narrow and comparatively well-defined, the instances of conflict with state policy are relatively few, and the critical issues of admiralty law tend now to be governed by federal statutes.¹⁹⁵ None of those things are true in the broader world of *Erie* itself.

In any event, federalizing the law applied in diversity cases would cut the general common law loose from its historical moorings, which have always treated that law as non-federal in nature.¹⁹⁶ One may doubt, moreover, whether horizontal uniformity would be fully achieved even under such a draconian solution. After all, how uniform is federal law, really? We

¹⁹¹ I set aside until Part III the small difficulty that *Jensen*'s solution is unconstitutional, for the same reasons that *Erie* is constitutionally required. See generally Young, *Preemption at Sea*, *supra* note 185.

¹⁹² HART & WECHSLER, *supra* note 66, at 656; see also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) ("It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence."); *Ballard Shipping Co. v. Beach Shellfish Co.*, 32 F.3d 623, 628 (1st Cir. 1994) (Boudin, J.) ("[T]he Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions however couched reflect a balancing of the state and federal interests in any given case.").

¹⁹³ David Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158. The definitive treatment, surveying the evolution of the *Jensen* test and identifying the troubles with each formulation, is David R. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM 325 (1995). In recent years, the Court has repeatedly questioned or distinguished *Jensen*. See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996); *Miller*, 510 U.S. at 450–52; see also *id.* at 458 (Stevens, J., concurring in part and in the judgment) ("In my view, *Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* . . . would be in a case under the Due Process Clause.").

¹⁹⁴ Indeed, in *Jensen* itself, the maritime law trumped a state statute. See *Jensen*, 244 U.S. at 216–18.

¹⁹⁵ See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (noting that "maritime tort law is now dominated by federal statute"); Young, *Preemption at Sea*, *supra* note 185, at 350–51.

¹⁹⁶ See generally Fletcher, *supra* note 90; see also GREVE, *supra* note 4, at 144.

have thirteen circuits with open and notorious differences in the law that each applies, and it seems doubtful that the Supreme Court would expand its docket sufficiently to unify federal law on the vastly broader set of federal questions that *Jensen-izingErie* would entail.¹⁹⁷ Moreover, one significant unifying force in federal statutory interpretation—construction of those statutes by federal agencies—would not exist for this new class of federal questions. For all these reasons, I suspect that the horizontal uniformity envisioned by contemporary advocates of a general federal common law is largely a mirage.

The real reason not to federalize the law in diversity cases, of course, is that it would be unconstitutional.¹⁹⁸ But before I take up *Erie*'s constitutional arguments, I want to consider a possible reconceptualization of *Erie*.

C. *Erie*, *Chevron*, and *Deference to State Judges on State Law Questions*

So far I have characterized the commercial law applied under *Swift* as “general” law—neither state nor federal in character. But as several scholars have pointed out, another conceptualization is possible.¹⁹⁹ Federal courts operating under *Swift* occasionally described the general commercial law as a species of *state* law, but one on which they owed no deference to the interpretations issued by the state courts.²⁰⁰In *Chicago, Milwaukee & St. Paul Railway. Co. v. Solan*,²⁰¹ for instance, the Supreme Court said that

[t]he question [in this case] . . . is . . . one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions

¹⁹⁷ See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1572 (2008) (concluding that “standardizing federal law is no longer possible as a practical matter”); John Harrison, *Federal Appellate Jurisdiction over Questions of State Law in State Courts*, 7 GREEN BAG 2D 353, 357 (2004) (“Federal law is notoriously non-uniform among the different circuits, and the Supreme Court is apparently sufficiently indifferent to this fact that it leaves many inter-circuit conflicts unresolved.”).

¹⁹⁸ See Robert H. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A. J. 609, 614 (1938) (“The need for uniformity has never been allowed to operate as a basis of power in Congress, which was not granted in the Constitution, and it is hard to see why it should supply power, otherwise not granted, to the Federal judiciary.”).

¹⁹⁹ See Michael G. Collins, *Justice Iredell, Choice of Law, and the Constitution—A Neglected Encounter*, 23 CONST. COMMENT. 163, 175 (2006); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 526 (2000) [hereinafter Harrison, *Power of Congress*]; Nelson, *Erie*, *supra* note 6, at 927–29.

²⁰⁰ Even prior to *Erie*, some observers were skeptical of such claims. See, e.g., Comment, *What is “General Law” Within the Doctrine of Swift v. Tyson?*, 38 YALE L.J. 88, 91 (1928) (“Though the courts in making such independent judgments assert that there is no federal common law, and claim instead that they are expressing the state’s own common law, it seems clear that they are in fact looking to some ‘transcendental body of law’ when they apply the *Swift v. Tyson* rule.”).

²⁰¹ 169 U.S. 133 (1898).

of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State²⁰²

It is not completely clear in *Solan* and similar cases what the Court meant by “the law of the State.” The Court’s language seems perfectly consistent with saying that the general law had become “the law of the state” by virtue of a state choice of law rule.²⁰³ For example, when Professor Hill observed that “in theory the federal courts deemed themselves to be applying state law during the era of *Swift v. Tyson*,”²⁰⁴ he seems to have meant that the State had made a decision to adopt the general law on the relevant points—not that the law applied in such cases was a body of state law *other than* the general law.²⁰⁵ Professor Purcell’s discussion is also consistent with this notion; when he says that the common law under *Swift* “was properly ‘state’ law,” he means that it was “not ‘the creation of the federal [lawmaking] power,’” that it did not preempt state law under the Supremacy Clause, and that it “did not give rise to ‘federal questions’ for purposes of either original jurisdiction or Supreme Court review.”²⁰⁶ The “general” law described by Judge Fletcher and others shared all these characteristics.²⁰⁷ As the remainder of this section explains, I do not think it ultimately makes any difference which way we phrase the matter. The important point, common to both perspectives, is simply that the general law never applied of its own force, but always because of a state’s decision to follow it.

If we take the common law under *Swift* to be state law, then the distinction between *Swift* and *Erie* lies in the degree of deference that federal courts owe to state courts on the proper construction of state law.²⁰⁸ *Erie* rejected the notion that there is any category of cases in which federal courts may exercise independent judgment as to state law (although later cases restricted *Erie*’s mandate of deference to decisions of the state’s highest court).²⁰⁹ This notion turns out to lie at the heart of *Erie*’s *constitutional*

²⁰² *Id.* at 136; see also PURCELL, *supra* note 9, at 185 (“According to long-established doctrine, *Swift* authorized the federal courts only to make an ‘independent judgment’ on common law principles as to what was properly ‘state’ law.”).

²⁰³ See *supra* text accompanying notes 101–104 (arguing that this is the right way to think about it).

²⁰⁴ Hill, *supra* note 102, at 444.

²⁰⁵ See also *id.* at 443 (observing that in cases under *Swift* “the law of the state on a particular matter was the common law in what was considered to be its more *general* aspect” and that this was why “a federal court deemed itself as competent as a state court to ‘find’ and ‘declare’ the legal principle applicable to the case”).

²⁰⁶ See PURCELL, *supra* note 9, at 185.

²⁰⁷ See *supra* notes 96–98 and accompanying text.

²⁰⁸ See Nelson, *Erie*, *supra* note 6, at 941–42, 950.

²⁰⁹ See, e.g., *King v. Order of United Commercial Travelers*, 333 U.S. 153, 158–59 (1948); HART & WECHSLER, *supra* note 66, at 570 (collecting authorities).

argument, and I will thus return to it in Part III. The present section asks whether there is anything to be said for the no-deference rule from a pragmatic standpoint.

The problem is that, if the concession that *state* law is being applied is to mean anything, then the boundary between local and general law must itself be a question of state law—and a question, moreover, of the *local*-kind. It might be possible—although doubtful—to interpret the statutory grant of diversity jurisdiction to imply a mandate to apply the general commercial law, much as the admiralty grant was long interpreted as a mandate to apply the general maritime law.²¹⁰ But if the law involved is really state law, then it is surely up to the state to determine its content and scope of application.

The only way to make sense of the notion of a “general” law that is nonetheless state law is to say that, on matters of a general character, state law aims to mirror a broader set of norms applied in multiple jurisdictions. In practical effect, this would be much like a state choice-of-law rule to apply general law in a certain set of cases.²¹¹ But either way, it would be up to the state to determine how broadly this mirroring was to take place—for example, whether it would be confined to commercial cases or extended to the law of torts.²¹² And the recurring, difficult question would be whether, in cases where state court decisions seemed to depart from the tendency in other jurisdictions, that discrepancy should be treated simply as an error, undeserving of deference from the federal courts, or a deliberate limitation imposed by the state on the scope of its general law.²¹³

One can imagine situations in which federal courts could plausibly answer this question without deference to state courts. If, for example, the legislature adopted the general law by statute in certain areas, such as transactions involving commercial paper, then federal courts could conceivably make an independent judgment about the text of the statute. But even under *Swift*, the federal courts deferred to state constructions of state statutes,²¹⁴

²¹⁰ See, e.g., HART & WECHSLER, *supra* note 66, at 653. The trouble, of course, is that the diversity grant says no such thing (nor does the admiralty grant). It says nothing about the law to be applied in diversity cases, and it certainly contains nothing suggesting a distinction between general and local law.

²¹¹ See *supra* note 107–113 and accompanying text.

²¹² See BRIDWELL & WHITTEN, *supra* note 63, at 91 (discussing the states’ power to “localize” questions of general law under *Swift*).

²¹³ As Professors Bridwell and Whitten discuss, the Supreme Court did exercise some degree of independent judgment in determining whether state courts had taken a consistent position on whether a question had been localized. See *id.* at 88. That function is analogous to the Court’s occasional (and generally quite deferential) review of state courts’ decision of state law questions that are antecedent to a question of federal law. See generally HART & WECHSLER, *supra* note 66, at 462–63; Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL’Y 107, 120–25 (2011) (discussing this form of review).

²¹⁴ See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938); *supra* notes 47, 66 and accompanying text.

and in any event, state legislatures generally do not legislate such rules so explicitly. The question, then, is whether federal courts should defer to state courts in the murkier setting in which the issue actually arises.

I submit that they should, for reasons similar to those that undergird the federal rule mandating judicial deference to administrative agencies' constructions of the federal statutes they administer. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²¹⁵ the Court held that federal courts must defer to federal administrative agency interpretations of the statutes they administer, so long as the statute in question is ambiguous and the agency's interpretation is reasonable. The Court has developed three distinct justifications for this rule: that the agency has relatively more expertise and experience with a statute that it administers than does a reviewing court;²¹⁶ that the agency is more democratically accountable than a court;²¹⁷ and that an ambiguous statute may be viewed as a congressional delegation of authority to the agency to fill in the gaps in the statute's meaning.²¹⁸ Each of these justifications finds a persuasive analogy in the *Erie* context. The third—that agencies have been delegated interpretive authority by the legislature—speaks to *Erie*'s constitutional underpinnings, and I accordingly address it in Part III. But the other two—expertise and accountability—provide pragmatic justifications for *Erie*'s rule of deference.

First, state courts have superior experience and expertise concerning state law, much as federal agencies have expertise with respect to the statutes they administer. To be sure, our federal system does not draw any essential link between the source of law and the court that interprets; in other words, state courts are presumptively appropriate fora for interpreting federal law,²¹⁹ and federal courts similarly may, and frequently do, interpret state law. But state courts surely have a comparative advantage in construing state law, given how frequently it is litigated in state court.²²⁰ This

²¹⁵ 467 U.S. 837, 843–44 (1984).

²¹⁶ See EinerElhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2135 (2002) (noting this as “the leading alternative theory for *Chevron*” but ultimately finding it unsatisfactory).

²¹⁷ See *Chevron*, 467 U.S. at 866 (1984) (insisting that “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do”); see generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466–67 (1989) (discussing the delegation and democratic accountability justifications for *Chevron*).

²¹⁸ See *Chevron*, 467 U.S. at 843–44; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197–98 (2006) (arguing that the delegation rationale has won out).

²¹⁹ See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990) (holding that state courts presumptively have jurisdiction to hear federal law claims unless Congress clearly states its intention to exclude them).

²²⁰ See, e.g., *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499–500 (1941) (acknowledging the superior expertise and authority of the state courts to construe state law). This is likely to be true even on issues where a state had, by hypothesis, chosen to follow the drift of “general” jurisprudence.

advantage may be particularly pronounced on the sort of state law questions I have been considering, which require a court to assess the overall shape of state law in an area and assess the degree to which the state as decided to go its own way and depart from the “general” jurisprudence.

Second, state courts are plainly more accountable than federal judges to the state electorate. This is true on both the front and the back end. State judges are much more likely to be appointed or elected with an eye to their views and expertise concerning state law than federal judges, whose nomination and confirmation tend to focus on federal issues and concerns. And of course many state judges, unlike all federal judges, are elected and can be voted out of office if they make a mess of state law. Certainly state judges compare favorably to the rather attenuated form of democratic accountability motivating deference to unelected federal agency officials under *Chevron*.²²¹

Finally, it seems unlikely that a regime limiting deference to state judges on general questions of state law would achieve significant practical advantages over *Erie*’s regime. One factor that put pressure on the *Swift* regime in the late-nineteenth and early-twentieth centuries was the federal expansion of *Swift*’s general law beyond the commercial context to cover matters such as tort and noncommercial contracts, as well as the concomitant decision by many states to depart from the general law, particularly in these collateral areas.²²² If general law is really state law, at bottom, then it will surely be relatively narrow in scope—most likely confined to *Swift*’s original commercial law bounds. But that is not really the area raising horizontal uniformity concerns today; after all, the modern analog to *Swift* is the Uniform Commercial Code, under which states have been able to achieve a significant measure of uniformity.²²³ What interstate businesses worry about are questions of tort, consumer protection law, and the like, and the only way to return these questions to a general law basis is likely to be through the main force of federal preemption.²²⁴

Even if we could somehow *fiat* the states’ adoption of a system of general law in these areas, the Supreme Court would lack the appellate jurisdiction (or the inclination) to unify conflicts among the state supreme courts and the federal circuits on these matters.²²⁵ It seems likely we would

Chances are that the states will see more of those cases than the federal courts and therefore develop greater expertise.

²²¹ See, e.g., Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 224 (1993).

²²² See FREYER, *supra* note 30, at 43–75; HART & WECHSLER, *supra* note 66, at 556–58.

²²³ UNIFORM COMMERCIAL CODE (1952); see also Stephan, *supra* note 149, at 1049 (noting that the UCC represents “a cooperative strategy of legal harmonization” by the states).

²²⁴ See, e.g., Issacharoff & Sharkey, *supra* note 184, at 1431–32.

²²⁵ See Fletcher, *supra* note 90, at 1561–62 (noting the Supreme Court’s lack of appellate jurisdiction over state court decisions on matters of general law). The sharp decline in Supreme Court review of state court decisions on questions of *federal* law since Congress expanded the Court’s *certiorari*

be trading one patchwork for another. As *Swift*'s most prominent contemporary defender acknowledges, "[t]he fact remains that the *Swift* regime proved unstable even in the nineteenth century and is unlikely to fare any better under modern circumstances."²²⁶

III. THE CONSTITUTIONAL ARGUMENT

Justice Brandeis concluded his discussion of the statutory and pragmatic issues in *Erie* by stating that "[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."²²⁷ For *Erie*'s many critics, however, "the unconstitutionality of the course pursued" in *Swift* has been anything but clear.²²⁸ Part of the problem is that both critics and defenders of *Erie* disagree about the nature of *Erie*'s constitutional rationale.²²⁹ In my view, *Erie* cannot be fairly read to rest on the proposition that the rule at issue fell outside Congress's power; rather, it rested—and rightly so—on the proposition that the Constitution vests no general lawmaking powers in the federal courts. Although recent students of *Erie* have identified important and instructive difficulties with this rationale, I conclude that it remains eminently defensible.

Before turning to that rationale, however, I begin by clarifying the role that some basic issues in jurisprudence play in Justice Brandeis's discussion.

discretion in 1988, see Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335 (2002), suggests that the Court would probably not review many state court decisions on general law matters even if it had jurisdiction to do so.

²²⁶ GREVE, *supra* note 4, at 373.

²²⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 77–78 (1938).

²²⁸ See, e.g., Green, *Repressing*, *supra* note 5, at 602 (arguing that "none of [Brandeis's constitutional arguments] provides adequate constitutional support for *Erie*'s result"); Hill, *supra* note 102, at 427, n.3 (citing numerous articles suggesting that "the constitutional basis of *Erie* has been widely regarded as dictum, and rather dubious dictum at best").

²²⁹ See, e.g., LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* 10–15 (1994) (collecting scholarly arguments about *Erie*'s constitutional basis, ranging from equal protection to federalism to separation of powers to due process). There is even disagreement as to whether the Court really relied on the Constitutional ground, Clark, *Erie's Source*, *supra* note 90, at 1298 n.66 (noting Chief Justice Stone's opinion that *Erie*'s constitutional ground is dicta), although it is hard to take that particular disagreement all that seriously. See, e.g., 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4505 (2d ed. 1996) (noting the opinion's explicit reliance on the Constitution); Hill, *supra* note 102, at 439 ("[I]t is difficult to view as dictum the Court's statement of a legal proposition without which, we are assured in the opinion, and have no reason to doubt, the case would have been decided the other way.").

A. *Erie and Positivism*

Much of Justice Brandeis's constitutional discussion in *Erie* suggests that the case turns on a basic disagreement, not just about the Constitution, but rather about the nature of law and judicial decision making. "The fallacy underlying the rule declared in *Swift v. Tyson*," he said,

is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law."²³⁰

This was wrong, Holmes had written, because

law 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.²³¹

It followed that "the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."²³² Brandeis thus concluded, again quoting Holmes, that "the doctrine of *Swift v. Tyson* is 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'"²³³

²³⁰ *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); see also FREYER, *supra* note 30, at 131–53 (documenting the influence of the positivist critique of *Swift* on Justice Brandeis's opinion in *Erie*). Justice Holmes was hardly the only positivist critic of *Swift*. See, e.g., William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 908 (1988) ("In the late nineteenth century, the Field brothers, David and Stephen, launched devastating positivist attacks on *Swift*, and their self-evident criticism was vigorously reiterated by Professor [John Chipman] Gray, Justice Holmes, and others."); see also *id.* at 922–24 (outlining these attacks).

²³¹ *Black & White Taxicab*, 276 U.S. at 533–34.

²³² *Id.* at 535.

²³³ *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533). Professor Purcell argues that Justice Brandeis's embrace of positivism in *Erie* was a limited one: "In *Erie* Brandeis incorporated the narrowly positivist elements of Holmes's jurisprudence that equated judicial decisions with 'law' and law with the power of an identified sovereign." PURCELL, *supra* note 9, at 181. He did not, however, "adopt any broader skeptical, positivist, or 'realist' legal philosophy," such as "the proposition that law means only what the courts would enforce or that any rule the courts enforced was immune from meaningful philosophical and moral critique." *Id.* at 182. According to Purcell,

Erie's narrow positivism was grounded ultimately not in any distinctively Holmesian or realist jurisprudence, or any other general legal philosophy, but in Brandeis's practical under-

Many subsequent courts and commentators accepted the description of *Swift* by Justices Holmes and Brandeis. Justice Frankfurter, for example, portrayed the *Swift* regime as one in which “[I]aw was conceived as a ‘brooding omnipresence’ of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law.”²³⁴ Similarly, William Casto has written that “[u]nder *Swift* . . . judges were considered the living oracles of a preexisting natural law.”²³⁵ This model “pictured common-law judges as oracles who discovered preexisting metaphysical legal principles and declared the principles’ applicability in particular cases. Under this view, the metaphysical principles were the law, and judicial precedents were merely evidence of the law.”²³⁶

When *Swift* is seen in this light, “*Erie* is often regarded as a victory of legal positivism over natural law.”²³⁷ As Professor Casto put it, “The general acceptance of positivism in this century virtually dictated the overruling of *Swift v. Tyson* and the creation of the *Erie* doctrine in 1938.”²³⁸ This positivist reading has become highly controversial in recent years, however. The debate has to do both with the logic of Justice Brandeis’s argument and the accuracy of his portrayal of *Swift*.²³⁹ With respect to the former, Craig

standing of the structural and operational requirements of American constitutional federalism in an age of burgeoning multistate activities.

Id.; see also *id.* at 185.

²³⁴ *Guaranty Trust Co. v. York*, 326 U.S. 99, 102 (1945) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)); see also Jackson, *supra* note 198, at 612 (“*Swift v. Tyson* rests on the philosophic premise that a court . . . does not *make* the law but merely *finds* or declares the law, and so its decisions simply constitute evidence of what the law is, which another court is free to reject in favor of better evidence to be found elsewhere.”).

²³⁵ Casto, *supra* note 230, at 908.

²³⁶ *Id.* at 911.

²³⁷ Jay Tidmarsh, *Foreword: Erie’s Gift*, 44 AKRON L. REV. 897, 900 (2011); see also Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 854–55 (2011) (book review) (observing that “the received legal wisdom about *Swift* and *Erie* has it that *Swift* was based on a misunderstanding about the nature of law” but arguing that the true story is “far more complicated”).

²³⁸ Casto, *supra* note 230, at 907–08.

²³⁹ Craig Green suggests that the positivist problem in *Swift* and *Erie* simply evaporates because “judicial lawmaking does not violate legal positivism. On the contrary, many positivists have acknowledged that, when judges decide cases, *that is positive law*.” Green, *Repressing*, *supra* note 5, at 605 (citing H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608–09 (1958); H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961)). That is true so far as it goes, but it conflates an external perspective with the internal perspective of the judge deciding cases. From the external perspective, one can readily construct a positivist account of judge-made law: judicial decisions are social facts, and they derive their legal force from the community’s acceptance of them as law. But the question is more difficult from the internal perspective of the judge, who typically must ground her own decision in some *other* source—either a delegation of authority to *make* law or some other positive law that she interprets and applies. The interesting question about *Swift* is how the judges thought about what they were doing in diversity cases.

Green points out that “[e]ven if Holmes’s argument were true, *Swift*’s alleged ‘fallacy’ did not violate the Constitution. Positivism was popular in the early twentieth century and remains so today. Yet the Constitution requires no more adherence to trendy legal theory than to Spencer’s sociology.”²⁴⁰

It is certainly true that *Swift* could not be unconstitutional *solely* because it was jurisprudentially mistaken. Positivism holds, however, that legal principles must be grounded in *authority*—not their logical truth or some transcendent source such as natural law. Hence, “what counts as law in any society is fundamentally a matter of social fact.”²⁴¹ Discussing the general maritime law, for example, Justice Holmes insisted that

however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow.²⁴²

This positivist perspective thus forced courts applying the general common law to search for some sort of legal authorization to do so. In other words, “[t]his [positivist] strand of *Erie* requires federal courts to identify the sovereign source for every rule of decision.”²⁴³ Failure to do so *could* amount to a constitutional problem.²⁴⁴

It is not clear, however, that Joseph Story would have denied any of this. As Susan Bandes points out, “neither Justice Story nor subsequent Justices who expanded the reach of *Swift* experienced themselves as communing with a brooding omnipresence.”²⁴⁵ Two critical aspects of Story’s analysis in *Swift* rendered that decision completely consistent with the positivist theory that law must be grounded in social facts. First, the general

²⁴⁰ Green, *Repressing*, *supra* note 5, at 604 (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

²⁴¹ Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *HART’S POSTSCRIPT* 355, 356 (2001); *see also* Goldsmith & Walt, *supra* note 14, at 677–78 (“Natural law and related theories, in their simple forms, hold that law depends on conformity to moral principle. Positivism, by contrast, holds that law depends on social practices of one sort or another.”). This is the “social thesis,” which forms the core of legal positivism alongside the “separation thesis” distinguishing between law and moral norms. *See id.*

²⁴² *The Western Maid*, 257 U.S. 419, 432 (1922).

²⁴³ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852 (1997) (quoting *Eric R. Co. v. Tompkins*, 304 U.S. 79 (1938)).

²⁴⁴ *See* Lessig, *supra* note 78, at 1793 (explaining that positivism requires that law be grounded in social authority, and that this forced courts to confront the *constitutional* basis for the general common law).

²⁴⁵ Bandes, *supra* note 237, at 855.

commercial law was customary in its origin.²⁴⁶ Its rules were derived from the actual practices of merchants—a social fact—not from some notion of natural law. Second, Story emphasized that the New York courts applied the general common law to commercial disputes.²⁴⁷ If positivism required a *governmental* imprimatur rather than simply a social one, state law supplied it in commercial cases.

It is probably fair to say that current conventional wisdom has come to reject interpreting *Swift* as inherently antipositivist.²⁴⁸ I think that conventional wisdom is basically right, but *Erie* nonetheless adopted a considerably different view of what judges do in diversity cases than *Swift* had articulated, primarily because the judicial role under *Swift* itself had changed over the intervening years. This change, I argue, was critical to setting up Justice Brandeis's arguments about federalism. In this sense, it remains true that "[t]he positivist belief that judges make law is a *sine qua non* to [*Erie*'s] constitutional argument."²⁴⁹

Under *Swift*, federal and state courts decided a relatively narrow range of commercial cases under a shared body of "general" principles. For a variety of reasons, American courts were able to maintain a remarkable degree of uniformity in this area notwithstanding the lack of a single sovereign or court with authority to unify the law in cases of divergence.²⁵⁰ In particular, commercial law was an area that affected primarily sophisticated merchants, for whom it was often more important that the rules be settled

²⁴⁶ Or at least it was viewed that way. See *supra* note 78. My friend Emily Kadens has argued that, in the Middle Ages, the law merchant was not, in fact, customary—rather, it arose from contract and statute. See Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012). But even if that finding were to call into question the actual nature of the law merchant in nineteenth-century America, the important point for present purposes is how courts and commentators perceived that law in thinking about the sources of law in diversity cases.

²⁴⁷ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842); *supra* notes 107–108 and accompanying text.

²⁴⁸ See, e.g., Goldsmith & Walt, *supra* note 14 (concluding that jurisprudential legal positivism was in fact logically irrelevant to the holding of *Erie*); Michael Stephen Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1127–35 (2011) [hereinafter Green, *Suppressed Premise*] (same); Lessig, *supra* note 78, at 1790–92 (characterizing the original application of general commercial law under *Swift* as unproblematic from a positivist perspective).

²⁴⁹ Casto, *supra* note 230, at 928. George Rutherglen makes a curious claim that Justice Brandeis's positivism left him without a basis for overruling *Swift*. Professor Rutherglen asserts that Brandeis "appeal[ed] to principles of federalism whose source and weight could not be identified simply by tracing them back to the Constitution," and that, "[h]aving made this appeal outside of recognized legal sources, Brandeis could not criticize the federal general common law of *Swift v. Tyson* for lacking such a source." Rutherglen, *supra* note 127, at 291. I doubt this jurisprudential "gotcha" works, however. "Positivist" is not a synonym for "textualist," and principles of federalism and separation of powers are surely "recognized legal sources," regardless of how much people may differ about their meaning.

²⁵⁰ See Fletcher, *supra* note 90, at 1549.

than that they be settled *right*.²⁵¹ Moreover, any state choosing to *depart* from general law principles in the commercial field would have placed itself at a potentially disastrous disadvantage in an increasingly competitive national market.²⁵²

As Tony Freyer has documented, however, “[b]etween 1842 and the end of the nineteenth century the *Swift* doctrine underwent a gradual but fundamental transformation.”²⁵³ The Court slowly but steadily expanded the scope of general law into new areas previously governed by local principles; as then-Solicitor General Robert Jackson put it, *Swift*’s rule “grew by what it fed on.”²⁵⁴ “By the 1880s,” Professor Freyer notes, “the general law included 26 distinct doctrines. The two main categories of cases in which this enlargement took place involved tort liability in accidents and recovery on defaulted municipal bonds.”²⁵⁵ These were *not* areas where interested parties valued certainty over content.²⁵⁶ Moreover, these expansions brought the general law increasingly into conflict not only with state court decisions but also with state statutes. In *Gelpcke v. City of Dubuque*, for example, the Court famously refused to follow a state court’s construction of the state constitution that would have invalidated the state bonds at issue.²⁵⁷ “We shall never immolate truth, justice, and the law,” the Court bellowed, “because a State tribunal has erected the altar and decreed the sacrifice.”²⁵⁸

²⁵¹ *Id.* at 1562–63; *see also* H. Parker Sharp & Joseph B. Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900*, 4 IND. L.J. 367, 371 (1929) (arguing that “[u]niformity is especially desirable in the case of negotiable instruments” that “circulate freely from state to state” and that “[i]t would greatly impede their marketability if prospective purchasers were bound to ascertain whether the instruments had become subject to any peculiar local rules”).

²⁵² *See* BRIDWELL & WHITTEN, *supra* note 63, at 91.

²⁵³ FREYER, *supra* note 30, at 45.

²⁵⁴ Jackson, *supra* note 198, at 611; *see also* Lessig, *supra* note 78, at 1792. At the same time, the general common law as interpreted by the federal courts was becoming considerably more friendly to business interests than was state law. *See* PURCELL, *supra* note 9, at 66–67.

²⁵⁵ FREYER, *supra* note 30, at 58; *see also* Comment, *supra* note 200, at 91–92 (“Confining themselves at first to a sort of law merchant of usages common to the commercial world the federal courts have applied their own rules in an increasing field, without regard to the non-statutory law of a state, feeling dictated . . . by the importance of national certainty of the law in the broader field of general jurisprudence”) (internal quotation marks omitted); Sharp & Brennan, *supra* note 251, at 376 (noting, in 1929, that “[f]or the most part, in negligence cases federal courts are not bound by state decisions”).

²⁵⁶ *See generally* JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987) (describing the controversy over the state bond cases).

²⁵⁷ 68 U.S. 175, 206–07 (1863).

²⁵⁸ *Id.* Professor Freyer notes that “[d]uring the 30 years after the *Dubuque* decision, approximately 300 bond cases came to the Supreme Court (more than on any other single issue), while many others were settled in the lower federal courts without appeal.” FREYER, *supra* note 30, at 60.

This expansion of the general law seems to have been driven—or at least accompanied—by a shift in *Swift*'s underlying rationale.²⁵⁹ Although *Swift* and other early decisions had emphasized the customary nature of the general commercial law and the importance of the parties' expectations in interstate commercial transactions, later decisions relied on a more expansive need for national uniformity.²⁶⁰ This shift did not render the later decisions antipositivist; *Swift*'s late-century defenders relied on indubitably positivist sources—typically the Diversity Clause of Article III.²⁶¹ But the shift away from customary law to normative lawmaking put the question of legislative authority front and center.

I submit that what happened to *Swift* was not that it could no longer be justified once legal positivism became well established, but rather that the twin positivist *sources* of *Swift*'s authority eroded as the general law expanded beyond its commercial law origins. Justice Story could ground the general commercial law in the customary practices of merchants as well as the states' decision, acknowledged by the state courts, to follow the general commercial law rather than localize the rules governing such transactions. But the common law principles articulated in the new bond and tort cases, for example, did not arise from the customary practices of parties to consensual transactions, and in many instances the states *had* made a deliberate decision to localize the relevant legal principles. The federal courts thus needed a new basis of positive authority for applying general law in this broader universe of cases. "As the federal judiciary continued to enlarge the body of general law," Professor Freyer relates, "a fundamental question arose as to the proper balance of power between the state and federal governments."²⁶² *Erie* thus raised a question of federalism that *Swift* had not.²⁶³

Although there is fairly widespread agreement today that *Erie*'s positivism requires courts "to identify the sovereign source for every rule of decision,"²⁶⁴ disagreement persists about the available options. Professors Bradley and Goldsmith maintain that "[b]ecause the appropriate 'sovereigns' under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state

²⁵⁹ See, e.g., Lessig, *supra* note 78, at 1792 ("As the practice of the common law became less reflective and more directive, theories of the common law as custom yielded to theories of the common law as science. The theories that fit the emerging practice saw the common law as normative, and these in turn displaced theories that insisted that the common law was simply reflective.").

²⁶⁰ See Casto, *supra* note 230, at 915–18; Comment, *supra* note 200, at 92.

²⁶¹ See, e.g., Goldsmith & Walt, *supra* note 14, at 682–83; BRIDWELL & WHITTEN, *supra* note 63, at 95, 147 n.17.

²⁶² FREYER, *supra* note 30, at 71.

²⁶³ See, e.g., FREYER, *supra* note 30, at 36–37 (explaining why pro-states'-rights justices on the Court did not object to Story's holding in *Swift*); see generally Lessig, *supra* note 78, at 1793–94 (explaining that as the general common law became normative rather than reflective of customary practices, it became more difficult for federal judges to justify their role in shaping that law).

²⁶⁴ Bradley & Goldsmith, *supra* note 243, at 852.

law.”²⁶⁵ Similarly, Louise Weinberg has written that “[a]t the heart of [*Erie*] was the positivistic insight that American law must be either federal or state law. There could be no overarching or hybrid third option.”²⁶⁶ I have criticized this view at greater length elsewhere,²⁶⁷ and a number of recent commentators have noted the role that “general” law continues to play in our legal system.²⁶⁸ Nothing in *Erie* or in legal positivism generally would preclude state or federal courts from continuing to follow the general law in diversity cases, so long as state law mandated that choice as it did under *Swift*.²⁶⁹ The reason that federal courts generally may *not* apply the general law presently is simply that states generally do not make that choice.

B. *Erie and Federalism*

Positivism, as I have said, required courts to locate some ground of legal authority to construe and apply the common law. By the time of *Erie*, application of the general law could, for the most part, no longer rest on the *states'* acquiescence or on the notion that courts were simply enforcing the customary understandings of parties to interstate transactions. The federal courts thus needed some sort of *federal* authority to displace state law in diversity cases. Positivism did not, strictly speaking, require rejecting *Swift*—but it did mean that *Erie* had to be a case about federalism.

Erie's federalism rationale, however, is frequently misunderstood.

1. Legislative Power and Dual Federalism

Misinterpretation of *Erie's* constitutional rationale stems from two statements: one at the beginning and one at the end of Justice Brandeis's constitutional discussion. Brandeis opened with the canonical statement of *Erie's* holding: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.”²⁷⁰ He then made a

²⁶⁵ *Id.*

²⁶⁶ Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 820 (1989).

²⁶⁷ See Young, *CIL*, *supra* note 84, at 492–96 (arguing that there is nothing antipositivist about general law so long as that law is adopted and empowered by positivist means—that is, social acceptance or governmental authorization).

²⁶⁸ See Nelson, *General Law*, *supra* note 74; Bellia & Clark, *supra* note 49; see also Young, *CIL*, *supra* note 84, at 467–74 (arguing that American courts should treat customary international law as “general” law unless it is incorporated into federal law by Congress).

²⁶⁹ See, e.g., Rutherglen, *supra* note 127, at 295 (concluding that “the federal courts could appeal to the general common law if state law allowed them to do so”).

²⁷⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

somewhat confusing reference to *Congress's* power, despite the fact that no federal statute purported to govern the merits of the case: "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."²⁷¹ Brandeis compounded the confusion when he added, at the end of the section, "that in applying the doctrine [of *Swift*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."²⁷²

This language has suggested to some that *Erie* rested on a pure question of federalism. Craig Green, for example, purports to find two supposedly distinct federalism rationales in Justice Brandeis's opinion: a highly-implausible "states' rights" interpretation and a slightly more tenable "enumerated powers" reading.²⁷³ The gravamen of each argument, however, is to characterize *Erie* as a case about limits on the power of the federal government as a whole, rather than about limits specific to the powers of the federal courts.²⁷⁴ Likewise, Suzanna Sherry appears to read Brandeis as relying entirely on a lack of congressional power to reach the conduct at issue in the case.²⁷⁵

This reading, if correct, would have important implications for current debates about federal judicial power to recognize and enforce norms, such as principles of customary international law, that are not embodied in federal positive law. Harold Koh has argued, for example, that "given both Congress's enumerated authority to define and punish offenses against the law of nations and its affirmative exercise of that power in a range of statutes, no one could similarly claim that federal courts lacked power to make federal common law rules with respect to international law."²⁷⁶ More broadly, the enumerated powers reading would support an extremely capacious view of federal common law generally. Current enumerated powers doctrine, after all, gives Congress extremely broad legislative powers.²⁷⁷ If *Erie* were about federal legislative jurisdiction, then that entire field would now be open to federal judicial lawmaking.

If this were the rationale, then *Erie's* critics would be right to criticize it. As Professor Sherry notes, "[i]t is doubtful that *Erie's* federalism limitation on congressional power was correct when it was decided, and doctrinal

²⁷¹ *Id.*

²⁷² *Id.* at 80; see also, e.g., Sherry, *Wrong*, *supra* note 6, at 142 (plucking these two statements out as the key expression of the Court's rationale).

²⁷³ Green, *Repressing*, *supra* note 5, at 607–14.

²⁷⁴ See also PURCELL, *supra* note 9, at 172–73.

²⁷⁵ See Sherry, *Wrong*, *supra* note 6, at 142–44; see also Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1571–73 (2008) (reading *Erie* similarly).

²⁷⁶ Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824, 1831 (1998).

²⁷⁷ See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

developments have made it even less valid.”²⁷⁸ As the critics read it, *Erie* is a relic of “dual federalism”—the regime of federalism doctrine that dominated the Court’s jurisprudence for the first century and a half of our history.²⁷⁹ Dual federalism contemplated “two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions.”²⁸⁰ Consistent with this model, some critics interpret *Erie* to hold that matters like the tort duty at issue in that case fell within an exclusive zone of state authority.²⁸¹

The problem, of course, is that this view of federalism has become untenable.²⁸² The Court rejected dual federalism as part of its New Deal revolution, which largely abandoned the notion of judicially enforced limits on the Commerce Clause.²⁸³ *Erie* was decided in 1938, a year after the Court’s 1937 “switch in time.” But even before the Court switched, it had made clear that Congress had extensive power to regulate even intrastate matters pertaining to the railroads as instrumentalities of interstate commerce.²⁸⁴ It is thus difficult to say that Congress would have lacked constitutional power to specify by statute a duty of care for railroads towards persons walking along their rights-of-way. Indeed, Michael Greve seems right to contend “that Congress could reenact, and could have reenacted even in 1938, the entire corpus juris of general common law that was declared unconstitu-

²⁷⁸ Sherry, *Wrong*, *supra* note 6, at 143.

²⁷⁹ See Green, *Repressing*, *supra* note 5, at 607–09. Even Professor Purcell’s reading takes *Erie* into this territory. See PURCELL, *supra* note 9, at 168 (“The federal common law was illegitimate, Brandeis believed, because it was based on the fallacy that the scope of congressional power had no relevance to the reach of the federal judicial power.”); *id.* at 173 (“[Congress’s lack] of power . . . turned on the absence of congressional authority as determined by reference to the constitutional grant of powers to the national government.”).

²⁸⁰ Alpheus Thomas Mason, *The Role of the Court*, in FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24–25 (Valerie A. Earle, ed., 1968); see also ANTHONY J. BELLIA, JR., FEDERALISM 183 (2011) (“The dual federalism paradigm understands federal and state governments to operate in different spheres of authority.”).

²⁸¹ See Sherry, *Wrong*, *supra* note 6, at 144–45.

²⁸² See, e.g., Ely, *supra* note 1, at 701 (concluding that “the enclave theory does not accurately reflect the Constitution’s plan for allocating power between the federal and state governments”).

²⁸³ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37–38 (1937); see also *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942); see generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (recounting dual federalism’s collapse); Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, NOMOS LV: FEDERALISM AND SUBSIDIARITY (forthcoming 2013) [hereinafter Young, *Puzzling Persistence*] (complaining that many contemporary commentators confuse any federalism-protective doctrine with the old dual federalism model).

²⁸⁴ See *Houston E. & W. T. Ry. Co. v. United States* (Shreveport Rate Case), 234 U.S. 342, 354–55 (1914) (holding that the federal government could regulate intrastate railroad rates where necessary to regulating interstate rates); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974) (“[E]ven by then contemporary standards, Congress would have been seen as having power to prescribe a substantive rule of liability for the specific accident in *Erie*.”).

tional in *Erie*.”²⁸⁵ This, for *Erie*’s critics, is enough to dispose of *Erie*’s federalism rationale.²⁸⁶

It is highly unlikely, however, that this was the Court’s actual rationale. As Professor Green acknowledges, Justice Brandeis was hardly a proponent of dual federalism.²⁸⁷ It would have been exceptionally odd to find him aggressively seeking to roll back the *Shreveport Rate Case*’s more expansive view of national power. Unsurprisingly, Brandeis said no such thing.²⁸⁸ His opinion is completely consistent with notions of *judicial* federalism—that is, limits on the lawmaking power of *courts* that impose no parallel limits on the power of Congress. I discuss the judicial federalism rationale in the next section.

2. Judicial Federalism, Separation of Powers, and the Legal Process Vision

Contemporary federalism doctrine—and most contemporary federalism *theory* as well—largely accepts that Congress shares broad, largely concurrent regulatory powers with the States.²⁸⁹ The principal limits on national authority thus arise from the difficulty of enacting federal legisla-

²⁸⁵ GREVE, *supra* note 4, at 227. Interestingly, then-Solicitor General Robert Jackson did cite this sort of federalism problem as a reason for getting rid of *Swift*. Writing in 1938, Jackson argued that *Swift* created an anomaly because questions like insurance contracts or torts were “held to be within Federal judicial power, but not within Federal congressional power.” Jackson, *supra* note 198, at 614. If contemporary observers thought that all or most of the realm covered by general common law had come within Congress’s legislative power as a result of the Court’s expansive reading of the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), one would have expected Jackson, of all people, to note that fact.

²⁸⁶ See, e.g., Sherry, *Wrong*, *supra* note 6, at 143 (“*Erie*’s reliance on federalism is utterly inconsistent with both contemporaneous and subsequent cases on congressional power.”).

²⁸⁷ Green, *Repressing*, *supra* note 5, at 607; see also PURCELL, *supra* note 9, at 134–35 (noting that although Justice Brandeis valued decentralization, he shared the post-1937 majority’s “sense of excitement and vindication” at “[jettison[ing] doctrine identified with the ‘old Court’”).

²⁸⁸ See, e.g., Ely, *supra* note 1, at 702 (“The opinion Justice Brandeis wrote for the *Erie* Court in 1938 was a creature of its time [(a year after *NLRB v. Jones & Laughlin Steel Corp.* . . . and three years before *United States v. Darby*)] and it understood all this [that there were no exclusive enclaves of state authority] perfectly well.”). As Professor Ely points out, some later courts did appear to make this mistake. See *id.* at 705; see also, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (suggesting that if the Federal Arbitration Act were to apply in diversity actions, it would unconstitutionally invade the “local law field”). It might be best to understand *Bernhardt*’s reference to the field of local law as an application of the “presumption against preemption” in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), which applies most strongly when Congress legislates “in a field which the States have traditionally occupied.” *Id.* at 230.

²⁸⁹ See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 279–80 (2012) [hereinafter Young, *Ordinary Diet*].

tion and the states' political representation in that process.²⁹⁰ From this standpoint, it is critical that "the states, and their interests as such, are represented in the Congress but not in the federal courts,"²⁹¹ and no less significant that the federal courts may formulate rules of decision far more readily than Congress can enact laws.²⁹² Hence the principle of judicial federalism. As Paul Mishkin put it,

That Congress may have constitutional power to make federal law displacing state substantive policy does not imply an equal range of power for federal judges. Principles related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress).²⁹³

As in other areas of federalism doctrine,²⁹⁴ then, separation of powers reinforces the limits on national power by constraining courts from displacing state law even where similar action by Congress would be permissible.²⁹⁵

This judicial federalism theory of *Erie* fits well into a broader vision of federalism commonly associated with the Legal Process school of jurisprudence.²⁹⁶ That vision, articulated in the first edition of the famous *Hart &*

²⁹⁰ 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 (1954) (emphasizing the political representation of the states in Congress); Clark, *Separation of Powers*, *supra* note 15, at 1339–42 (emphasizing the procedural difficulty of enacting federal law).

²⁹¹ Mishkin, *supra* note 284, at 1685.

²⁹² See, e.g., Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1362 (2001) [hereinafter Young, *Two Cheers*]; see also Young, *Preemption at Sea*, *supra* note 185, at 313–16 (identifying other institutional factors pressing federal courts to make law); Gasaway & Parrish, *supra* note 4, at 967 (arguing that because the common law is "comprehensive" and "integrated" it must provide answers to all conceivable questions arising between two parties).

²⁹³ Mishkin, *supra* note 284, at 1683; see also Clark, *Separation of Powers*, *supra* note 15, at 1414; Hill, *supra* note 102, at 441 (raising the "rather obvious point" that "even if a particular area is one in which the federal government has power to make independent law, it does not follow that a federal court also has power to do so, for the power of the federal courts does not correspond in all respects with the power of the federal government as a whole").

²⁹⁴ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting Congress's power to act against the states pursuant to Section Five of the Fourteenth Amendment by restricting Congress's ability to second-guess the Court's interpretation of constitutional rights); *Solid Waste Auth. of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (refusing to defer to an agency rule that pressed the outer limits of Congress's commerce power).

²⁹⁵ See Henry P. Monaghan, *Hart and Wechsler's the Federal Courts and the Federal System*, 87 HARV. L. REV. 889, 892 (1974) (book review) ("*Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the jurisdictional statute provides."). In this essay, I will generally use the labels "judicial federalism," "separation of powers," and "Legal Process" interchangeably to describe what I view to be the best account of *Erie*'s constitutional rationale.

²⁹⁶ On the Legal Process school, see generally Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964–67 (1994); William N. Eskridge, Jr. & Philip P. Frickley, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M.

Wechsler casebook, portrayed federal law as broad in its potential scope but interstitial in its actual manifestation:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It 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.²⁹⁷

As the current editors of *Hart & Wechsler* note, “the expansion of federal legislation and administrative regulation . . . has accelerated,” so “at present federal law appears to be more primary than interstitial in numerous areas.”²⁹⁸ Nonetheless, they suggest—I think correctly—that “the First Edition’s thesis [remains] accurate over an extremely broad range of applications.”²⁹⁹

Erie’s constitutional holding—that federal judicial lawmaking authority is not coextensive with Congress’s, and that in fact federal courts generally lack common lawmaking powers—fits comfortably within this framework. Indeed, I argue in Part IV that *Erie* is the paradigm case of contemporary federalism doctrine. What is “reserved” to the States, on the Legal Process view, is regulatory authority over matters upon which Congress has been unwilling or unable to legislate.³⁰⁰ In that sense, the late nineteenth century expansion of the *Swift* doctrine had indeed “invaded rights . . . reserved by the Constitution to the several States”³⁰¹—in particular, the right to govern matters not preempted by federal legislation. Similarly, Justice Brandeis’s statement that “Congress has no power to declare substantive rules of common law applicable in a State” is best read as a somewhat inart-

SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li-cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 205–99 (1995).

²⁹⁷ HART & WECHSLER, *supra* note 66, at 459 (quoting the first edition, published in 1953); *see also* Wallis v. Pan Am. Petrol. Corp., 384 U.S. 63, 68 (1966) (citing and endorsing this view); Hart, *supra* note 10, at 525–35 (developing the casebook’s view); MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 80–86 (1966) (adopting the interstitial view); Hill, *supra* note 102, at 442 (“[T]here are vast reaches within the scope of the commerce power which have always been deemed to be subject to the sovereign power of the states until pre-empted for the federal prerogative by action of Congress Until such pre-emption takes place the federal courts have always understood that the law of the states furnishes the rule of decision.”).

²⁹⁸ HART & WECHSLER, *supra* note 66, at 459–60.

²⁹⁹ *Id.*

³⁰⁰ *See, e.g.*, Hart, *supra* note 10, at 526.

³⁰¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938).

ful way of saying that Congress may not confer a general common lawmaking power on the federal courts.³⁰² Congress can declare only *statute* law, made through the Article I lawmaking process. As Professor Clark has explained,

Erie's constitutional holding is best understood as an attempt to enforce federal lawmaking procedures and the political safeguards of federalism they incorporate. In other words, *Erie* reflects the idea that the Constitution not only limits the powers granted to the federal government, but also constrains the manner in which the federal government may exercise those powers to displace state law.³⁰³

The Legal Process vision of federal law as interstitial has several important implications for federalism doctrine. The primary limits on federal authority, on this view, arise from the political representation of the states in Congress and the procedural difficulty of making federal law. Herbert Wechsler, a key expositor of the Legal Process approach, emphasized the former in his work on the “political safeguards of federalism,”³⁰⁴ and the Supreme Court adopted that notion—for some purposes, at least—in the *Garcia* case.³⁰⁵ Brad Clark’s more recent work has emphasized the latter,

³⁰² This view finds considerable support in the Framers’ considered decision *not* to include a general reception of the common law in the federal constitution. See Jay, *Part Two*, *supra* note 91, at 1312; compare *id.*, with *infra* note 513 (discussing state provisions receiving the common law).

³⁰³ Clark, *Separation of Powers*, *supra* note 15, at 1414; see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 15–19 (1985) [hereinafter Merrill, *Common Law*]. Ed Purcell has argued that the judicial federalism aspect of *Erie* was merely prudential—not constitutional—in nature. See PURCELL, *supra* note 9, at 173. I have argued against that reading in Young, *CIL*, *supra* note 84, at 410–13.

³⁰⁴ Wechsler, *supra* note 290; see also JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING (2009) (exploring the operation of political safeguards in practice).

³⁰⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, (1985). The *Garcia*/Wechsler “political safeguards” argument has been controversial. Compare, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1982) (arguing that the Supreme Court should abandon judicial review of federalism issues and rely entirely on political safeguards); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (criticizing Wechsler’s original account but arguing that alternative mechanisms, especially political parties, provide important protection for states), with Saikrishna B. Prakash & John Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEXAS L. REV. 1459 (2001) (criticizing old and new versions of the political safeguards theory); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 106–33 (2001) (same). My own view is that while the states’ representation in Congress does not provide sufficient protection for states to *substitute* for judicial review, it is a significant check on national power and judicial review should be geared to maximize the effect of political and procedural checks. See, e.g., Young, *Two Cheers*, *supra* note 292, at 1365–66; Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 65–91, 123–29 (2004) [hereinafter Young, *Two Federalisms*]. As I discuss in Part IV, the *Erie* doctrine fits well with that approach.

more procedural checks.³⁰⁶ Both political and procedural limits on federal authority militate in favor of judicial doctrines that channel federal lawmaking to Congress, rather than administrative agencies and federal courts. Agencies and courts, after all, lack built-in state representation and can make federal law considerably more easily than Congress can.³⁰⁷ The political/procedural perspective likewise favors doctrines that raise the salience and political costs of measures that encroach on state authority, such as the presumption against preemption and the various clear statement rules.³⁰⁸

To be sure, the notion that Congress must always make federal law is often honored in the breach. In particular, Congress has delegated—and the courts have *allowed* it to delegate³⁰⁹—broad lawmaking authority to administrative agencies.³¹⁰ One might contend that Congress has likewise delegated broad lawmaking powers to the federal courts, either in the statutory grant of diversity jurisdiction or (if one buys the Sherry/Ritz reading discussed earlier³¹¹) in the Rules of Decision Act itself. Against such a reading, Aaron Nielson has argued *Erie* should be read to rest on the nondelegation doctrine.³¹² “In light of the broad, unchanneled power exercised by federal courts under *Swift v. Tyson*’s interpretation of the Rules of Decision Act,” he insists, “*Erie* . . . can and should be understood as a nondelegation case.”³¹³

The nondelegation reading of *Erie* is best read to make two distinct claims: Congress *can’t* delegate a general lawmaking power to the federal

³⁰⁶ See, e.g., Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681 (2008) [hereinafter Clark, *Procedural Safeguards*]; Young, *Two Cheers*, *supra* note 292, at 1361–64.

³⁰⁷ See Clark, *Separation of Powers*, *supra* note 15, at 1433; Young, *Executive Preemption*, *supra* note 7, at 878.

³⁰⁸ See generally Young, *Ordinary Diet*, *supra* note 289, at 265; Matthew Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008).

³⁰⁹ See, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474–75 (2001) (rejecting a nondelegation challenge to a provision of the Clean Air Act and observing that “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law’”) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

³¹⁰ See, e.g., *INS v. Chadha*, 462 U.S. 919, 985–86 (White, J., dissenting) (“For some time, the sheer amount of law . . . made by the [administrative] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”). Delegation is not an entirely new phenomenon. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 411 (2008) (“From the early days of the Republic, Congress voluntarily has . . . ‘delegated’ . . . substantial lawmaking powers to members of both the executive and judicial branches.”). It is undeniable, however, that the volume and scope of delegations has vastly increased since the advent of the modern regulatory state in the mid-twentieth century.

³¹¹ See *supra* Part II.A.3.

³¹² Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239 (2011).

³¹³ *Id.* at 241–42.

courts, and in any event Congress *hasn't* delegated such a power. One obvious rejoinder to the first claim is that the nondelegation doctrine is dead; the Supreme Court has not struck down a federal statute on nondelegation grounds since 1935.³¹⁴ But although the Court has proven extremely reluctant to draw firm lines fixing the outer limits of permissible delegations, it has always treated the underlying constitutional principle as sound.³¹⁵ As my colleague Margaret Lemos has observed, “the basic notion that the Constitution imposes some restrictions on Congress’s ability to delegate law-making authority is deeply entrenched in constitutional law and widely accepted in constitutional commentary.”³¹⁶

Moreover, “the constitutional principles underlying the [nondelegation] doctrine apply with full force to delegations to courts.”³¹⁷ In fact, they ought to apply with *greater* force. Federal courts lack even the minimal democratic accountability of executive agencies, and the usual legislative checks on agency action—such as oversight hearings, funding control, and judicial review for compliance with statutory mandates—are attenuated or absent when Congress delegates to courts.³¹⁸ Moreover, as Professor Neilson points out, one of the Court’s earliest nondelegation cases concerned a judicial delegation.³¹⁹ In *Wayman v. Southard*,³²⁰ the Court upheld the Process Act, which required federal courts to apply state procedural rules in common law actions but authorized them to make “such alterations and

³¹⁴ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down a provision of the National Industrial Recovery Act (NIRA) on nondelegation grounds); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down a different NIRA provision on similar grounds). As Cass Sunstein puts it, “the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).” Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) (lamenting the “virtually complete abandonment of the nondelegation principle”).

³¹⁵ See, e.g., *Whitman v. Am. Trucking Assn’s, Inc.*, 531 U.S. 457, 472 (2001) (reaffirming that “when Congress confers decisionmaking authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform’”) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *Loving v. United States*, 517 U.S. 748 (1996) (rejecting—but taking seriously—a nondelegation challenge to aspects of the military capital punishment scheme); see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1408 (2000) (suggesting that the Court’s decision in *Clinton v. City of New York*, 524 U.S. 417 (1998), actually relied on a nondelegation rationale).

³¹⁶ Lemos, *supra* note 310, at 413; see also Nielson, *supra* note 312, at 263; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?* 98 MICH. L. REV. 303, 311 (1999) (contending that “the doctrine is properly held in reserve for extreme cases—that it serves as a genuine, but judicially underenforced, constitutional norm—and that it operates as a legitimate tool of statutory construction”).

³¹⁷ Lemos, *supra* note 310, at 405.

³¹⁸ See Nielson, *supra* note 312, at 266–98; Lemos, *supra* note 310, at 409; Young, *Federal Common Law*, *supra* note 8, at 1667; Merrill, *Common Law*, *supra* note 303, at 21–22.

³¹⁹ See Nielson, *supra* note 312, at 270.

³²⁰ 23 U.S. (10 Wheat.) 1 (1825).

additions as the said courts . . . shall in their discretion seem expedient.”³²¹ But Chief Justice Marshall firmly observed that “[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”³²²

A general delegation of federal common lawmaking power—even if confined to diversity cases—would fail any conceivable notion of nondelegation.³²³ Unlike Professor Nielson, I do not think a delegation of authority to apply the general *commercial* law construed in *Swift v. Tyson* would necessarily have been unconstitutional. That law, after all, was relatively narrow in scope and, more importantly, its principles were dictated by the customary practices of merchants,³²⁴ directing the courts to follow those practices in order to vindicate party expectations would provide an intelligible principle to guide and cabin judicial discretion. But as I have already discussed, the general common law had overflowed the banks of *Swift* by the end of the nineteenth century, becoming both far broader in scope and far more normative in character.³²⁵ No intelligible principle specified by Congress limited judicial discretion in general law cases by the time the Court sat to decide *Erie*.

Even if Congress *could* delegate such broad authority, moreover, it plainly has not done so.³²⁶ I have already explained why the Rules of Decision Act cannot be read as such a delegation, and that forecloses any such reading of the diversity statute as well; after all, why would the Rules of Decision Act prescribe state law in diversity cases if Congress intended to delegate federal common lawmaking power in those cases?³²⁷ Contemporary nondelegation jurisprudence adds considerable force to this conclusion. Although the Court has not struck down a delegation as unconstitutional in nearly eighty years, it not infrequently invokes delegation concerns in the context of statutory construction.³²⁸ Given this strong presumption against

³²¹ Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792). The act also authorized the Supreme Court to make “such regulations as [it] shall think proper from time to time by rule to prescribe to any circuit or district court.” *Id.*

³²² 23 U.S. (10 Wheat.) at 42–43.

³²³ See Nielson, *supra* note 312, at 275–76.

³²⁴ See *supra* notes 73–89 and accompanying text.

³²⁵ See *supra* notes 253–60 and accompanying text.

³²⁶ See Ely, *supra* note 1, at 707 n.77 (“Congress has made clear its disinclination to delegate anything remotely resembling the entirety of its constitutional power to federal courts.”).

³²⁷ Professor Ritz argued that the Rules of Decision Act simply had nothing to do with diversity jurisdiction. See RITZ, *supra* note 124, at 163. The more common argument is that the Act applies *only* to diversity. See, e.g., Strauss, *supra* note 275, at 1573. But that’s not what the Act says either.

³²⁸ See, e.g., *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 341–43 (1974); Sunstein, *Nondelegation Canons*, *supra* note 314, at 322. It is probably fair to say that the modern nondelegation doctrine is enforced *entirely* through statutory construction—particularly through clear statement rules that disfavor broad delegations and delegations of authority to tread upon constitutional rights. See Bressman, *supra* note 315, at 1409 (“The Court has used clear-statement rules and the canon of avoidance as

inferring broad statutory delegations from ambiguous text—not to mention the breadth of the delegation that would have to be inferred—neither the Rules of Decision Act nor the diversity statute should be construed as authorizing federal courts to make federal common law.³²⁹

I want to stress that both of these judicial federalism arguments—that Congress *couldn't* delegate sufficiently broad common lawmaking authority to support judicial practice in the latter days of the *Swift* era, and that it *hasn't* delegated such authority—are *constitutional* arguments. As Paul Mishkin explained,

It makes no difference . . . whether the core of *Erie* be 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.³³⁰

surrogates for the nondelegation doctrine.”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1603–06 (2000) (arguing that clear statement rules supply the best method of enforcing certain constitutional values and that nondelegation is an example).

³²⁹ In *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981), the Court read *Erie* as making clear that “[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.” Two frequently cited exceptions to this principle involve interstate disputes and admiralty cases. See HART & WECHSLER, *supra* note 66, at 653–54 (noting these exceptions but suggesting that “lawmaking authority in these areas rests on factors other than a jurisdictional grant”). Commentators have said that the federal courts’ federal common lawmaking authority in interstate disputes “springs of necessity from the structure of the Constitution.” Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975) [hereinafter Monaghan, *Constitutional Common Law*]; see also Clark, *Federal Common Law*, *supra* note 147, 1322–31 (grounding federal courts’ authority in the structural principle that states enter the Union on an “equal footing”). And I have argued elsewhere that the admiralty statute similarly cannot be read as a broad delegation of federal common lawmaking authority. See Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 485–507 (2004) [hereinafter Young, *Just Water*]. The only other prominent example of judicial lawmaking authority implied from a jurisdictional grant is the *Lincoln Mills* case, which inferred such authority from a bare grant of jurisdiction to resolve collective bargaining disputes under the Labor Management Relations Act (LMRA). See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The majority opinion in that case, however, relied heavily on evidence that Congress intended the grant in the LMRA to be *more* than a bare jurisdictional grant and instead to embody a specific policy of enforcing arbitration agreements. *Id.* at 450–56; see also HART & WECHSLER, *supra* note 66, at 664 (suggesting that “federal common lawmaking in *Lincoln Mills* [is] best viewed as rooted in the need to carry out the substantive policies of the federal labor laws rather than as an implication from the jurisdictional grant”); Young, *Just Water*, *supra*, at 496–98 (identifying other problems with *Lincoln Mills* as a template for congressional delegations of lawmaking authority).

³³⁰ Mishkin, *supra* note 284, at 1686; see also *id.* (“It is true in fact that Congress generally does not ignore such principles; in any event, it is sound policy not to take constitutional principles as likely undercut by Congress (even if it should have ultimate power to do so) when Congress has not squarely and unmistakably taken the decision to do so.”); Field, *Sources of Law*, *supra* note 55, at 920 (stating

Our Constitution leaves much to be worked out by statute, practice, and convention, and the result is that much of our government structure is “constituted” by law that is not constitutionally entrenched.³³¹ Both sorts of law, moreover, serve fundamental constitutional values of federalism and separation of powers.³³² This is particularly true of the nondelegation principle. In modern administrative law, the relatively strict judicial enforcement of statutory boundaries to delegated authority has largely come to stand in for judicial enforcement of limits on excessive delegation grounded in Article I.³³³ Given that evolution, Congress’s decision not to delegate broad federal common lawmaking authority to the federal courts has constitutional significance; it means, after all, that it would be *unconstitutional* for the courts to assert such unbounded authority on their own.³³⁴

Our experience under *Erie* confirms that the manner of federal lawmaking makes a practical difference. Professor Mishkin noted, for example, that “central judicially appointed committees . . . proposed Federal Rules of Evidence broadly abrogating state laws on privilege, and . . . these passed through the Supreme Court, to be intercepted only in the Congress.”³³⁵ He concluded that “this weighting of state interests in the Congress, more significantly than in the Court (or judicial appointees), was a fulfillment of the institutional structure established in the Constitution.”³³⁶

The most important implication of this judicial federalism reading of *Erie* is that federal common law is always constitutionally problematic.³³⁷

that even if *Erie* did not rest on strictly constitutional grounds, “the scheme we have inherited from *Erie* and developed since has become such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it, so that *Erie*, together with *Murdock v. Memphis*, has “created our current view of what ‘state law’ is”).

³³¹ See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

³³² See Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CAL. L. REV. 1371, 1384–85 (2010).

³³³ See, e.g., CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990) (“Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”); Farina, *supra* note 217, at 597–98.

³³⁴ Cf. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding the Bush Administration’s use of military commissions to try suspected terrorists unconstitutional because it was not authorized by Congress).

³³⁵ Mishkin, *supra* note 284, at 1685.

³³⁶ *Id.*

³³⁷ Craig Green asserts that “Brandeis’s conclusion, ‘[t]here is no federal general common law’ . . . had nothing to do with separation of powers or new-myth aversion to federal common law.” Green, *Repressing*, *supra* note 5, at 616. But this, like much of Professor Green’s argument, is badly overstated. It is true that “[f]ederal general common law” is different from ‘federal common law,’” *id.*, in the sense that the former would be a subset of the latter. But *Erie*’s statement—that except for cases governed by statutes and constitutional provisions state law applies—pertains to both. It means that judicial lawmaking must be tied to constitutional meaning or Congress’s intent, as Judge Friendly—

“Problematic” is not the same thing as “unconstitutional”; as Judge Friendly famously pointed out, *Erie* cleared the way for legitimate forms of federal common law.³³⁸ But federal judge-made law always requires special justification under *Erie*.³³⁹ It must be tied to the specific forms of federal law that *Erie* mentioned—federal statutes or constitutional provisions, and we might reasonably add treaties in respect of the Supremacy Clause’s clear command. If a federal common law rule cannot be connected to some source in federal positive law, then it is unconstitutional.³⁴⁰ And it is no answer to say that Congress can override federal common law rules if it likes. Our federalism protects state authority in large part through placing burdens of overcoming inertia on federal actors, which ordinarily may act with the force of supreme federal law only when those burdens have been overcome.³⁴¹

Like everything else about *Erie*, however, this Legal Process understanding of the case has come under widespread attack. I consider various objections in the next section.

C. *Objections*

This section considers four distinct objections to the judicial federalism understanding of *Erie*. First, a number of commentators—most importantly, Ed Purcell in his wonderful book on *Erie*—have argued that the Legal Process writers reinterpreted *Erie* unfaithfully to Justice Brandeis’s “original understanding” of the case. Second, Susan Bandes and other critics of the Legal Process school have argued that its assumptions are outdated and overly formalistic. Third, Suzanna Sherry and Louise Weinberg have both made a narrower argument that any reading of *Erie* based on separation of powers must fail because the founding generation assumed that legislative and judicial powers are coextensive. And finally, Michael Greve has argued that the judicial federalism argument proves too much because it would require us to reject other forms of nonlegislative federal lawmaking that are pervasive in the modern administrative state. None of

upon whom Green relies—acknowledged. See Friendly, *supra* note 57, at 407. Calling the separation of powers argument against federal common law “wordplay” and a “mistake,” as Green does, Green, *Repressing*, *supra* note 5, at 617, is not an argument.

³³⁸ Friendly, *supra* note 57, at 405.

³³⁹ See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (“Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.”); Merrill, *Common Law*, *supra* note 303, at 3 (arguing that federal common law is legitimate only where it arises from textual interpretation of federal enactments, congressional delegation, or preemptive federal interests).

³⁴⁰ See, e.g., Young, *Federal Common Law*, *supra* note 8, at 1663–65.

³⁴¹ See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983); see also Mishkin, *supra* note 284, at 1687–88 (warning against reliance on congressional inaction).

these objections, in my view, makes much of a dent in *Erie*'s constitutional argument.

1. *Erie*'s Original Meaning

Erie's critics have generally acknowledged that the most plausible constitutional rationale incorporates not only federalism but also separation of powers.³⁴² They often insist, however, that this rationale “finds no support in the decision itself.”³⁴³ It's not clear what turns on this insistence; if *Erie*'s principle can be shown to rest on firm constitutional ground, the critical enterprise would amount to little more than correcting Brandeis's opinion.³⁴⁴ In any event, these “originalist” critiques of *Erie*'s separation of powers rationale misconstrue both the opinion and its author.

The “originalist” case against a separation of powers reading for *Erie* has both a textualist and an intentionalist strain. For the textualists, Craig Green insists that “*Erie*'s new myth [the separation of powers reading] lacks support in Brandeis's opinion. Indeed, the Court's words fail to identify any separation-of-powers issue at all.”³⁴⁵ But this assertion is wrong. Justice Brandeis's initial statement—“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State”³⁴⁶—echoes the Supremacy Clause's command that only “[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof” are “the supreme law of the land.”³⁴⁷ More

³⁴² See, e.g., GREVE, *supra* note 4, at 375 (“The most promising defense of *Erie* is some combination of separation of powers and federalism arguments.”); Rutherglen, *supra* note 127, at 288 (observing that the judicial federalism argument “is the best current account of *Erie* as a fundamental principle of federalism”). This is the dominant interpretation among *Erie*'s supporters. See, e.g., Clark, *Erie's Source*, *supra* note 90; Merrill, *Common Law*, *supra* note 303, at 15–19; Mishkin, *supra* note 284, at 1683; J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1689 (2004).

³⁴³ Sherry, *Wrong*, *supra* note 6, at 145; see also GREVE, *supra* note 4, at 228 (asserting that the judicial federalism reading “is hard to square with Brandeis's opinion”); Green, *Twin Aims*, *supra* note 18, at 1878 (calling the judicial federalism reading a “new *Erie*”).

³⁴⁴ Cf. Bandes, *supra* note 237, at 844 (questioning the “occasional tendency to portray *Erie* as belonging to Brandeis, and thus to portray those who deviated from Brandeis's vision—whether on the Court or on future Courts interpreting it—as betraying the true *Erie*”).

³⁴⁵ Green, *Repressing*, *supra* note 5, at 617.

³⁴⁶ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

³⁴⁷ U.S. CONST. art. VI, cl. 2. Of course, the Supremacy Clause also includes in this list “all treaties made, or which shall be made, under the authority of the United States.” *Id.* International law scholars have long suggested that the Court never meant to apply *Erie* to foreign relations matters. See, e.g., Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) (“Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum.”); see also Koh, *supra* note 276, at 1832–38 (endorsing Professor Jessup's view). I have argued against this suggestion at length elsewhere. See Young, *CIL*, *supra* note 84, at 404–34. The contemporary Court has made clear that *Erie* remains relevant in foreign relations cases even while disagreeing as to its precise import. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726–27 (2004) (hold-

than any other provision, the Supremacy Clause ties separation of powers and federalism together: only laws made according to the rigorous lawmaking procedures specified in the Constitution have the authority to oust the presumptive authority of the states. Brandeis built his opinion around that principle.³⁴⁸

Although Justice Brandeis's opinion did not anticipate the analytic terms of contemporary process federalism, his constitutional analysis put the focus squarely where that theory suggests it belongs: on the way that supreme federal law is made. "[N]o clause in the Constitution," he wrote, "purports to confer such a power [to declare substantive rules of common

ing that, in light of *Erie*, federal courts should recognize an implied right of action to enforce customary international law only in relatively narrow circumstances); *id.* at 740–43 (Scalia, J., concurring in part and in the judgment) (arguing that *Erie* forbids recognition of *any* implied right to enforce customary international law); see generally Bradley, Goldsmith & Moore, *supra* note 16 (discussing *Erie*'s continuing importance to foreign relations cases).

³⁴⁸ See, e.g., Monaghan, *Constitutional Common Law*, *supra* note 329, 11–12 ("[*Erie*] recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law."). Professor Green acknowledges that this key language—"Erie's statement that, '[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the States'"—is about separation of powers. Green, *Repressing*, *supra* note 5, at 617 (quoting *Erie*, 304 U.S. at 78). "By [its] terms," Green admits, "this language does support new-myth limits on federal courts' lawmaking authority." *Id.* He does not agree with Justice Brandeis's conclusion on this point, arguing that "if the sentence were accurate, it would bar federal common law altogether—and therein lies its error." *Id.* But that is quite different from asserting that the opinion fails to deal with separation of powers altogether.

In any event, Professor Green is wrong to characterize the quoted language from *Erie* as wholly foreclosing federal common law. If Green were right, then Judge Friendly would have badly misread Justice Brandeis's opinion when he said it opened the way for a "new federal common law." Friendly, *supra* note 57, at 405. Brandeis said that state law applies "[e]xcept in matters governed by the Federal Constitution or by acts of Congress," *Erie*, 304 U.S. at 78, and a great deal of federal common law arises because a matter is "governed . . . by acts of Congress" but Congress has not filled in the details. See, e.g., Merrill, *Common Law*, *supra* note 303, at 40–46 (discussing "delegated" federal common lawmaking). Even Professor Merrill's somewhat more tenuous category of "preemptive" federal common lawmaking, see *id.* at 36–40, is probably best justified on the theory that it arises in areas "governed by the Federal Constitution or by acts of Congress." See Young, *Federal Common Law*, *supra* note 8, at 1660–65; see also Rutherglen, *supra* note 127, at 294 ("The defining characteristic of federal common law as it exists today is that it is based upon federal statutes or the Constitution without being plainly determined by them."). As Professor Purcell explains, Brandeis took precisely this approach in justifying a federal common law of interstate disputes in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), which he decided on the same day as *Erie*. See PURCELL, *supra* note 9, at 188. Hence, much of the federal common law that does exist can be squared with a judicial federalism reading of *Erie*, although different commentators may disagree about particular areas. See, e.g., Young, *Preemption at Sea*, *supra* note 185, at 336–37 (arguing that much federal maritime law is unconstitutional because it cannot be tied to statutes). It is thus unfair to read Brandeis as taking a more categorical position in order to undermine *Erie*'s plausibility. Significantly, Green barely engages the extensive literature on federal common law.

law applicable in a State’] upon the federal courts.”³⁴⁹ I have already argued, moreover, that Justice Brandeis’s Legal Positivist argument—which makes up the bulk of the Court’s constitutional analysis—is also directed to the issue of lawmaking authority. Brandeis needed to deflate the notion that *Swift* entailed the mere application by federal courts of a “transcendental body of law outside of any particular State,”³⁵⁰ rather than lawmaking. If *Swift* required federal lawmaking and depended on a federal sovereign source, it could stand only if it were somehow reconcilable with the institutional mechanisms for supplanting state law specified in the Constitution.³⁵¹

There is also an “intentionalist” strand to the argument that a judicial federalism reading misconstrues *Erie*. For Edward Purcell, “*Erie* was a constitutional statement of the political ideals of early twentieth-century Progressivism.”³⁵² He explains that

Brandeis’s constitutional theory was not based on any particular limitation on congressional power, nor was it based on a commitment to decentralization as such. Rather, it was grounded on two related principles. The first, which Brandeis regarded as inherent in the constitutional structure, was that legislative and judicial powers were coextensive. The second, which he regarded as a prudential but nevertheless essential corollary, was that federal judicial power was also limited to those areas—not involving constitutional rights—where Congress had chosen to act. Absent compelling reason, the federal courts should not make law even in areas within the national legislative power unless and until Congress made the initial decision to assert national authority in that area.³⁵³

This view hardly denies that *Erie* was about separation of powers—in fact, Purcell argues that *Erie* “rested not on the distinction between local and national authority but, rather, on the relationship between federal judicial and legislative power.”³⁵⁴ And Purcell’s second principle precisely duplicates the judicial federalism interpretation of *Erie*. The only difference is that Purcell interprets this “essential corollary” as “prudential” rather than constitutional in nature.

It is unclear how much that distinction between prudential and constitutional separation of powers matters.³⁵⁵ The ordinary import of the distinction in other doctrinal areas is that Congress may override prudential rules

³⁴⁹ *Erie*, 304 U.S. at 78; see also LOW, JEFFRIES & BRADLEY, *supra* note 129, at 13 (“This language suggests that *Erie* is based, at least in part, on separation of powers.”).

³⁵⁰ *Id.* at 79 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

³⁵¹ See, e.g., BRIDWELL & WHITTEN, *supra* note 63, at 11 (“[I]n a federal system in which both national and local judges believe that their legitimate function is to ‘make’ law in a legislative sense, sources of sovereign authority become critical.”).

³⁵² PURCELL, *supra* note 9, at 172.

³⁵³ *Id.*

³⁵⁴ *Id.* at 165.

³⁵⁵ See *supra* notes 330–34 and accompanying text (suggesting that it matters little whether the rule of *Erie* is constitutionally entrenched).

but not constitutional ones.³⁵⁶ But where the rule in question is itself one that judicial authority to displace state law depends on action by Congress, it matters considerably less whether we call that rule constitutional or not. In any event, one searches the *Erie* opinion in vain for language indicating that its restriction on judicial power is prudential. Even Professor Purcell describes the separation of powers aspect of Brandeis's opinion as "essential" and "critical,"³⁵⁷ and the reasons he gives for that conclusion strongly suggest that the principle is in fact constitutional.³⁵⁸ Purcell notes that Brandeis believed in a fundamental principle of "legislative primacy," such that "congressional abstention in any area within its authority represented a political judgment by the representative branch that states should exercise control in that area, and courts should defer to that judgment."³⁵⁹ This principle fits comfortably with accounts of *Erie* grounded in constitutional principles of judicial federalism—that is, that *Erie* "enforce[d] federal law-making procedures and the political safeguards of federalism they incorporate."³⁶⁰

Professor Purcell also voices a broader criticism of the judicial federalism rationale when he says that *Erie* "was not designed primarily to protect 'federalism' or special enclaves of state law. Rather, its more vital concern lay in broader ideas about judicial lawmaking and separation of powers."³⁶¹ This is a problem, however, only if we assume—as many of *Erie*'s critics do³⁶²—that federalism and separation of powers have little to do with one another. Not only does Purcell equate "federalism" generally with the specific dual federalist model of "special enclaves of state law," but he also seems to think that "broader ideas about judicial lawmaking and separation of powers" is a wholly separate rationale from concerns about federalism.³⁶³ But these concerns have been linked from the beginning. The Con-

³⁵⁶ See, e.g., HART & WECHSLER, *supra* note 66, at 128 (discussing the difference between constitutional and prudential standing doctrines).

³⁵⁷ PURCELL, *supra* note 9, at 172–73.

³⁵⁸ I have canvassed them in detail in Young, *CIL*, *supra* note 84, at 412–14.

³⁵⁹ PURCELL, *supra* note 9, at 173–74.

³⁶⁰ Clark, *Separation of Powers*, *supra* note 15, at 1414.

³⁶¹ PURCELL, *supra* note 9, at 3.

³⁶² See, e.g., Green, *Repressing*, *supra* note 5, at 615 (contrasting "*Erie*'s old myth as a 'cornerstone[] of our federalism'" with a "new myth" that "focus[es] on separation of powers") (quoting Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring)).

³⁶³ In related areas, commentators have well understood the close relationship between federalism and separation of powers. The Court's much more recent decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), for example, struck down the Religious Freedom Restoration Act as beyond the scope of Congress's power to enforce the Reconstruction amendments. As many have pointed out, the federalism issue in that case—the scope of Congress's enumerated power to supplant state law—was intimately bound up with separation of powers concerns about the respective role of Congress and the Court in interpreting the Fourteenth Amendment. See, e.g., Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997). Just as it makes no sense to

stitution protects federalism primarily by limiting federal lawmaking.³⁶⁴ And Madison tied federalism and separation of powers together in Federalist 51 as part of the Constitution's "double security" for the rights of its citizens.³⁶⁵ Brandeis broke no new ground by intertwining these concerns in *Erie*.³⁶⁶

Professors Bridwell and Whitten suggest that the separation of powers concern was not unknown prior to *Erie*.³⁶⁷ Rather, two factors allowed federal courts to apply the general law under *Swift* without intruding on legislative prerogatives. First, in cases under the general law merchant or the maritime law, "the preexistence of a system of relatively certain customary or common law . . . provid[ed] a background against which to judge party behavior, and which the federal courts might utilize to avoid the conclusion that they were 'making' law in a legislative sense."³⁶⁸ Second, the "purposes of the jurisdictional grant" also, in some situations, required federal courts to exercise judgment independent of the state courts about the meaning of this preexisting law. In diversity cases, most importantly, "protection of the noncitizen required the federal court to exercise a relative degree of independence."³⁶⁹ Even in the nineteenth century, then, American lawyers recognized that the potential for congressional lawmaking on a particular subject did not necessarily imply a similar capacity in the courts.

It is no doubt true, as Professor Purcell contends, that subsequent interpreters—including subsequent courts as well as Legal Process thinkers

claim that *Boerne* was a federalism decision rather than one about separation of powers, so too with *Erie*.

³⁶⁴ See generally Clark, *Separation of Powers*, *supra* note 15; Young, *Two Cheers*, *supra* note 292, at 1352.

³⁶⁵ FEDERALIST No. 51, at 351 (James Madison) (Jacob E. Cook ed., Wesleyan University Press 1961); see also HART & WECHSLER, *supra* note 66, at 611 (noting Madison's combined use of federalism and separation of powers arguments in opposing the Alien and Sedition Acts).

³⁶⁶ See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77–78 (1873) (eschewing broad judicial recognition of unenumerated rights under the Fourteenth Amendment, based in part on concerns that such construction would expand the legislative powers of Congress vis-à-vis the states). Martha Field's suggestion that "federal common law poses a more serious threat to federalism than it does to separation of powers" rests on a similar assumption, although it points in the opposite direction by suggesting that separation of powers principles should not limit judicial lawmaking. See Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 305 (1992).

³⁶⁷ See BRIDWELL & WHITTEN, *supra* note 63, at 29–31.

³⁶⁸ *Id.* at 30.

³⁶⁹ *Id.* These factors help to explain one of the great puzzles in the history of federal common law—that is, why the federal courts refused from an early date to entertain common law *criminal* prosecutions, while exercising a robust general law decision-making power in civil commercial cases. Compare, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (rejecting federal common law crimes), with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (applying general law to civil commercial dispute). Neither of these factors applied so readily in the criminal context, and although there was some preexisting law on common law crimes, criminal law involved an inevitably sovereign exercise of power. See BRIDWELL & WHITTEN, *supra* note 63, at 47.

like Henry Hart and Paul Mishkin—altered *Erie*'s meaning in ways that departed from Justice Brandeis's specific early-twentieth-century Progressive vision.³⁷⁰ But, as Purcell recognizes, that is inevitable in a judicial system that proceeds by common law elaboration of relatively open-ended constitutional and statutory texts.³⁷¹ If our understanding of *Erie*—and in particular, its notion of judicial federalism—has evolved over time, that is part of the genius of our system of precedent. But what is remarkable, given the chorus of criticism, is how much support the judicial federalism reading finds in *Erie*'s text, the extent to which the separation of powers concerns undergirding that reading predated *Erie* itself, and the ability of *Erie*'s principles to cohere with the contemporary structure of constitutional doctrine.

2. *Erie* and the Legal Process School

Rather than attacking the Legal Process scholars' reading of *Erie* as a distortion of Justice Brandeis's intentions, a different line of criticism attacks the Legal Process school head on. In an important review of Professor Purcell's book on *Erie*, Susan Bandes portrayed the Legal Process worldview as hopelessly out of touch with contemporary, pluralistic American legal culture. Professor Bandes is hardly the only contemporary critic of Legal Process thinking; her critique is representative of a broader uneasiness in the Federal Courts field about whether that field's founding jurisprudential paradigm remains viable in our current legal and intellectual environment.³⁷² Given the close relation between *Erie* and Legal Process thinking about federalism, it is worth pausing to consider her arguments.

"In attempting to impart a systemic coherence to the field, and to federalism as its central organizing principle," Professor Bandes writes, "the legal process approach advocated an insularity that sought to exclude a whole host of influences and contingencies—political, cultural, historical, and practical."³⁷³ One pictures a faded black and white photograph of a staid law school faculty lounge taken sometime in the 1950s, featuring a bunch of rumpled old white men in out-of-date suits. Similarly, she asserts that the Legal Process school "mask[ed] the assumptions and value judgments that inevitably shape decisionmaking," and that its emphasis on "abstract norms insulat[ed] those judgments from public debate."³⁷⁴

³⁷⁰ See PURCELL, *supra* note 9, at 247–49.

³⁷¹ See PURCELL, *supra* note 9, at 303.

³⁷² See, e.g., Michael Wells, *Busting the Hart and Wechsler Paradigm*, 11 CONST. COMMENTARY 557 (1995) (arguing that the Legal Process approach to Federal Courts law should be rejected in favor of "pragmatism"); Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994) (lots of angst).

³⁷³ Bandes, *supra* note 237, at 830.

³⁷⁴ *Id.* at 869.

Part of the problem with this line of argument is its heavy reliance on characterizing the Legal Process scholars' views negatively rather than letting those scholars speak for themselves. Professor Bandes does not actually quote Legal Process scholars "advocat[ing] an insularity that sought to exclude a whole host of influences and contingencies."³⁷⁵ It is rare for scholars to actually argue for insularity, and it is unsurprising that she is unable to catch Henry Hart or Herbert Wechsler doing so—in word or even in practical effect. It is equally hard to find Legal Process scholars actually arguing for "an abstract and timeless logic of federalism."³⁷⁶ Bandes would do better to focus on the positions that the Legal Process school actually took.³⁷⁷

Professor Bandes's rather tendentious characterization of the Legal Process jurisprudence is at odds with the role those scholars played in the development of American jurisprudence. Any defense—as well as any critique—of the Legal Process school must begin by recognizing that that the label encompasses a variety of strands, emphases, and tendencies. As Neil Duxbury has shown, "[p]rocess jurisprudence was never packaged as a discrete theory"; it lacked a single "grand, initiating text," and it constituted less a theory than "a particular attitude towards law."³⁷⁸ Although process jurisprudence originated more or less at the same time as Legal Realism,³⁷⁹ it remains fair to say that it responded to the Realist critique of law as political and indeterminate. One aspect of that response, which Bandes seems to

³⁷⁵ Instead, Professor Bandes cites articles by two other critics of the Legal Process school. See *id.* at 830 n.4. That actually might suggest a bit of insularity among that school's critics.

³⁷⁶ *Id.* at 832. Professor Bandes offers no citations on this point. And Professor Wechsler's seminal reorienting of federalism theory toward the national political process, although grounded in arguments reaching back to the Federalist papers, was quite different from federalism theory in the nineteenth century. See, e.g., Young, *Puzzling Persistence*, *supra* note 283 (contrasting dual federalism and process federalism). Wechsler certainly did not think that federalism had an "abstract and timeless logic."

³⁷⁷ Professor Bandes's attack on the Legal Process school appears to be motivated primarily by disdain for the Rehnquist Court's "new federalism" decisions—such as *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)—which she sees as replicating the Legal Process school's sins. See Bandes, *supra* note 237, at 869–78. This is not the place for an analysis or defense of those decisions. See, e.g., Young, *Two Federalisms*, *supra* note 305. But it is hard to see how Bandes can derive any "formalist" notion of "an immutable obvious boundary between the truly national and the truly local," Bandes, *supra* note 237, at 873, from what the opinions actually say and do. Tellingly, she relies primarily on characterizations of those opinions by the dissenters. See *id.* at 873 n.238–40.

³⁷⁸ DUXBURY, *supra* note 296, at 206–07. Although Henry Hart's and Albert Sacks's textbook, *The Legal Process*, is often cited as the "classic work" of this school, Professor Duxbury points out that "process-oriented legal thought was already fairly well established in the United States" when that work appeared in the mid-1950s. *Id.* at 207.

³⁷⁹ See *id.* at 205.

emphasize, was a reaffirmation of the primary role of reason in the law.³⁸⁰ But at least the strands of Legal Process thinking that I—and many contemporary Federal Courts scholars—take to be most important was neither as formalist nor as rationalistic as Bandes suggests.³⁸¹ Critically, process reasoning was directed to a functional analysis of the most promising allocation of institutional authority.³⁸²

Process jurisprudence thus did not presuppose a consensus on values in society; rather, it aspired to bridge social cleavages on substantive values by securing widespread agreement on legitimate processes for the resolution of disputes. As Richard Fallon puts it,

In a post-Realist world, legal norms are frequently indeterminate. Moreover, in a demonstrably pluralistic society, we cannot expect consensus about appropriate answers to many urgent questions of substantive justice. But most of us, Hart and Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions. On this assumption rest our hopes for the rule of law.³⁸³

Hence the principle of “institutional settlement,” which lies at the heart of the Legal Process vision.³⁸⁴ Modern, pluralistic society gives rise both to disputes and to differing ideas about how those disputes should come out. Under these conditions, “[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of sion.”³⁸⁵ The principle of institutional settlement reflects the respect that members of the society owe to the outcome of these agreed-upon procedures; as Henry Hart and Albert Sacks put it, institutional settlement “expresses the judgment that decisions which are the duly arrived-at result of

³⁸⁰ See Bandes, *supra* note 237, at 863 (arguing that “Legal process theory attempted to maintain the rule of law despite the unavoidable fact of judicial discretion” by emphasizing “reasoned elaboration” as the key constraint on judicial imposition of values); see also DUXBURY, *supra* note 296, at 205, 225–28.

³⁸¹ Far from slavish devotion to formalism and abstract theory, process jurisprudence emphasized prudence. See, e.g., DUXBURY, *supra* note 296, at 278–86 (describing Alexander Bickel’s contributions to process jurisprudence); Anthony Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (same). Nor was process jurisprudence indifferent to substantive justice. As Professor Duxbury explains, “it [was] Hart and Sacks’s belief that, so long as judges respect the principle of institutional competence, they ought to engage in the reasoned elaboration of principles as actively as possible in order to achieve substantive justice for the parties to any particular dispute.” DUXBURY, *supra* note 296, at 264.

³⁸² See *infra* notes 387–90 and accompanying text.

³⁸³ Fallon, *supra* note 296, at 964.

³⁸⁴ DUXBURY, *supra* note 296, at 255–56.

³⁸⁵ HART & SACKS, *supra* note 296, at 4.

duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.”³⁸⁶

Legal Process thinkers urged that institutional settlement of authority to make decisions should be undertaken based on judgments about comparative institutional competence.³⁸⁷ These judgments were highly functional and often grounded in social science,³⁸⁸ which makes it hard to understand how Professor Bandes can charge process jurisprudence with formalism or insularity. To be sure, the constitutional scheme of federalism and separation of powers was part of this institutional allocation; hence, institutional settlement had to rest in part on the “reasoned elaboration” of constitutional text and principle.³⁸⁹ But consider the notion at the heart of the Legal Process view of *Erie*—that if Congress must legislate in order to make federal law, then inertia and political conflict will maintain a large realm of autonomy for the states. This view is far more functional than formal, and it draws considerably on social science insights about how government actually works.³⁹⁰

When politically progressive scholars like Professor Bandes insist that “federalism” involves a value choice, they generally seem to mean that federalism is going to entrench antiprogressive notions against nationally driven reform.³⁹¹ “Federalism,” Bandes writes, “is a term that serves as an indelible reminder of the dangers of jurisdictional principle deployed as a socially acceptable cover for the insulation of unacceptable substantive ends.”³⁹² But a Legal Process-style emphasis on allocation of legitimate decision-making can also advance progressive causes. Just last term, for example, in *United States v. Windsor*,³⁹³ principles of federalism played a critical role in

³⁸⁶ *Id.*; see also Fallon, *supra* note 296, at 970 (“The Legal Process school, with its principle of institutional settlement and its theories of comparative institutional competences, furnished a theory of law and provided a structure for distinctively legal analysis; it substantially addressed the threat of judicial subjectivity introduced by Legal Realism, but without relying on the metaphysical pretenses that had brought moral and political philosophy into bad repute.”).

³⁸⁷ See HART & SACKS, *supra* note 385, at 158 (taking as central questions, “What is each of these institutions good for? How can it be made to do its job best? How does, and how should, its working dovetail with the working of the others?”).

³⁸⁸ See, e.g., DUXBURY, *supra* note 296, at 208–09, 235, 255.

³⁸⁹ See DUXBURY, *supra* note 296, at 259–60 (discussing reasoned elaboration); Fallon, *supra* note 296, at 966 (same).

³⁹⁰ See, e.g., William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008) (playing out the implications of an interstitial view of federal law with functionalist, social science tools).

³⁹¹ Bandes, *supra* note 237, at 871 (suggesting that the Rehnquist Court’s federalism decisions “have tended to create barriers to federal governmental protection of the rights of individuals”). That is a particularly strange claim to make in the *Erie* context, given the broad consensus that the pre-*Erie* general common law obstructed progressive causes and individual remedies against national corporations.

³⁹² Bandes, *supra* note 237, at 868–69.

³⁹³ 133 S. Ct. 2675 (2013) (striking down the federal Defense of Marriage Act).

protecting individual states' recognition of same-sex marriage from the national government's effort to impose a more socially conservative solution.³⁹⁴ As *Windsor* and other cases have shown, we have little reason to assume that federalism will undermine substantive justice, even from a progressive perspective.³⁹⁵ Federalism protects minorities' rights both to exit from oppressive regimes and to implement their own norms in smaller communities where they may constitute a majority; in this way, it may systematically promote reform.³⁹⁶

Even if the Legal Process scholars did rely on unacknowledged assumptions about the importance of federalism and separation of powers as constitutional values, it hardly follows that those values should be abandoned. They should be defended explicitly. The present article is long enough without also essaying a general defense of federalism and separation of powers values, but the topic is not neglected in the literature.³⁹⁷ Indeed, Professor Bandes is more than content to rely on her own presuppositions; she never undertakes any sort of *argument* why federalism intrinsically tends toward "unacceptable substantive ends." Nor does she articulate how a legal culture that was more oriented toward "substantive justice" would actually operate in a world of pervasive disagreement on what justice entails.

A more on-point criticism of the Legal Process vision of federalism might be that the world of intergovernmental relations has changed to the point that this vision no longer can effectively protect state autonomy. For example, to the extent that federal law is no longer interstitial and federal bureaucracies now dominate the regulatory landscape, the judicial federal-

³⁹⁴ See generally Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012–2013 CATO SUP. CT. REV. 117 (2013).

³⁹⁵ See also *Wyeth v. Levine*, 555 U.S. 555 (2009) (upholding individual tort claim against a pharmaceutical company against a federal preemption defense); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (rejecting federal preemption of Oregon's law legalizing physician-assisted suicide); *Gonzales v. Raich*, 545 U.S. 1 (2005) (rejecting federalism-based argument that would have invalidated federal prohibition on individuals' use of medicinal marijuana). If one were inclined to be snarky, one might even cite *United States v. Lopez*, 514 U.S. 549 (1996), which vindicated the claim of an individual criminal defendant. See generally Baker & Young, *supra* note 305, at 152–153 (contesting the view that federalism is inherently anti-progressive).

³⁹⁶ See, e.g., Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37, 37–38 (2012), available at <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=1>; Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, NOMOS LV: FEDERALISM AND SUBSIDIARITY (forthcoming 2013); Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, U. COLO. L. REV. (forthcoming Spring 2014).

³⁹⁷ See, e.g., MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 1–9 (1999); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); McConnell, *supra* note 167; Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006).

ism model of *Erie* might be largely beside the point.³⁹⁸ We might do better to focus on approaches like Heather Gerken's and Jessica Bulman-Pozen's model of "uncooperative federalism," in which the implementing role (and resulting "agency slack") of state officials operating within federal bureaucratic structures provides a primary safeguard of state autonomy.³⁹⁹ But this model, too, fits comfortably within the Legal Process tradition: it brackets substantive policy disagreements and focuses on the institutional settlement of authority to decide in particular officials and processes, and it does presuppose that limiting national authority is a legitimate constitutional value. In any event, the imperative to develop alternative models that fit certain aspects of the current regulatory environment hardly denies the importance of judicial federalism in those areas where state law still has a central role to play.

3. Are Judicial and Legislative Powers Coextensive?

Arguing against the Legal Process school's judicial federalism reading of *Erie*, Professor Sherry relies heavily on "the views of the founding generation," which "assumed that the powers of the various departments of the federal government were co-extensive with regard to the states."⁴⁰⁰ This original understanding, she says, refutes any notion "that federal courts have more limited power than the federal legislature."⁴⁰¹ Professor Purcell attributes this notion to Justice Brandeis himself.⁴⁰² In either case, the support for this principle is thin, and to the extent it exists at all it does not undermine *Erie*'s judicial federalism argument.

At the outset, it is worth noting that the Constitution itself says nothing about coextensive powers. Its basic structure belies the notion, carefully denoting the powers of each branch largely without reference to the others. They are coextensive in a sense, in that action by each branch may provide the occasion for action by the others. Whenever Congress passes a law on any subject, for example, the Executive acquires the responsibility to execute that law,⁴⁰³ and the Judiciary may hear cases arising under it.⁴⁰⁴ But

³⁹⁸ See HART & WECHSLER, *supra* note 66, at 460 (suggesting, in the 2009 edition, that "federal law appears to be more primary than interstitial in numerous areas").

³⁹⁹ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); see also Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427 (2013).

⁴⁰⁰ Sherry, *Wrong*, *supra* note 6, at 145.

⁴⁰¹ *Id.*

⁴⁰² PURCELL, *supra* note 9, at 172.

⁴⁰³ U.S. CONST. art. II, § 3 (providing that the President "shall take care that the laws be faithfully executed").

⁴⁰⁴ U.S. CONST. art. III, § 2 (providing that "[t]he judicial power shall extend to all cases . . . arising under . . . the laws of the United States").

even in this sense, the coextensivity is imperfect and not automatic. The federal courts cannot even hear cases—much less make law—without statutory jurisdiction, and for much of our history both the lower federal courts and the Supreme Court have lacked jurisdiction over important classes of federal question cases.⁴⁰⁵ The rules of standing, political questions, and limits on judicial review abroad⁴⁰⁶ all create situations in which judicial power is not coextensive with the powers of the legislative and political branches.

To be sure, the founding generation did from time to time suggest that the federal branches' powers were coextensive.⁴⁰⁷ The Founders' doctrine of coextensive powers, however, cannot do the work that Professor Sherry needs it to do. First, James Madison and others deployed it to *reject* the notion that the federal courts had broad federal common law powers. Writing against the Alien and Sedition Acts, Madison warned that accepting the Federalist argument that the Constitution had endowed the federal courts with broad power to declare common law crimes would legitimize federal *legislative* intrusion into any area that the common law could reach, thereby destroying the whole notion of a government of limited and enumerated powers.⁴⁰⁸ The election of 1800 arguably ratified the Jeffersonian position on this issue,⁴⁰⁹ and in any event, the Supreme Court adopted it in *United States v. Hudson & Goodwin*,⁴¹⁰ which rejected the very notion of federal common law crimes.⁴¹¹

As Madison's position makes clear, the coextensivity argument was often used to say that *Congress* could legislate wherever the courts could adjudicate. So, for instance, many maritime statutes were justified on the

⁴⁰⁵ See, e.g., HART & WECHSLER, *supra* note 66, at 275–76; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585–86 (1990).

⁴⁰⁶ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (standing); *Nixon v. United States*, 506 U.S. 224 (1993) (political questions); *Johnson v. Eisentrager*, 339 U.S. 763, 777–78 (1950) (holding that the federal courts lacked jurisdiction over an enemy alien detained abroad); *Downes v. Bidwell*, 182 U.S. 244, 285–86 (1901) (rejecting the notion that the Constitution always follows the flag).

⁴⁰⁷ THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cook ed., Wesleyan University Press 1961); Jay, *Part Two*, *supra* note 91, at 1242.

⁴⁰⁸ See Report on Resolutions, House of Delegates, Session of 1799–1800, Concerning Alien and Sedition Laws, in 6 WRITINGS OF JAMES MADISON 381 (Gaillard Hunt ed. 1906) (“[T]he consequences of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the Constitutions and laws of the States, the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation new model the whole political fabric of the country.”).

⁴⁰⁹ See, e.g., HART & WECHSLER, *supra* note 66, at 611 (“Many historians believe that a backlash against federal-common law crimes helped to elect Jefferson in 1800.”).

⁴¹⁰ 11 U.S. (7 Cranch) 32, 34 (1812).

⁴¹¹ See generally Gary Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992); Jay, *Part One*, *supra* note 91, at 1111–13.

ground that Congress's legislative jurisdiction piggybacked on the federal courts' ability to decide cases under general maritime law.⁴¹² As the admiralty example makes clear, however, we need to be careful about the inferences we draw from that notion of coextensivity. At the Founding and throughout the nineteenth century, prior to *Jensen*, the federal courts did not treat judge-made maritime law as federal law within the meaning of the Supremacy Clause,⁴¹³ and even thereafter the Court held that admiralty cases did *not* fall within the federal question jurisdiction.⁴¹⁴ Most important, it does not follow, as Louise Weinberg has suggested, that "[t]he judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon."⁴¹⁵ The originalist assumption that courts can act wherever the political branches can act could sensibly be taken to mean simply that the federal courts always have the presumptive authority to review, interpret, and apply any federal legislation or order promulgated by those branches.⁴¹⁶ But nothing in that assumption implies the further proposition that federal courts have the authority to *go first* and act in an area where the national political branches potentially *could* act, but have not.⁴¹⁷

Edward Purcell imputes an assumption of coextensive powers not to the Founders but rather to Justice Brandeis himself. As I have already discussed, coextensivity of legislative and judicial powers was one of the "two related principles" upon which, in Purcell's view, Brandeis rested *Erie*.⁴¹⁸ Purcell's account is ambiguous, however, as to what Brandeis meant by coextensivity or what constitutional authority he rested that assumption upon. Purcell suggests that Brandeis developed his views on coextensive

⁴¹² See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360–61 (1959); GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 1-16, at 47 (2d ed. 1975). I think it's generally fair to say that these statutes would be better grounded in the Commerce Clause today.

⁴¹³ See Young, *Preemption at Sea*, *supra* note 185, at 319–22.

⁴¹⁴ See *Romero*, 358 U.S. at 363–68.

⁴¹⁵ Weinberg, *Federal Common Law*, *supra* note 266, at 813.

⁴¹⁶ See Jay, *Part Two*, *supra* note 91, at 1242 (noting that, according to James Wilson, the principle that "the judicial [powers] were commensurate with the legislative powers [and] went no further" both limited judicial authority and provided "the means of making the provisions" of congressional laws "effectual over all that country included within the Union") (quoting 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 515 (J. Elliot ed. 1836)). Even so, the coextensivity proposition would be subject to the important qualification that the federal courts may act only where Congress confers jurisdiction upon them by statute. See *supra* note 405 and accompanying text.

⁴¹⁷ See, e.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 61 (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.").

⁴¹⁸ PURCELL, *supra* note 9, at 172; see *supra* text accompanying notes 352–61 (discussing Purcell's argument).

powers from his pre-*Erie* experience with state legislative jurisdiction.⁴¹⁹ But that issue, which involved constitutional issues on state choice of law, establishes only that Brandeis believed *state* legislative and judicial powers must be considered coextensive. That view would reflect the widespread assumption that state courts share lawmaking authority with legislatures⁴²⁰ but it hardly translates without controversy to *federal* courts.⁴²¹ Similarly, Brandeis's correspondence with Justice Reed during the deliberations in *Erie* relied on the coextensive powers of *state* legislatures and courts: "Since [the *Swift* doctrine] admits that the state rule must be followed if declared in a [state] statute," Brandeis wrote, "it admits that [the state rule] is not a matter within the authority of Congress."⁴²²

If this is the key point, then it is a very odd one. We cannot, for the reasons already discussed, impute to Justice Brandeis the view that Congress could not have legislated a rule to deal with mishaps along railroad rights-of-way.⁴²³ Professor Purcell seems to think the problem "was not that Congress lacked certain powers but that the federal courts ignored the relevance of whatever those powers were."⁴²⁴ In other words, *Swift* would support displacing state law even in situations that fell outside Congress's commerce power.⁴²⁵ But if that is the point, then *Erie* (in which Congress plainly *did* have power to act) was an odd case in which to overrule *Swift*.⁴²⁶ And Purcell's reading seems flatly inconsistent with Brandeis's statement 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."⁴²⁷ If Bran-

⁴¹⁹ See PURCELL, *supra* note 9, at 185 (observing that Brandeis's concept of state legislative jurisdiction "also implied that the scope of that allowable lawmaking should be no broader for one branch of a government than for its other branches").

⁴²⁰ See *supra* text accompanying notes 211–214.

⁴²¹ See, e.g., *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").

⁴²² Quoted in PURCELL, *supra* note 9, at 173.

⁴²³ See *supra* text accompanying notes 273–288.

⁴²⁴ PURCELL, *supra* note 9, at 173.

⁴²⁵ See Rutherglen, *supra* note 127, at 288 (construing Brandeis to mean that "federal general common law as a whole was illegitimate because it exceeded the power of Congress, not necessarily on the special facts of the case before the Court, but in a broad range of other cases").

⁴²⁶ See Green, *Repressing*, *supra* note 5, at 613. If the question in *Erie* were really whether Congress had the requisite power, then under modern practice *Swift* would have been constitutional "as applied" to the facts of *Erie*, and there would surely have been sufficient constitutional applications for the doctrine to survive a "facial" challenge as well. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challenges can succeed only when there is "no set of circumstances" under which the challenged action would be valid). Professor Green thinks this point shows why *Erie* was wrong. My own view is that it demonstrates that both Green and Purcell have misinterpreted what Brandeis was driving at.

⁴²⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

deis were concerned about the scope of Congress's legislative jurisdiction, he would hardly choose topics fitting plainly within that jurisdiction—such as commercial law—as examples of unconstitutional federal action.

As I have already suggested, the language just quoted is best read as insisting that Congress actually pass substantive statutes in order to displace state law; it cannot simply order federal courts to apply the common law in disregard of state jurisprudence.⁴²⁸ And the more natural implication from the coextensivity of *state* legislative and judicial powers would be that state decisional law can be displaced only by the same sorts of federal action that displace state statutes: federal statutes and constitutional provisions. Brandeis wrote that “[m]y own opinion had been that it was wise (1) to treat the constitutional power of interstate commerce as very broad and (2) to treat acts of Congress as not invading State power unless it clearly appeared that the federal power was intended to be exercised exclusively.”⁴²⁹ On this reading, Purcell's two principles—the coextensivity principle and its “prudential” corollary—are really the same idea. In any event, as I have already pointed out,⁴³⁰ the supposedly prudential reasons for that corollary limiting judicial displacement of state law to situations in which Congress has already acted are sufficiently strong to warrant treating it as a *constitutional* principle in its own right—and that is how it *has* been treated by subsequent courts and commentators.⁴³¹

The Sherry/Weinberg position requires a still further and even more radical step—that is, it asserts that the federal courts' supposed authority to adjudicate any issue that the national political branches could act upon also presupposes the power to *make law* on such issues. Beginning with the proposition that when “the national interest so requires, Congress has power to federalize a matter previously governed by state law,” Professor Weinberg concluded that it “would seem that that basic power must also inhere in its courts.”⁴³² Even if one assumes that all diversity cases involve interstate commerce and therefore involve matters upon which Congress could

⁴²⁸ See *supra* text accompanying note 337.

⁴²⁹ Quoted in PURCELL, *supra* note 9, at 174.

⁴³⁰ See *supra* text accompanying notes 356–369.

⁴³¹ See, e.g., Merrill, *Common Law*, *supra* note 303; Clark, *Erie's Source*, *supra* note 90. In *Atherton v. FDIC*, 519 U.S. 213 (1997), for example, the Court said that “when courts decide to fashion rules of federal common law, ‘the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.’” *Id.* at 218 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). This language, to my mind, suggests a stronger limitation than a merely prudential test.

⁴³² WEINBERG, *supra* note 229, at 20. As Professor Purcell notes, “Weinberg's views did not seem to persuade most legal scholars.” PURCELL, *supra* note 9, at 402 n.47. See, e.g., Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853, 858–59 (1989) (concluding that Weinberg's approach is flatly inconsistent with the Rules of Decision Act).

potentially legislate,⁴³³ that coextensivity would not itself answer the question of what law the federal courts must apply in such cases, or whether those courts have the power to fashion common law rules of decision with the force of federal law.⁴³⁴ Coextensivity, at most, establishes the federal courts' power to adjudicate in situations where Congress might legislate, but it leaves unanswered the most important question: Does power to adjudicate necessarily include the power to make law?⁴³⁵

A recent case may help to illustrate this cluster of arguments. In *Zivotofsky v. Clinton*,⁴³⁶ parents of a child born in Jerusalem sued the Secretary of State requesting that their child's passport list "Israel" as his place of birth. They invoked a federal statute, § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, providing that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."⁴³⁷ The Secretary refused, pursuant to Department policy recognizing that whether Jerusalem is legitimately part of Israel is a hotly disputed issue and asserting that Congress's attempt to resolve that question interfered with the Executive's constitutional authority to conduct foreign affairs.⁴³⁸ The lower courts concluded that Zivotofsky's claim presented a nonjusticiable political question.⁴³⁹ The Supreme Court reversed, and its reasoning may help illustrate what it may and may not mean for legislative, executive, and judicial power to be "coextensive."

Even if the Founders and Justice Brandeis thought that the three branches possess "coextensive" powers, *Zivotofsky* demonstrates that that

⁴³³ This assumption is likely incorrect. For example, a citizen of one state might bring a diversity suit against an out-of-stater for intentional infliction of emotional distress if the out-of-stater brought a gun to school and frightened him, but it would not follow that schoolyard gun possession is within Congress's regulatory authority. See *United States v. Lopez*, 514 U.S. 549, 567 (1995).

⁴³⁴ See generally BRIDWELL & WHITTEN, *supra* note 63 (arguing that the point of the diversity jurisdiction was to provide a neutral forum that would apply general principles of commercial law arising out of customary dealings among merchants).

⁴³⁵ For example, Professor Purcell cites the 1969 American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* as relying "most fundamental[ly]" on the principle that "the judicial and legislative powers should be coextensive." PURCELL, *supra* note 9, at 273. But the ALI relied on that principle to condemn diversity jurisdiction for rendering "the state's judicial power . . . less extensive than its legislative power," and to suggest that "federal courts should be 'concentrated upon the adjudication of rights created by federal substantive law.'" *Id.* (quoting American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, at 99 (1969)). Neither of these points comes close to establishing that federal courts may make substantive rules of decision on any issue upon which Congress could legislate.

⁴³⁶ 132 S. Ct. 1421 (2012).

⁴³⁷ 116 Stat. 1350, 1366.

⁴³⁸ *Zivotofsky*, 132 S. Ct. at 1425–26.

⁴³⁹ See *Zivotofsky v. Sec'y of State*, 511 F. Supp. 2d 97, 103 (D.D.C. 2007), *aff'd*, 571 F.3d 1227, 1232–33 (D.C. Cir. 2009).

cannot be true in any simple, straightforward sense. The Executive branch, to start with, took the position (1) that *only* it could determine the U.S. position on the status of Jerusalem, (2) that Congress's attempt to do so was flatly unconstitutional, and (3) that the judicial branch lacked even the power to determine who was right about (1) and (2).⁴⁴⁰ On this view, power would be coextensive only in the sense that Congress would have authority to legislate and appropriate money in support of the Executive's position on the matter, and the judiciary might have occasion to interpret and apply those directives. No one thought that some broad notion of coextensive powers required categorical rejection of the Executive's claims.

The Court's rejection of the political question argument, moreover, illustrated two important distinctions: (1) between courts "going first" and following action by another branch in a particular area, and (2) between the power to make law and the power to resolve disputes. If Congress had not acted on the question of Jerusalem's status, then it seems likely that the Court would have found that status to pose a nonjusticiable political question—after all, the Court seemed to acknowledge that the Constitution may commit recognition of foreign sovereigns to the political branches and that, in any event, courts lack "judicially discoverable and manageable standards" for resolving recognition questions.⁴⁴¹ But, Chief Justice Roberts noted, "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute," and concerns about a lack of standards "dissipate . . . when the issue is recognized to be the more focused one of the constitutionality of 214(d)."⁴⁴² This is thus a case where the judiciary's power to act may well have depended on the fact that Congress had acted first.

Even more obviously, the judiciary's power to resolve a dispute about who had the power to establish the U.S. position on Jerusalem hardly equated with a judicial power to make law itself on that question. The Chief Justice distinguished between two questions: "whether Jerusalem is the capital of Israel," and "whether Zivotofsky may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth."⁴⁴³ The D.C. Circuit erred, he said, when it "treated the two questions as one and the same."⁴⁴⁴ Answering the first would have required the federal courts "to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be"—in other words, it would have invited the courts to make law on their own.⁴⁴⁵ But in order to answer the

⁴⁴⁰ See 132 S. Ct. at 1428.

⁴⁴¹ *Id.* at 1428.

⁴⁴² *Id.*

⁴⁴³ *Id.* at 1427.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

second question, “the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.”⁴⁴⁶ Adjudicating disputes under preexisting law, whether statutory or constitutional, is distinct from lawmaking, and the judiciary’s power to do one is not necessarily coextensive even with its *own* power to do the other.⁴⁴⁷

Professors Sherry and Weinberg assert not simply that legislative and judicial powers are coextensive in scope, but also that they are the *something*.⁴⁴⁸ There is no evidence that either the founding generation or Justice Brandeis ever thought that and abundant evidence that they did not. If they had, then to what end did the Founders make specific and distinct provision for the jurisdiction and operating procedures of each branch? And why did Brandeis insist that, in practice, judicial power was much narrower than legislative power? In any event, we certainly do not equate judicial and legislative powers under contemporary law, and it would be strange to reject *Erie* based on anachronistic assumptions if it coheres with current doctrine.

4. Proving Too Much and Too Little: Judicial Lawmaking and the Administrative State

Michael Greve offers a different argument against the judicial federalism interpretation of *Erie*. Although conceding that this account “provides a plausible constitutional rationale,” he complains that, “in substance, the argument proves both too little and too much.”⁴⁴⁹ Too little because Justice Story could both read the Supremacy Clause and appreciate the importance of federal lawmaking procedures. And too much because “a Supremacy Clause understanding that is sufficiently rigorous to provide firm ground for *Erie* also casts doubt on practices and institutions wholly outside its ambit—for starters, the administrative state, whose *raison d’être* is to make law outside the constitutional strictures of bicameral approval and presentment.”⁴⁵⁰ Both objections are plausible, and considering them will help flesh out the implications of the judicial federalism position.

⁴⁴⁶ *Id.*

⁴⁴⁷ See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (stating that “instances [of federal common lawmaking authority] are ‘few and restricted’”) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). As discussed earlier, none of this is to deny that every adjudication may involve a sort of Heisenbergian element of lawmaking. See *supra* notes 82–83 and accompanying text. I do deny that this element is the *same* as deliberate formulation of rules of federal common law.

⁴⁴⁸ See Sherry, *Wrong*, *supra* note 6, at 145 (asserting that because the Founders “assumed that the powers of the various departments of the federal government were co-extensive,” it followed that “none denied the power of federal courts to declare the common law”); Weinberg, *supra* note 266, at 813.

⁴⁴⁹ Greve, *supra* note 4, at 375.

⁴⁵⁰ *Id.*

Arguments beginning from a premise along the lines of “Justice Story made an obvious mistake” generally are—and should be—met with considerable skepticism.⁴⁵¹ But that is not my claim. My own view has always been that, under the circumstances that each court faced at the time, *both-Swift* and *Erie* were rightly decided.⁴⁵² The explanation has to do with changes in the content of both state law and general law over the course of the nineteenth century. The latter began as a narrow category of principles derived from the customary practices of merchants engaged in primarily cross-border transactions.⁴⁵³ But as the nineteenth century wore on, the Court extended it to the construction of ordinary contracts or other written instruments,⁴⁵⁴ tort cases,⁴⁵⁵ and even cases involving deeds of land.⁴⁵⁶ This radical expansion of *Swift*’s scope coincided with erosion of the strong norm of deference to state courts on construction of state statutes and constitutions.⁴⁵⁷

The result was that the general common law came to apply in areas that not only had a more local flavor but also that were more strongly normative in character. Justice Story’s general commercial law had sought simply to capture the actual practices of merchants and involved issues upon which it was often more important that rules be settled than that they be settled *right*; areas like tort law, by contrast, implicated much sharper conflicts over justice and fairness, upon which local political communities were more likely to insist on their own way.⁴⁵⁸ Federal courts could not, as a result, continue to take for granted the state choice of law rule that I have

⁴⁵¹ One might also, however, say the same of Justice Brandeis.

⁴⁵² See also Bellia & Clark, *supra* note 49, at 687–88, 701 (taking a similar view).

⁴⁵³ As I have noted, scholars debate whether the law merchant was ever as customary or as uniform as it is sometimes made out to be. See, e.g., Kadens, *supra* note 246, at 1168–81 (arguing that it was not). That dispute is beyond my scope here, although it does have implications for related issues today. See, e.g., Kadens & Young, *supra* note 77 (arguing that customary international law cannot rest on analogy to the customary law merchant).

⁴⁵⁴ Lane v. Vick, 44 U.S. (3 How.) 464, 476 (1845).

⁴⁵⁵ Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 378 (1893); Chicago v. Robbins, 67 U.S. (2 Black.) 418, 428 (1862).

⁴⁵⁶ Kuhn v. Fairmont Coal Co., 215 U.S. 349, 360–62 (1910).

⁴⁵⁷ See, e.g., Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 184 (1863) (refusing to follow a state court’s construction of the state constitutional provisions governing defaulted municipal bonds, declaring that “[w]e shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice”); Watson v. Tarpley, 59 U.S. (18 How.) 517, 521 (1855) (“[A]ny state law or regulation, the effect of which would be to impair the rights [under and defined by the general commercial law] . . . or to divest the federal courts of cognizance thereof . . . must be nugatory and unavailing.”). Michael Collins has argued that the federal diversity courts even developed a “general” body of constitutional law that they applied in cases construing state constitutions during the latter end of this period. Michael Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000); see also Lucas A. Powe, Jr., *Rehearsal for Substantive Due Process: The Municipal Bond Cases*, 53 TEXAS L. REV. 738, 745–47 (1975).

⁴⁵⁸ See FREYER, *supra* note 30, at 23–25; Fletcher, *supra* note 90, at 1513.

argued was crucial to *Swift*'s reasoning—that is, that the state itself had determined that general law should govern the relevant class of cases.⁴⁵⁹ Nor could general law be regarded as customary or “bottom-up” law, based on the actual practices of merchants—instead, it embodied top-down normative commands like any other form of law. Both developments made it imperative to identify the sovereign source of the general law and the federal courts' power to apply it.

Professor Greve is thus right to focus on *why Swift* “got out of hand and eventually prompted [federal] judges to substitute their own views of sound public policy on the states.”⁴⁶⁰ The answer is that a doctrine that originally reflected state policy—New York's own decision to apply the general law merchant to cases like *Swift*—had become a tool by which federal judges limited state policy in order to benefit interstate businesses.⁴⁶¹ Professor Greve may or may not be right that such limits are salutary and necessary—what cannot be denied, however, is that they require a different constitutional justification than a decision, like Justice Story's in *Swift*, to follow state preferences. In *Erie*, Justice Brandeis found that this more difficult constitutional case simply could not be made.

Does the judicial federalism rationale prove too much? It is morally satisfying to pound on the table and insist that “Only Congress can make federal law!”—but that principle is often honored in the breach. As Gary Lawson has depressingly explained, “the demise of the non-delegation doctrine . . . allows the national government's now-general legislative powers to be exercised by administrative agencies.”⁴⁶² This development, moreover, “has encountered no serious real-world legal or political challenges, and none are on the horizon.”⁴⁶³ Justice White thus famously observed that “[f]or some time, the sheer amount of law . . . made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”⁴⁶⁴ If we accept that development, then why not accept judicial lawmaking, *contra-Erie*?

It does seem to me that it is one thing to admit that we have a massive administrative state and that it is too late in the day to return to a simpler model where Congress makes all the laws but quite another to say that the administrative state should become our template for reasoning in cases where the burdens of historical inertia do not exist or point in a different

⁴⁵⁹ See *Baugh*, 149 U.S. at 377–78; *Robbins*, 67 U.S. at 428–29; *supra* text accompanying notes 116–120.

⁴⁶⁰ GREVE, *supra* note 4, at 375.

⁴⁶¹ See, e.g., Lessig, *supra* note 78, at 1792; Hovenkamp, *supra* note 12, at 212–14.

⁴⁶² Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994).

⁴⁶³ *Id.*

⁴⁶⁴ *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

direction.⁴⁶⁵ Moreover, there are significant differences between administrative agencies and federal courts as lawmaking agents. Agencies are subject to extensive congressional oversight and budgetary controls that, if applied to the federal courts, we would consider a serious threat to judicial independence.⁴⁶⁶ Most importantly, one can still argue that although federal agencies plainly “make law” in an important sense, considerably more stringent limits exist on their capacity to displace *state* law. Current doctrine continues to stress that such displacement must be traceable to *Congress’s* intent in an authorizing statute,⁴⁶⁷ and the Court has proven willing to limit the preemptive force of agency decisions in a number of important ways.⁴⁶⁸ Although no viable doctrinal proposal can avoid taking the administrative state into account, the way remains open to make process federalism arguments against broad administrative preemption analogous to the judicial federalism argument in *Erie*.⁴⁶⁹

The more serious version of Professor Greve’s “too much” argument focuses instead on the extensive use of federal common law after *Erie*.⁴⁷⁰ As Judge Friendly famously observed, *Erie* hardly put an end to federal common law:

By banishing the spurious uniformity of *Swift v. Tyson* . . . and by leaving to the states what ought to be left to them, *Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as its predecessor, more general in subject matter but limited to the federal courts, was not. The clarion yet careful pronouncement

⁴⁶⁵ See, e.g., Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2113 (2008) (rejecting the “‘in for a penny, in for a pound’ approach to the modern administrative state”). If Professor Greve is actually arguing otherwise, then perhaps he should worry about having his American Enterprise Institute membership card revoked.

⁴⁶⁶ See *Chadha*, 462 U.S. at 955 n.19; see also *supra* note 318 and accompanying text.

⁴⁶⁷ See Benjamin & Young, *supra* note 465, at 2147.

⁴⁶⁸ See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011) (“Although we defer to the agency’s interpretation of its regulations, we do not defer to an agency’s ultimate conclusion about whether state law should be pre-empted.”); *Wyeth v. Levine*, 555 U.S. 555, 576–80 (2009) (refusing to defer to agency preamble asserting broad preemptive effect to federal drug approvals); *Solid Waste Auth. of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–74 (2001) (refusing to defer to agency rule operating at the outer limit of Congress’s Commerce Clause authority); see generally Young, *Ordinary Diet*, *supra* note 289, at 280–81 (discussing doctrinal limits on agency preemption).

⁴⁶⁹ See, e.g., Bradford R. Clark, *Process-Based Preemption*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALTY OF FEDERALISM’S CORE QUESTION* 192 (William M. Reva ed., 2009); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 769–79 (2008); David S. Rubenstein, *Delegating Supremacy?* 65 VAND. L. REV. 1125, 1188–90 (2012); Young, *Executive Preemption*, *supra* note 7.

⁴⁷⁰ GREVE, *supra* note 4, at 375.

of Erie, ‘There is no federal general common law,’ opened the way to what, for want of a better term, we may call specialized federal common law.⁴⁷¹

Federal common law rules thus fill in the interstices of federal statutes, and they dominate certain legal enclaves even in the absence of statutory guidance or authorization.⁴⁷² Judge-made federal law plays a critical role, for example, in admiralty,⁴⁷³ disputes between states,⁴⁷⁴ foreign-relations law,⁴⁷⁵ labor–management relations,⁴⁷⁶ and matters involving the proprietary relations of the United States government.⁴⁷⁷ Professor Greve argues that “the structural Supremacy Clause argument runs up hard against well-recognized enclaves of federal common law.”⁴⁷⁸

I think it is fair to say, however, that Judge Friendly’s “new federal common law” is—as the judge insisted—very much a creature of *Erie*’s world, not *Swift*’s. Notwithstanding revisionist academic theories arguing for a *general* federal common law power in the federal courts,⁴⁷⁹ each enclave of federal common lawmaking has been developed and justified as an exception to *Erie*’s rule, with special attention to why a departure from the presumptive rule of congressional primacy is warranted.⁴⁸⁰ Reasonable people disagree about whether all the existing instances of federal common lawmaking can be justified in this way. My own view is that filling in the gaps of federal statutes is so close to—and difficult to distinguish from—statutory interpretation as to be relatively unproblematic,⁴⁸¹ that most of the foreign affairs rules can be justified as self-imposed prudential limitations

⁴⁷¹ Friendly, *supra* note 57, at 405.

⁴⁷² See generally HART & WECHSLER, *supra* note 66, at 616–26 (discussing the development of the “new federal common law” after *Erie*).

⁴⁷³ See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

⁴⁷⁴ See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

⁴⁷⁵ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁴⁷⁶ See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1947).

⁴⁷⁷ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

⁴⁷⁸ GREVE, *supra* note 4, at 375.

⁴⁷⁹ See, e.g., Field, *Sources of Law*, *supra* note 55; Weinberg, *Federal Common Law*, *supra* note 266. But see HART & WECHSLER, *supra* note 66, at 618 (observing that “[f]ew decisions or commentators support the broad view” of federal common law). For rejections of the broad view, see, e.g., *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (“[J]udicial creation of a special federal rule . . . is limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’”) (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)); *Atherton v. FDIC*, 519 U.S. 213, 213 (1997) (same).

⁴⁸⁰ See, e.g., Merrill, *Common Law*, *supra* note 303 (exploring the different domains and justifications of federal common lawmaking from this perspective).

⁴⁸¹ See, e.g., Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity*, 78 MICH. L. REV. 311, 331–36 (1980) (arguing that statutory interpretation and federal common lawmaking are indistinguishable).

on judicial review;⁴⁸² that the *Clearfield* line of cases is not obviously necessary but may be largely assimilated to notions of conflict preemption;⁴⁸³ that state-versus-state cases may be a legitimate uses of “general” law where states are not competent to legislate;⁴⁸⁴ and that freestanding federal common law in admiralty is unconstitutional.⁴⁸⁵ But, the important point is that the new federal common law must be grounded in a plausible interpretation of the Supremacy Clause; no courts, and few scholars, are willing to generalize from these enclaves to a rejection of judicial federalism.

Importantly, these enclaves do not rest on a judgment that they somehow implicate the most important or fundamental aspects of our constitutional scheme. Rather, they generally rest on arguments about congressional authorization⁴⁸⁶ or claims that applying state law would thwart particular federal interests that cannot otherwise be easily protected.⁴⁸⁷ Professor Greve’s argument that the law governing interstate business must necessarily be governed by federal common law because it is a “basic aspect of the constitutional scheme,”⁴⁸⁸ thus, misses the mark. That argument also

⁴⁸² See Ernest A. Young, *The Story of Banco Nacional de Cuba v. Sabbatino: Federal Judicial Power in Foreign Relations Cases*, in *FEDERAL COURTS STORIES* 436–37 (Vicki Jackson & Judith Resnik eds., 2010).

⁴⁸³ See Young, *Federal Common Law*, *supra* note 8, at 1655–67. Importantly, the Court has backed away considerably from *Clearfield* since the New Deal. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739–40 (1979); HART & WECHSLER, *supra* note 66, at 628 (noting that contemporary case law under *Kimbell Foods* incorporates “a preference for incorporation of state law absent a demonstrated need for a uniform federal rule of decision”).

⁴⁸⁴ See, e.g., Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 711 (2008) (suggesting that “many of the ‘federal common law’ rules that fall within these enclaves do not actually constitute ‘federal judge-made law’ because they consist of background principles derived from the law of nations that are necessary to implement basic aspects of the constitutional scheme”).

⁴⁸⁵ See Young, *Preemption at Sea*, *supra* note 185, at 306; Young, *Just Water*, *supra* note 329.

⁴⁸⁶ See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457–58 (1947) (finding a delegation of common lawmaking authority in § 301(a) of the Labor Management Relations Act of 1947); Jonathan M. Guttoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367 (2000) (reading the 1948 Judiciary Act and the Admiralty Extension Act as delegating authority to federal courts to make federal common law in admiralty cases).

⁴⁸⁷ See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 510–12 (1988) (developing a federal common law defense for government military contractors sued in tort, based on the likelihood that damages awards would be passed through to the government and an analogy to the Federal Tort Claims Act). Professor Sherry argues that “it is at least plausible to read the grant of diversity jurisdiction as an authorization to develop federal common law.” Sherry, *Wrong*, *supra* note 6, at 146. Why? Sherry offers no explanation, and the text of the diversity grant says no such thing. And even under *Swift*, the Rules of Decision Act was not interpreted to authorize federal common law. See Fletcher, *supra* note 90, at 1514 (distinguishing federal common law from general common law). In any event, I submit that such an unbounded delegation of lawmaking to the federal courts—without any intelligible principle to guide their decisions—would violate even the vestigial nondelegation doctrine that persists today. See Young, *Just Water*, *supra* note 329, at 485–90.

⁴⁸⁸ GREVE, *supra* note 4, at 376.

represents a strange inversion of our scheme of government, which was concerned to empower *Congress*—not courts—to deal with the most critical matters for national unity and prosperity. As such, Professor Greve’s desire for federal courts to rescue interstate business from the grasping clutches of state law⁴⁸⁹ echoes *Erie*’s liberal critics, like Professors Sherry and Green, who seek to empower courts to protect human rights through expansive constitutional interpretation and importation of international law.⁴⁹⁰ As I suggest in Part IV, all of these arguments reflect a basic loss of faith in the political branches to solve national problems. Whether or not that loss of faith is warranted by the current performance of our national political branches, it finds little support in the Constitution.

D. *Erie*’s Premises: The State Courts’ Power and Inclination to Make Law

This section deals with a quite different critique of *Erie*’s constitutional argument developed by Caleb Nelson and Michael Green.⁴⁹¹ Professor Nelson’s critique proceeds from the notion that, in at least some cases under *Swift*, federal courts did not purport to apply general law as an alternative to state law, but rather saw themselves as applying *state* law but exercising independent judgment as to the content of that law.⁴⁹² On this view, the important holding of *Erie* is that “federal courts [must] follow state-court precedents on all questions that lay within the states’ legislative competence, even if those questions would previously have been classified as matters of ‘general’ law.”⁴⁹³ That makes sense, Nelson allows, if we conceive of state courts as having been delegated power to *make* state law under state constitutions.⁴⁹⁴ The trouble, in his view, is that it remains unclear that state constitutions do any such thing.⁴⁹⁵

⁴⁸⁹ *Id.*; see also Gasaway & Parrish, *supra* note 4, at 969.

⁴⁹⁰ See Green, *Repressing*, *supra* note 5, at 623–35; Sherry, *Wrong*, *supra* note 6, at 152–53; see also Koh, *supra* note 276, at 1831–33 (reading *Erie* narrowly to permit recognition of customary international law norms as federal common law); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393, 433–38 (1997) (same).

⁴⁹¹ See Nelson, *Erie*, *supra* note 6, at 929; Green, *Suppressed Premise*, *supra* note 248, at 1113.

⁴⁹² See *supra* notes 199–202 and accompanying text.

⁴⁹³ Nelson, *Erie*, *supra* note 6, at 950. Louise Weinberg seems to read *Erie* this way when she says that

Erie held, precisely, that the nation lacks power to make state law. State law is reserved to the states. The power of the nation is to make federal law only. There was, of course, no conflict between federal and state law in *Erie*. The Court struck down no federal law or rule.

It struck down only an independent view of what state law ought to be.

Weinberg, *Federal Common Law*, *supra* note 266, at 812.

⁴⁹⁴ See Nelson, *Erie*, *supra* note 6, at 981.

⁴⁹⁵ *Id.* at 984.

Professor Green's worry, by contrast, is less about power than inclination. Assuming that state courts have the authority to bind federal courts to follow their decisions on common law matters, Green asks, what if state courts don't *want* to bind the federal courts?⁴⁹⁶ What if, in other words, a particular state remains committed to *Swift's* notion of general law and believes that all courts should reach an independent determination of the meaning of that law? Green reads at least one state—Georgia—as persisting in the *Swiftian* view; if correct, his concern would amount to considerably more than a theoretical quibble.⁴⁹⁷ In any event, the basic point is that *Erie's* holding did not appear to allow for the continued possibility that state courts would cling to the general law.

These are both thoughtful objections, and it is worth considering them in some detail. At the end of the day, however, I conclude that there are good reasons for federal courts to follow the decisions of state supreme courts irrespective of the content of state law concerning the role of a particular state's courts.

1. Lawmaking Power and Deference to State Courts

Professor Nelson reads *Erie* as requiring federal courts to defer to state court interpretations of state law.⁴⁹⁸ The trouble with *Erie*, on this reading, is that it is not obvious where this obligation of deference comes from. As Professors Nelson and Green both point out,⁴⁹⁹ Justice Holmes attempted an answer in the *Taxicab* case:

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies . . . that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.⁵⁰⁰

These critics agree that “if one starts from the premise that state constitutions do indeed allocate authority to prescribe state law in the way that Jus-

⁴⁹⁶ See Green, *Suppressed Premise*, *supra* note 248, at 1112–13.

⁴⁹⁷ See *id.* at 1123–27, n.89. I remain quite skeptical about Professor Green's reading of Georgia law. See *infra* notes 533–547 and accompanying text.

⁴⁹⁸ See Nelson, *Erie*, *supra* note 6, at 950.

⁴⁹⁹ See Green, *Suppressed Premise*, *supra* note 248, at 1126; Nelson, *Erie*, *supra* note 6, at 950.

⁵⁰⁰ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 534–35 (1928)(Holmes, J., dissenting).

tice Holmes believed, then one might well arrive at the bottom line that Justice Brandeis reached in *Erie*.⁵⁰¹ As Brandeis pointed out, “whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”⁵⁰² On this view, there could be no federal authority to disregard a state’s allocation of lawmaking authority to its courts.⁵⁰³ Deference to the state court’s interpretations of state law would be mandatory on grounds analogous to the strong theory of *Chevron* deference in administrative law, which reads congressional ambiguity in statutory drafting as an outright delegation of lawmaking authority to the agency to fill in the gaps.⁵⁰⁴ Deference occurs, in other words, because the primary interpreter—there, the agency; here, the state court—is actually vested with authority to “say what the law is.”

The worry is that “no state constitution actually includes such an explicit allocation of the state’s lawmaking authority to the state’s highest court.”⁵⁰⁵ And although “Holmes believed that this allocation was *implicit* in each and every state constitution,”⁵⁰⁶ Professor Nelson argues that that premise “is at least contestable and may be false”:⁵⁰⁷

The typical state constitution certainly does not give the state supreme court the same sort of direct authority to prescribe state law that it gives the legislature. Subject only to constitutional limits, legislatures can announce whatever legal rules they like, and those automatically are the law of the state. What courts do is different. In many cases, the rules that they can legitimately articulate are constrained either by pre-existing written laws or by pre-existing sources of unwritten law (such as real-world customs). Even after the state supreme court has issued an opinion, moreover, people might say that the opinion is wrong about the true content of state law. One could not make the same statement about a state statute.⁵⁰⁸

If this is right, then “*Erie*’s claim that practice under *Swift* violated the *Federal* Constitution may well have rested on a debatable interpretation of each and every *state* constitution.”⁵⁰⁹

I do not want to concede the premise—that is, while I do think *Erie* requires federal courts to defer to state courts on the meaning of state law,

⁵⁰¹ Nelson, *Erie*, *supra* note 6, at 981.

⁵⁰² *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also id.* at 79 (quoting Holmes’s *Taxicab* dissent); Hart, *supra* note 10, at 512 (stating that “the need of recognizing the state courts as organs of coordinate authority with other branches of the state government in the discharge of the constitutional functions of the states” was “the essential rationale of the *Erie* opinion”).

⁵⁰³ *See* Nelson, *Erie*, *supra* note 6, at 981 (suggesting that an effort to “interfere with state governance” on this point might well be unconstitutional).

⁵⁰⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984); *see also* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 743–44 n.25 (2004).

⁵⁰⁵ Nelson, *Erie*, *supra* note 6, at 980.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 984.

⁵⁰⁸ *Id.* at 982.

⁵⁰⁹ *Id.* at 984.

there were also cases under *Swift*—including *Swift* itself—in which the federal courts plainly applied general law rather than state law, and *Erie* held that practice to be unconstitutional. I will have more to say about this at the end of this section, but for now I want to examine Professor Nelson’s argument on its own terms. Nelson is surely right that state courts do not enjoy *the same* lawmaking powers that state legislatures do. But is that the relevant question?

It may help to be more specific about the different faces of judicial lawmaking. Writing about the lawmaking function of the U.S. Supreme Court, Fred Schauer has distinguished between a “backward looking” and a “forward looking” aspect of judicial decisions.⁵¹⁰ The former concerns “the sources of the norms for making decisions in cases”; “[t]o the extent that its decision is based on norms not already embodied in authoritative legal materials, the Court is accused of, or praised for, making law.”⁵¹¹ State courts are sometimes thought to have lawmaking authority in this sense—for instance, they are often thought to have greater latitude to translate policy or moral views into binding legal norms than do federal courts, which are typically seen as limited to the interpretation of authoritative statutory or constitutional materials. If this view is correct, then state courts would be entitled to the strong form of *Chevron*-style deference described earlier: Having been delegated authority to *make* law, it would not be possible for the state supreme court to be “wrong” about the content of state law, and federal courts should defer accordingly.

We do often think about state courts in this way, particularly when they are operating within the common law tradition.⁵¹² Although there are no express delegations of lawmaking authority in the state constitutions, most states do have positive enactments—either in their state constitutions or in statutes—“receiving” the common law of England,⁵¹³ and it seems fair

⁵¹⁰ Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J. L. REFORM 1, 1–2 (1983).

⁵¹¹ *Id.* at 1.

⁵¹² See, e.g., Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 896–97 (1989) (“Unlike their federal counterparts, state courts continue to play an avowedly generative role in the growth of American law. As the energy of state courts in forging new common law rules in areas as diverse as products liability and corporate take-overs attests, state courts are imbued with the power and creative ethos of the common law tradition.”); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, 171 (1975) (“By the early nineteenth century judicially administered change had become an abiding and unavoidable feature of the legal system, and for judges to have said that they were merely applying precedent in bringing about such change would have been to ignore reality.”).

⁵¹³ See, e.g., CAL. CIV. CODE § 22.2 (“The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.”); N.C. GEN. STAT. ANN. § 4-1 (“All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or

to interpret those enactments not only as receiving the substantive law but also endorsing the judge-driven method by which it was made.⁵¹⁴ Indeed, a significant subset of those reception statutes explicitly endorses the state courts' role in applying and developing the common law.⁵¹⁵ Even those states that have chosen to codify their common law, such as California, continue to accept a leading role for the state courts in the evolutionary development of that law.⁵¹⁶ And in the key area of commercial law, the Uniform Commercial Code—adopted with relatively little formal variation in most states—seems plainly to envision that state court judges will continue to develop the relevant law.⁵¹⁷

in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.”); *see generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951) (describing the process of reception throughout the country). Those states lacking a positive reception provision have generally adopted the common law by judicial decision. *See, e.g.*, *Baldwin v. Walker*, 21 Conn. 168, 181 (1851) (“We have, in our judicial practice, adopted so much of the common law as was operative as law, in the father-land, when our ancestors left it, and which was adapted to the new state of things here, under our colonial condition. This was our inheritance.”).

⁵¹⁴ *See, e.g.*, Hall, *supra* note 513, at 800 (observing that, regardless of the wording of particular reception statutes, state courts enjoyed wide latitude in determining the content of the common law in force); *see also id.* at 823–24 (pointing out that judges possessed arguably legislative discretion to determine which common law rules were “inapplicable” to the circumstances of the new states).

⁵¹⁵ *See, e.g.*, HAW. REV. STAT. § 1-1 (“The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage”); KAN. STAT. ANN. § 77-109 (“The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state”); MD. CONST. art. 5 (“[T]he Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity”); OKL. ST. ANN. tit. 12, § 2 (“The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma”); WYO. STAT. § 8-1-101 (receiving “[t]he common law of England as modified by judicial decisions”). The most explicit endorsement of judicial lawmaking comes from the great state of North Dakota, which provides that “[t]he will of the sovereign power is expressed” not only by the constitution and statutes of the state, but also by “[t]he decisions of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.” N.D. CENT. CODE § 1-01-03.

⁵¹⁶ The codification of much of California’s common law did not, after all, prevent its most famous Chief Justice from insisting that judges retain “the major responsibility for lawmaking in the basic common-law subjects.” Roger J. Traynor, *No Magic Word Could Do It Justice*, 49 CAL. L. REV. 615, 618 (1961).

⁵¹⁷ U.C.C. § 1-103 (providing that the UCC “must be liberally construed and applied to promote its underlying purposes and policies, which are . . . to simplify, clarify, and modernize the law governing commercial transactions; . . . to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and . . . to make uniform the law among the various jurisdic-

So there is more positive support for backward-looking state court lawmaking authority than Professor Nelson has acknowledged. And I have already discussed the practical arguments for deference to state courts as to the content of state law.⁵¹⁸ Nonetheless, I think he is right to question whether *Erie*'s constitutional holding can be rested entirely on this ground. It remains intelligible, as Nelson points out, to insist that a state court is "wrong" about the content of state law, even state common law.⁵¹⁹ If that is true, then we may need a different argument to support a categorical rule of deference.

On the other hand, it also seems relatively clear that backward-looking lawmaking authority is *not*, in fact, the critical variable in *Swift* or *Erie*. After all, state courts hardly enjoy such authority vis-à-vis state statutes or constitutional provisions, and yet even under *Swift* the federal courts had generally considered themselves bound to follow state courts' interpretations of those positive enactments.⁵²⁰ In other words, the critical point was not whether the state courts were making law as opposed to interpreting some source of law with an objective existence outside their chambers. What the federal courts seem to have deferred to is the state courts' *forward* looking authority—that is, their authority to "set[] forth a standard, or principle, or rule that is to be followed and applied by those to whom it is addressed."⁵²¹ This aspect of state lawmaking authority thus focuses on the ability of state courts to settle the meaning of state law going forward.

I submit that once we agree that federal courts sitting in diversity are applying state law to any question not governed by federal positive law, then *Erie*'s rule of deference is fully supported by the necessity that *some* court must have final authority to settle the meaning of state law. Ultimate authority to determine that meaning, of course, resides in the state legislature or the people of the state (who may generally intervene through referenda and constitutional amendment more easily than the people of the United States may do so at the federal level).⁵²² But that is true at the federal level, too, where Congress may ultimately determine the meaning of federal statutes through amendment. That fact has never, however, kept courts and commentators from emphasizing the importance of having one Su-

tions"). Comment 1 to this section then makes clear that the U.C.C. "is intended to be a semi-permanent and infrequently-amended piece of legislation" and to "provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in the light of unforeseen and new circumstances and practices." See also *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 660 (2d Cir. 1994) (applying this section pursuant to New York state law).

⁵¹⁸ See *supra* text accompanying note 215–222.

⁵¹⁹ Nelson, *Erie*, *supra* note 6, at 979.

⁵²⁰ See *supra* text accompanying notes 102–104.

⁵²¹ Schauer, *supra* note 510, at 2.

⁵²² See, e.g., SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 332–33 (2012) (discussing the high amendment rate of state constitutions).

preme Court to resolve disputes about the meaning of federal law.⁵²³ A single judicial forum to settle the meaning of *state* law is no less important to the persons who must take that law as a guide to their own conduct. Absent such a forum, persons subject to state law would experience “the debilitating uncertainty in the planning of everyday affairs” that *Erie* was designed to prevent.⁵²⁴

That forum has to be the state supreme court. As the Court said long ago in *Murdock v. City of Memphis*, “[t]he State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise.”⁵²⁵ *Murdock* held that the U.S. Supremes lack jurisdiction to review state supreme court decisions on questions of state law, and the Court suggested that that statutory bar may have constitutional underpinnings.⁵²⁶ That holding is significant for at least two reasons:

⁵²³ See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (stressing the importance of the U.S. Supreme Court’s function in ensuring the uniformity of federal law); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960) (asserting that “maintaining the uniformity and supremacy of federal law” is the “essential constitutional function[]” of the Supreme Court).

⁵²⁴ Ely, *supra* note 1, at 710–11.

⁵²⁵ 87 U.S. (20 Wall.) 590, 626 (1874).

⁵²⁶ *Seeid.* at 631 (interpreting Section 25 of the Judiciary Act to limit Supreme Court review of state supreme court decisions to federal questions); *see also id.* at 633 (reserving judgment as “whether, if Congress had conferred such authority [to review state law questions], the act would have been constitutional”); *see also* Harrison, *Federal Appellate Jurisdiction*, *supra* note 197, at 355 (“*Murdock* rests in part on constitutional qualms.”). John Harrison has argued that “Justice Miller’s misgivings, however, almost certainly derived in large part from substantive premises about the federal structure that were dominant at the time but that do not derive straightforwardly from the text and that I think are unfounded.” *Id.* In particular, Professor Harrison argues that *Murdock* rested on notions of “dual federalism”—*not* the principle of separate and exclusive fields of regulatory authority that I discussed earlier, *supra* notes 279–280 and accompanying text, but rather a notion that “interactions between the two governments, and especially regulation of one level of government by the other, [are] strongly disfavored.” *See* Harrison, *Federal Appellate Jurisdiction*, *supra* note 197, at 355. I am not even sure that this notion is properly viewed as part of “dual federalism,” as opposed to simply a postulate of American sovereignty common to most models of federalism doctrine. *See generally* Young, *Puzzling Persistence*, *supra* note 283 (describing the dual federalist model as I understand it). But without regard to taxonomy, it is clear that this non-regulation or non-interference principle has a lot more life in it today than does the model of separate and exclusive spheres of authority to regulate *private* actors. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (striking down the Affordable Care Act’s expansion of Medicaid on the ground that it coerced state governments); *Medellin v. Texas*, 552 U.S. 491 (2008) (striking down an attempt by the President to issue commands to the state courts); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not “commandeer” state executive officials); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not subject states to damages liability in suits by individuals pursuant to federal law); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that neither the state nor the federal government presumptively may regulate the relationship between the people and their elected representatives in the other government, except as the Constitution expressly permits); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require state legislatures to enact laws implementing a federal statutory program); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“It is obviously essential to the indepen-

First, it means that the federal courts *cannot* unify the meaning of state law, because no federal tribunal has the authority to correct erroneous state interpretations.⁵²⁷ Second, and more fundamentally, as Martha Field has explained, if the federal Supreme Court were allowed to substitute its own view of state law for that of the highest state court, “it would not be possible to identify any body of law as ‘state law.’ It is thus because of *Murdock*—that the whole concept of state law as distinct from federal law is a meaningful one.”⁵²⁸

What I hope to have established is that *Erie*’s rule of deference to state courts on the construction of state law need not rest solely on the supposition that state courts do something fundamentally *different* from federal courts in deciding cases. That rule may also arise from recognizing that the

dence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.”) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900)); cf. Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (identifying serious constitutional objections to federal regulation of the state courts). In any event, it may not matter whether *Murdock* is constitutionally grounded. Professor Field points out that, despite *Murdock*’s avowed reliance on statutory construction, its rule has become “such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it.” Field, *supra* note 55, at 920. The critical point is that much of our judicial system now rests on a presupposition that the state courts are the last word on state law.

⁵²⁷ Even if there were no such bar, I have already suggested that it is doubtful that the Court would be willing to hear the volume of state law cases that that it would take to unify conflicting interpretations of state law. See *supra* note 197 and accompanying text. Of course, it is also true that we lack an appellate mechanism for state supreme courts to review federal applications of state law under *Erie*. The U.S. Supremes will occasionally vacate federal circuit court decisions and remand them for reconsideration in light of state precedents, see, e.g., *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913 (1996), and the Court has also encouraged certification of questions on the meaning of state law to the state courts, see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 80 (1997). But this situation seems less chaotic than what would exist were federal courts disobliged of their obligation to follow state decisions.

⁵²⁸ Field, *supra* note 55, at 922; see also Dogan & Young, *supra* note 213, at 119–23 (discussing the significance of the *Murdock* rule). A limited exception to *Murdock* allows the U.S. Supreme Court to review a state court’s decision of a state law question for the purpose of ensuring that the state court is not manipulating state law in order to undermine or thwart a federal right. See, e.g., *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1812) (reviewing the Virginia Court of Appeal’s construction of state property law in order to ensure that the state courts had not construed that law so as to defeat rights under the federal Treaty of Peace ending the Revolutionary War); HART & WECHSLER, *supra* note 66, at 457–58 (discussing the concept of “antecedent” state law grounds). Most of these cases are explainable by the presence of federal constitutional guarantees that, while not precluding the state from changing its law (even through judicial decision), do prevent *retroactive* changes or require that those changes be compensated. See, e.g., *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (reviewing state court’s decision about the existence of a contract under state law as a predicate to the plaintiff’s federal claim for impairment under the Contracts Clause); Dogan & Young, *supra* note 213, at 120–30 (discussing this exception in the context of claims that a state court’s change in state law has effected a judicial taking). In any event, even this exception incorporates a significant degree of deference to the state courts’ construction of state law. See HART & WECHSLER, *supra* note 66, at 485–86.

functions of the two judicial systems are fundamentally *similar*. That is, both the U.S. Supreme Court and the state supreme courts share similar responsibilities for settling the meaning of the bodies of law within their respective charges. As I tell my students each year, that is why they call them the state “supreme” courts. It would be hard to identify any good reason to impute this function to the U.S. Supreme Court on the federal side without also allowing it to the state supreme courts on the state side. And to the extent that a state’s constitutional regime vests this responsibility in the state courts, a *federal* court’s decision to set aside the state courts’ interpretation of state law must be construed as an attempted act of federal supremacy and measured by the lawmaking criteria of the Supremacy Clause.⁵²⁹

The Supreme Court adopted this view in *Green v. Neal’s Lessee*.⁵³⁰ As already mentioned, *Green* held that federal courts must defer to state courts’ construction of state statutes. The case involved a Tennessee statute of limitations that the U.S. Supreme Court had construed in a prior case; subsequent decisions of the Tennessee Supreme Court, however, had adopted a contrary construction. The *Green* Court explained that it would follow the Tennessee decisions in order to avoid a conflict “arising from two rules of property within the same state” that would be “deeply injurious” to the state’s citizens.⁵³¹ This rationale is consistent with what Professors Bridwell and Whitten describe as the basic purpose of the diversity jurisdiction—to protect the settled expectations of private parties.⁵³²

On this reading, *Erie* does rest on a premise about state constitutional law. That premise, however, is simply that state constitutions, by vesting the judicial power of the state in the state supreme courts, entrust those courts with the authority to settle the prospective meaning of state law until that meaning is altered by the legislature or other democratic processes of the state. This assumption strikes me as a somewhat safer, or at least less controversial, assumption than the one that Justice Holmes made and that Professor Nelson criticizes.

2. What if State Courts Don’t *Want* Federal Deference?

The role of state courts in settling the meaning of state law also responds to Professor Green’s objection, which is that we cannot take for granted that state courts *want* to bind the federal courts. Green’s argument

⁵²⁹ See, e.g., Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 314 n.199 (1984) (explaining that “there is no general federal judicial power to displace state law”).

⁵³⁰ 31 U.S. (6 Pet.) 291 (1832); see also BRIDWELL & WHITTEN, *supra* note 63, at 111 (discussing this case).

⁵³¹ *Green*, 31 U.S. (6 Pet.) at 300.

⁵³² See BRIDWELL & WHITTEN, *supra* note 63, at 67–68.

is not so much a critique of *Erie* as an effort to play out its implications: If *Erie* requires federal courts to follow state courts on matters not governed by positive federal law, he argues, then whether or not to defer to state court interpretations of the common law would seem to depend on whether state courts *want* deference.⁵³³ It is at least logically possible that they do not. If a state should choose to stick with *Swift* and view the common law as “general” law shared by all American jurisdictions, then *Erie* provides no obvious reason why federal courts should defer to the state courts’ construction of that law.⁵³⁴ I think Green’s argument, while ingenious, ultimately underrates the reasons compelling federal court deference to state court decisions.

As an initial matter, I am not at all convinced that any American jurisdiction continues to view the common law as “general” in nature or to accept the holding of *Swift* that federal diversity courts should not defer to state courts on the meaning of that law. Professor Green points to the great state of Georgia, and he begins by citing the Georgia Supreme Court’s statement reaffirming *Swift* in *Slaton v. Hall*:

The common law is presumed to be the same in all the American states where it prevails. Though courts in the different states may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction. If all the American states were to construe the same principle of common law incorrectly, the common law would be unchanged.⁵³⁵

Green acknowledges, of course, that *Slaton* came down nine years before *Erie*. He points out that such a late reaffirmation of *Swift* sets Georgia apart from the numerous states that had condemned *Swift* by that late date. And it is true that if *Erie* was right about the federal courts’ lack of constitutional power to dictate to the states on matters of common law, then Justice Brandeis could hardly impose his views on legal positivism on an unwilling state. But the notion that the general common law retains some sort of Platonic existence irrespective of the decisions of the courts in all fifty states is so far from contemporary understandings of jurisprudence that one would want to see a pretty clear statement from the modern Georgia courts indicating that this remains their view.

⁵³³ See Green, *Suppressed Premise*, *supra* note 248, at 1135–36.

⁵³⁴ Professor Green ultimately concludes that *Erie* is right because if a state’s supreme court’s decisions are binding on the inferior courts of a state (which they are) then a principle of “nondiscrimination” requires that they also be binding on *federal* courts. *See id.* at 1147. I agree that the role of the state supreme court vis-à-vis other state courts is a critical factor, but I think the reasons for federal court deference are more fundamental than a principle of nondiscrimination.

⁵³⁵ 148 S.E. 741, 743 (Ga. 1929) (quoted in Green, *Suppressed Premise*, *supra* note 248, at 1123).

Professor Green does not have one.⁵³⁶ And aside from the few odd conflicts cases Green cites, Georgia seems to behave pretty much like any other state with regard to its common law. Georgia has, in fact, adopted the U.C.C. (which would be unnecessary if *Swift*'s general commercial law were still operative), and the state legislature—like other legislatures—continues to tweak its provisions.⁵³⁷ Scholars have written about the extent to which Georgia has or has not adopted this or that aspect of the U.C.C.,⁵³⁸ but if *Swift v. Tyson* were still good law in Georgia one would expect to see some mention of that fact in these legislative debates or scholarly discussions. One does not. Likewise, Georgia conflicts of laws cases talk about the state's rejection of the Second Restatement and the applicability of Georgia common law,⁵³⁹ both of which would be odd things to do if those courts thought a *Swiftian* general law governed conflicts or other common law subjects. It would be a surprising thing indeed if any American state

⁵³⁶ Green infers the notion that Georgia adheres to *Swift* entirely from some state conflict of laws decisions in which Georgia courts have reached an independent judgment as to the content of a sister state's law. Green, *Suppressed Premise*, *supra* note 248, at 1126–27, n.89 (citing *Trs. of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 811 (1940); *Calhoun v. Cullum's Lumber Mill, Inc.*, 545 S.E.2d 41, 45 (Ga. Ct. App. 2001); *Leavell v. Bank of Commerce*, 314 S.E.2d 678, 678 (Ga. Ct. App. 1984). *Slaton* itself was a case of this type. See *id.* at 1123 (“[S]trictly speaking [*Slaton*] held only that Alabama decisions could be ignored when interpreting the common law of Alabama.”). Green reads these cases to say that “if the matter is governed by the common law (including apparently local common law), [Georgia courts] come to their own judgment about what this common law is. This suggests that they do not think that their own common-law decisions bind sister-state—or federal—courts.” *Id.* at 1126–27. Green acknowledges a far more likely possibility, however: “One might read these cases as simply applying Georgia common law to events in sister states.” *Id.* at 1126 n.89. He acknowledges that “[a] few cases do put the matter this way,” *id.* (citing *White v. Borders*, 123 S.E.2d 170, 172 (Ga. Ct. App. 1961)), but he characterizes that possibility as “an inaccurate description of Georgia’s approach,” *id.* at 1126 n.89. Green’s point is simply that ignoring a sister state’s tort rules would be inconsistent with Georgia’s conflict of laws principles. *Id.* That may be so, but this sort of inconsistency seems far more likely than a covert adherence to *Swift*. After all, the only authority on Georgia conflicts rules that Professor Green cites states the Georgia rule in exactly the way that Green characterizes as “inaccurate.” See John B. Rees, Jr., *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 789–90 (1983) (“When no statute is involved, the common law of Georgia controls; the other jurisdiction’s decisions construing its own common law will be ignored.”). Tellingly, Green cites no language whatsoever from a contemporary Georgia court explicitly endorsing a view that is anything like *Slaton*’s pre-positivist manifesto.

⁵³⁷ See, e.g., Bryan Cave Alert, *Recent Legislative Action Regarding Changes to Article 9 of Georgia’s Uniform Commercial Code (“The Georgia UCC”)*, April 23, 2013, available at http://www.bryancave.com/files/Publication/15bf7345-bfc0-4dd7-8508-680fa4c906a2/Presentation/PublicationAttachment/cf104535-9375-4389-b8f2-76a4f09335e2/Financial%20Services%20Alert_%204.23.13.pdf.

⁵³⁸ See, e.g., Albert H. Conrad, Jr. & Richard P. Kessler, Jr., *Proposed Revisions to the Georgia Uniform Commercial Code: A Status Report*, 43 MERCER L. REV. 887 (1992) (not mentioning it).

⁵³⁹ See, e.g., *Convergys Corp. v. Keener*, 582 S.E.2d 84 (Ga. 2003) (refusing to follow a contractual law-selection clause “[b]ecause the Restatement (Second) Conflict of Laws has never been adopted in Georgia, and because we continue to refuse to enforce contractual rights which contravene the policy of Georgia”).

persisted in the view that common law is general, so that other jurisdictions' courts need not defer to that state's courts in interpreting the law of that jurisdiction. What is unsurprising is the lack of any evidence for that phenomenon.

In any event, I do not think that *Erie* leaves the federal courts' obligation of deference up to the state courts. I have argued that federal courts should defer to state courts on the meaning of state law for reasons analogous to the grounds of deference in administrative law: state courts have greater expertise with respect to state law;⁵⁴⁰ they are more democratically accountable to the state electorate;⁵⁴¹ and state law typically delegates law-making authority to state courts.⁵⁴² Professor Green's argument questions only the third of these grounds, but the first two are sufficient to provide strong pragmatic justifications for deference.

One might object that, if a state really does view the common law as unitary and general, then the relevant law is not state law at all. On this view, as the Georgia Supreme Court put it in *Slaton*, "[t]he common law is presumed to be the same in all the American states where it prevails."⁵⁴³ If that is true, then any given state's courts could claim no special expertise or democratic connection to that general law. But it is *not* true. In the nineteenth century, courts applying the general commercial law could ground that law in a shared body of commercial custom that virtually all jurisdictions had agreed to respect. But outside of commercial law, principles of general law lacked any comparable positive grounding. To the extent that general law exists today, it is a collection of general principles and "best practices"—such as the American Law Institute's "Restatements"—that all agree require positive acts by particular jurisdictions in order to confer on them the force of law.⁵⁴⁴ And when individual jurisdictions do adopt those principles, they inevitably do so with particular variations reflecting the fact they have been adopted as *state* law.⁵⁴⁵

There is, however, an even more fundamental reason that the Constitution mandates federal court deference to state court decisions. I have argued that whether or not state courts have a "backward-looking" lawmaking function, they surely have a "forward-looking" one.⁵⁴⁶ That is, they have the authority and the obligation to settle the meaning of state law—at least unless and until the legislature intervenes—whether or not they have the

⁵⁴⁰ See *supra* notes 216, 219–220 and accompanying text.

⁵⁴¹ See *supra* notes 217, 221 and accompanying text.

⁵⁴² See *supra* notes 501–504 and accompanying text.

⁵⁴³ 148 S.E. 741, 743 (Ga. 1929).

⁵⁴⁴ See Nelson, *General Law*, *supra* note 74, at 505 ("In modern times, rules of [general law] are rarely thought to govern legal questions of their own force; they apply only to the extent that custom or positive adoption has incorporated them into the law of a particular sovereign.").

⁵⁴⁵ See, e.g., Conrad & Kessler, *supra* note 538 (describing the variations in Georgia's adoption of the U.C.C.).

⁵⁴⁶ See *supra* notes 510–532 and accompanying text.

authority to “make” that law in the first instance. The federal courts cannot perform that function; for reasons already discussed, it is exclusively delegated to the state courts. And because there is no “mystic over-law”⁵⁴⁷ to apply as an alternative, federal courts can only apply the state law administered by the state courts.

* * *

Erie affirms the definitive power and obligation of state courts to settle the meaning of state law, and that is sufficient to answer both Professor Nelson’s and Professor Green’s objections. But I doubt that this proposition about state law is *all* that *Erie* stands for. If *Erie* simply means that “the nation lacks power to make state law,” as Professor Weinberg puts it, then “[n]othing in that holding qualifies national power to make federal law.”⁵⁴⁸ And yet *Erie* said that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law.”⁵⁴⁹ *Erie* thus spoke not only to how federal courts ascertain the meaning of state law, but also to where state law and federal law respectively apply. It is the latter point that is critical for most of our contemporary debates about *Erie*, because those debates focus on federal courts’ power to fashion federal common law or to apply common-law-like norms such as customary international law.⁵⁵⁰ The remainder of my discussion focuses on this aspect of *Erie*.

IV. *ERIE*, JUDICIAL ACTIVISM, AND THE NEW DEAL SETTLEMENT

This last part briefly addresses *Erie*’s place in the architecture of contemporary federalism doctrine. That doctrine is largely a child of the New Deal, which put an end to the old dual federalism model and ushered in an era of largely concurrent federal and state regulatory authority.⁵⁵¹ This shift from separate and exclusive spheres of regulatory jurisdiction to largely overlapping ones preceded a parallel shift in the way that federalism is enforced. Under dual federalism, courts had drawn lines between the two regulatory worlds and invalidated measures, state or federal, that overstepped into the other government’s territory. Contemporary federalism doctrine, by contrast, emphasizes the political and institutional safeguards

⁵⁴⁷ *The Western Maid*, 257 U.S. 419, 432 (1922) (Holmes, J.).

⁵⁴⁸ Weinberg, *Federal Common Law*, *supra* note 266, at 812.

⁵⁴⁹ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁵⁵⁰ See, e.g., Green, *Repressing*, *supra* note 5, at 623 (identifying customary international law as the true issue).

⁵⁵¹ See Young, *Ordinary Diet*, *supra* note 289, at 257–61; Gardbaum, *supra* note 105, at 486.

of federalism—especially the representation of the states in Congress and the procedural difficulty of making federal law.⁵⁵² Although the leading case associated with this latter shift—*Garcia v. San Antonio Metropolitan Transit Authority*⁵⁵³—is also associated with judicial abdication,⁵⁵⁴ it has become clear since that *Garcia*'s notion of “process federalism” can be enforced with significant bite.⁵⁵⁵ Although the Court continues to enforce some sort of outer bound to Congress's authority,⁵⁵⁶ the most important cases have to do with what goes on *within* the realm of Congress's enumerated powers—powers which, after all, now largely overlap with those of the States.⁵⁵⁷

Where does *Erie* fit in all this? A significant school of thought holds that it doesn't fit at all. Kurt Lash asserts that *Erie* “had nothing to do with nationalism, redistribution, or any other part of the New Deal political agenda.”⁵⁵⁸ As Edward Purcell puts it, *Erie* “bore an oblique and problematic relationship to the jurisprudence of the ‘Roosevelt Court.’”⁵⁵⁹ And Suzanna Sherry, invoking the Court's expansion of federal authority in cases like *Wickard v. Filburn*⁵⁶⁰ and *NLRB v. Jones & Laughlin*,⁵⁶¹ as well as its undermining of state sovereignty and “exclusive territoriality” in cases like *International Shoe Co. v. Washington*,⁵⁶² asserts that “[t]he *Erie* Court's solicitude for state sovereignty, and its reliance on ‘pre-New Deal federalism,’ is inexplicable in the midst of this march toward federal dominance.”⁵⁶³

I have already rejected the notion that *Erie* relied on “pre-New Deal federalism,”⁵⁶⁴ but I now want to press the further claim that *Erie* actually

⁵⁵² See Wechsler, *supra* note 290 (stressing political safeguards); Clark, *Procedural Safeguards*, *supra* note 306.

⁵⁵³ 469 U.S. 528 (1985).

⁵⁵⁴ See, e.g., William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

⁵⁵⁵ See, e.g., *Printz v. United States*, 521 U.S. 898, 918–22 (1997) (relying in part on process arguments to hold that Congress may not commandeer state executive officials); see generally Young, *Two Cheers*, *supra* note 292; see also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341 (anticipating this development).

⁵⁵⁶ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act as outside Congress's power under the Commerce Clause).

⁵⁵⁷ See Young, *Ordinary Diet*, *supra* note 289, at 261–65.

⁵⁵⁸ Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 461 (2001).

⁵⁵⁹ PURCELL, *supra* note 9, at 3.

⁵⁶⁰ 317 U.S. 111 (1942).

⁵⁶¹ 301 U.S. 1 (1937).

⁵⁶² 326 U.S. 310 (1945).

⁵⁶³ Sherry, *Wrong*, *supra* note 6, at 148 (quoting Green, *supra* note 5, at 607); see also Bandes, *supra* note 237, at 850 (arguing that *Erie*'s federalism—at least as understood by its Legal Process school defenders—was completely cut off from its historical roots).

⁵⁶⁴ See *supra* Part III.A.1.

fits rather well with post-New Deal federalism jurisprudence. In fact, it is fair to say that *Erie* is the archetypal case of that jurisprudence. I do not claim that *Erie* is a *product* of the New Deal jurisprudence or quarrel with Professor Purcell's account of *Erie* as a specimen of Brandisian progressivism.⁵⁶⁵ As Susan Bandes has noted, "[t]he age that gave rise to the *Erie* decision was ending as the decision was issued, dramatically altering many of the social concerns and political assumptions on which the decision had been based."⁵⁶⁶ I do claim that *Erie*, despite being a product of an earlier era, fit beautifully with the federalism doctrine that would emerge after the New Deal.

The statements from Professor Sherry and others quoted above take an unfortunately simplistic view of what the New Deal and the New Deal Court accomplished. The point, as Stephen Gardbaum has well demonstrated, was not simply to achieve "federal dominance" but to liberate government at *both* the state and national levels from the constraints imposed on it by the Old Court.⁵⁶⁷ Those constraints included not only a more limited affirmative commerce power, but also notions of economic substantive due process and a rigorously enforced dormant Commerce Clause that kept the states from regulating pursuant to their view of the public interest.⁵⁶⁸ After the New Deal, both the national and the state governments enjoy broad regulatory scope, and attention necessarily shifts to the modes of resolving conflicts that may arise between their efforts.⁵⁶⁹

Erie's place in this post-New Deal vision stands out in the preface to the first edition of the famous *Hart & Wechsler* casebook on federal jurisdiction, published in 1953. That preface compares the "[p]roblems of federal and state legislative competence" that generally arise in "elementary courses in constitutional law" with the problems to be addressed in the new book.⁵⁷⁰ The former sort of problems, which "arise in clear-cut instances of conflict" and call for "adjudication of competing claims of power," "touch only the beginnings of the problems."⁵⁷¹ Rather,

[f]or 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

⁵⁶⁵ See PURCELL, *supra* note 9, at 114.

⁵⁶⁶ BANDES, *supra* note 237, at 849.

⁵⁶⁷ Gardbaum, *supra* note 105, at 486 ("[W]hat occurred in many areas was not a shift from exclusive state authority to concurrent federal and state authority, but a shift from a regulatory vacuum to concurrent powers: *both* federal and state governments were constitutionally enabled to regulate a large number of areas of social and economic life that previously they had both been prohibited from regulating.").

⁵⁶⁸ See *id.* at 564–65.

⁵⁶⁹ See Young, *Ordinary Diet*, *supra* note 289, at 261–62.

⁵⁷⁰ Quoted in HART & WECHSLER, *supra* note 66, at vi.

⁵⁷¹ *Id.*

normal state-created norms, leaving courts to face the problem as an issue of choice of law.⁵⁷²

The latter sort of case is, of course, *Erie*. No federal statute had sought to set a railroad's duty of care to a passerby, and thus the case presented no question of "ultimate power"; instead, the federal diversity court faced a difficult "choice of law" problem in judging between the general common law and the law of the state. In a world of largely concurrent jurisdiction, Professors Hart and Wechsler insisted, these would be the most important problems.⁵⁷³

The judicial federalism rationale of *Erie* also fits comfortably with the process federalism that dominates contemporary federalism doctrine. Justice Blackmun explained in *Garcia* that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."⁵⁷⁴ Separation of powers at the national level, in other words, is the key to federalism. Hence, as Brad Clark has recognized, "the Constitution prescribes precise procedures to govern the adoption of each source of law recognized by the Supremacy Clause as 'the supreme Law of the Land,'" and "all of these procedures assign responsibility for adopting such supreme law solely to actors subject to the political safeguards of federalism."⁵⁷⁵ And whatever doubts one might have about the efficacy of political safeguards standing alone,⁵⁷⁶ "federal lawmaking procedures continue to constrain federal lawmaking simply by establishing multiple 'veto gates,' and thus effectively creating a supermajority requirement."⁵⁷⁷ In the later stages of the *Swift* regime, federal courts had begun to displace state law by formulating effectively federal rules of decision without regard to this system of structural safeguards.⁵⁷⁸ By insisting that federal courts may not make federal law outside the constitutionally ordained legislative process, *Erie* became the central decision of modern process federalism.⁵⁷⁹

⁵⁷² *Id.*

⁵⁷³ See Mishkin, *supra* note 284, at 1686 (arguing that *Erie* is of profound constitutional significance whether or not Congress could override it because "it rests on 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").

⁵⁷⁴ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

⁵⁷⁵ Clark, *Erie's Source*, *supra* note 90, at 1304.

⁵⁷⁶ See, e.g., Prakash & Yoo, *supra* note 305, at 1459; Baker & Young, *supra* note 305, at 106–33.

⁵⁷⁷ Clark, *Erie's Source*, *supra* note 90, at 1304–05.

⁵⁷⁸ See, e.g., BRIDWELL & WHITTEN, *supra* note 63, at 115–27; HART & WECHSLER, *supra* note 66, at 556–58; Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1319 (2000).

⁵⁷⁹ This is not lost on all of *Erie's* critics. GREVE, *supra* note 4, at 242 ("[T]he true protection for the 'states as states' is not their representation in Congress. Rather, it is the certainty that Congress will consistently fail to enact, and federal courts will under *Erie* refuse to supply, federal rules of decision in

Professor Purcell offers a different view near the conclusion of his book on *Erie*. He contends that “[a]lthough *Erie* constrained the federal courts in some ways, it also channeled them in new directions where they could enjoy freedom and, eventually, even greater power.”⁵⁸⁰ He worries that Justice Brandeis’s judicial federalism “corollary” has become “of uncertain import” in contemporary jurisprudence “because the social and institutional trajectory of the twentieth century challenged the corollary’s wisdom and utility, and hence its power to command judicial allegiance.”⁵⁸¹ “[I]n an age of accelerating interstate and international integration,” he writes, judges “could not deny the compelling need for effective national ordering in those areas they valued most highly and thought most essential to the nation’s well-being.”⁵⁸² Purcell supports this concern by noting a scholarly literature asserting that “[t]he Rehnquist Court . . . actively made law implementing its values, sometimes ignoring or setting aside congressional actions in the process.”⁵⁸³

It is hard to say, however, that the Rehnquist Court’s activism—such as it was—cut against *Erie*’s principle of judicial federalism. That Court continued an earlier tendency to restrict federal common law with respect to both primary obligations and implied federal remedies.⁵⁸⁴ The Court’s 2004 decision in *Sosa v. Alvarez-Machain*⁵⁸⁵ provides an important example. In its first significant encounter with human rights suits under the Alien Tort Statute,⁵⁸⁶ the Court wrote that “[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement

a specified domain—the state exploitation of interstate commerce. So viewed, *Erie*’s legacy dovetails with the New Deal’s ambivalent preemption doctrine.”) (emphasis in original).

⁵⁸⁰ PURCELL, *supra* note 9, at 300.

⁵⁸¹ *Id.* at 302.

⁵⁸² *Id.*

⁵⁸³ *Id.* at 406 n.85.

⁵⁸⁴ See, e.g., *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (narrowing the implied right of action under the Alien Tort Statute to exclude wholly extraterritorial cases); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (restricting federal common law implied rights of action under federal statutes); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83–86 (1994) (holding that state law governed the liability of a failed bank’s former law firm in a suit brought by a federal agency as receiver); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (establishing a balancing test for federal common lawmaking that presumptively tips in favor of state law); *but see Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (establishing a federal common law “military contractor defense” in products liability actions, even though the United States was not a party). For an overall assessment, see generally HART & WECHSLER, *supra* note 66, at 629 (stating that “characteristic[s] of the Court’s current approach to federal common lawmaking” include “careful analysis of the asserted need for uniformity, concern that federal rules of decision will generate intrastate disuniformity, and a preference for incorporation of state law absent a demonstrated need for a uniform federal rule of decision”).

⁵⁸⁵ 542 U.S. 692 (2004).

⁵⁸⁶ 28 U.S.C. § 1350 (conferring jurisdiction on the federal courts in a “civil action by an alien for a tort only, committed in violation of the law of nations”). On the ATS, see generally HART & WECHSLER, *supra* note 66, at 679–85.

the jurisdiction conferred by the early statute.”⁵⁸⁷ Prominent among these reasons were the conception of law affirmed in *Erie* and that decision’s “significant rethinking of the role of the federal courts in making [common law].”⁵⁸⁸ Whether or not *Sosa* resolved the longstanding dispute about the status of customary international law in domestic courts,⁵⁸⁹ it left little doubt about the continuing importance of *Erie* as a restraint on judicial lawmaking.

Moreover, Professor Purcell’s assurance that the future belongs to national power may itself be out of date. In 1937, at the height of the New Deal (and a year before *Erie*), a significant majority of Americans favored concentration of power in the federal government as opposed to the states;⁵⁹⁰ however, a recent overview of opinion research observed that “trust in the federal government has declined since the 1960s,” while “attitudes toward subnational governments have held steady or even improved.”⁵⁹¹ A survey in April of 2013 found that 57% of Americans viewed state governments favorably while only 28% viewed the federal government favorably.⁵⁹² Because our system rests, as Alexander Hamilton pointed out, on intergovernmental competition for “the confidence and good will of the people,” these opinion trends matter.⁵⁹³

These trends in public opinion correspond to institutional changes. As Alice Rivlin has observed, “[t]he dissatisfaction with state government that

⁵⁸⁷ *Sosa*, 542 U.S. at 725.

⁵⁸⁸ *Id.* Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have gone further and eliminated altogether judicial discretion to recognize customary international law claims under the ATS, based on “*Erie*’s fundamental holding that a general common law *does not exist*.” *Id.* at 744 (Scalia, J., concurring in part and in the judgment) (emphasis in original).

⁵⁸⁹ See, e.g., Bradley, Goldsmith & Moore, *supra* note 16 (addressing this question); Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. FORUM 28–35 (2007), available at <http://www.harvardlawreview.org/media/pdf/young.pdf> (same).

⁵⁹⁰ See Megan Mullin, *Federalism*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 209, 217 (Nathaniel Persily, Jack Citrin & Patrick J. Egan, eds. 2008). In the 1937 poll, Americans favored the federal government by 46 to 34 percent; in polls with the same wording taken in 1981 and 1995, those numbers had reversed to 28 to 56 percent and 26 to 64 percent, respectively. *Id.*

⁵⁹¹ *Id.* at 214 (collecting opinion studies from 1976 to 2006).

⁵⁹² See PEW RESEARCH CTR., *supra* note 17. By October, in the midst of the latest round of government shutdown and debt-ceiling follies, the federal government’s favorable had declined further to 19 percent. See PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *Trust in Government Nears Record Low, but Most Federal Agencies Are Viewed Favorably* (October 18, 2013), available at <http://www.people-press.org/files/legacy-pdf/10-18-13%20Trust%20in%20Govt%20Update.pdf>. The October poll does not appear to have addressed confidence in state governments. See also Chris Cilizza & Aaron Blake, *Are We in the End Times of Trust in Government*, WASH. POST (Feb. 7, 2013), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/02/07/are-we-in-the-end-times-of-trust-in-government/> (lamenting a steep and lasting decline in trust in the federal government, but ignoring data on robust public trust in the states).

⁵⁹³ The Federalist No. 17 (Alexander Hamilton), at 109 (J.E. Cooke ed., 1961); see also Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L. J. 1669 (2007) (arguing that trust levels affect the federal balance of power).

reached a crescendo in the 1960s not only prompted an explosion of federal activity, it also brought a wave of reform to the states themselves. . . . [S]tates took steps to turn themselves into more modern, responsive, competent governments.”⁵⁹⁴ The result is an increasingly stark contrast between political gridlock at the national level and policy innovation in the states. States have led the way on gay rights, with the federal government acting primarily as a brake on reform.⁵⁹⁵ Individual states have developed their own policies to combat global warming even while pressing a reluctant federal government to take action.⁵⁹⁶ States have played a similar role on immigration reform, taking action on their own while also stimulating a national debate on the subject.⁵⁹⁷ Even healthcare reform, the current administration’s signature national policy innovation, seems to have dubious prospects at the national level while individual states continue to pursue more radical reforms.⁵⁹⁸

⁵⁹⁴ ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT* 102 (1992); *see also* PHILIP W. ROEDER, *PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES* 24-27 (1994) (collecting studies indicating that state governmental capacity has improved significantly in recent decades); Van Horn, *supra* note 17, at 2-3 (describing a “quiet revolution” as a result of “changes in representation, government organization, and managerial competence” at the state level, with the result that “[s]tate officials are far more willing and able to carry out significant responsibilities”).

⁵⁹⁵ *See, e.g.,* *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (striking down the federal Defense of Marriage Act, which denied federal recognition to same-sex marriages, as applied to a couple married under the laws of New York; the Court emphasized that “[t]he State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import”); Letter from Dayna K. Shah, Managing Assoc. Gen. Counsel, GAO, to Senators Tom Harkin, Susan Collins & Jeff Merkley, *Re: Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data* (Oct. 1, 2009), available at <http://www.gao.gov/new.items/d10135r.pdf> (“Although federal law does not prohibit discrimination in employment on the basis of sexual orientation, 21 states and the District of Columbia provide such protection in their statutes.”).

⁵⁹⁶ *See, e.g.,* *Massachusetts v. EPA*, 549 U.S. 497 (2007) (upholding the standing of a group of states to challenge the federal Environmental Protection Agency’s refusal to issue regulations governing greenhouse gas emissions); *Rocky Mt. Farmers Union v. Corey*, 2013 U.S. App. LEXIS 19258, at *13 (9th Cir. Sept. 18, 2013) (upholding California’s Low Carbon Fuels Standard against a dormant Commerce Clause challenge and noting that “California’s role as a leader in developing air-quality standards has been explicitly endorsed by Congress in the face of warnings about a fragmented national market”); *see also* REGIONAL GREENHOUSE GAS INITIATIVE, <http://www.rggi.org/home> (last visited Nov. 3, 2013) (agreement by nine northeastern and mid-Atlantic states to establish a regional cap and trade program for electric generating plants).

⁵⁹⁷ *See generally* David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y (forthcoming 2013), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2264483; Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

⁵⁹⁸ *Compare, e.g.,* Amy Goldstein & Juliet Eilperin, *Healthcare.gov: How Political Fear Was Pitted Against Technical Needs*, WASH. POST, Nov. 2, 2013, available at http://www.washingtonpost.com/politics/challenges-have-dogged-obamas-health-plan-since-2010/2013/11/02/453fba42-426b-11e3-a624-41d661b0bb78_story.html?hpid=z1 (documenting “the

It is thus far from obvious that, as Professor Purcell contends, our “social and institutional trajectory” continues to undermine the “wisdom and utility” of *Erie*’s view of federalism. Many lawyers and academics formed their views about federalism in an earlier era, when state autonomy seemed both technologically outdated and morally retrograde.⁵⁹⁹ Whether or not that view was ever fair, a lot has happened since then, and Purcell’s view now seems, well, *so sixties*.⁶⁰⁰ In an era of resurgent and innovative states, accompanied by national gridlock, *Erie*’s concern for preserving state autonomy is more relevant and more critical than ever.

It is *Erie*’s limitation of judicial lawmaking that may ultimately motivate some of the more violent attacks on its holding. According to Professor Sherry, “that new myth [*Erie*’s judicial federalism rationale] has lent support to a distorted view of what judges do and what they are supposed to do, in ways that are detrimental to our constitutional democracy.”⁶⁰¹ Sherry thus complains that “*Erie* has been drafted into service in the war against judicial ‘activism.’”⁶⁰² *Erie*’s real victim, this view suggests, was not so much *Swift v. Tyson* as *Roe v. Wade*.⁶⁰³ The consequences, moreover, are dire and far-reaching: according to Sherry,

We are now enjoying the benefits of *Erie*’s dichotomy [between “legitimate judicial interpretation and illegitimate judicial lawmaking”] in the form of a highly politicized judicial nomination process, and academic calls either to abandon judicial review and substitute popular constitutionalism or to constrain judicial discretion by means of some utopian grand theory of interpretation. The judiciary, it seems, is in danger of losing both its independence and its ability to lead.⁶⁰⁴

disastrous rollout of the new federal health insurance marketplace”); Susan Page, *USA Today/Pew Poll: Health Care Law Faces Difficult Future*, USA TODAY (Sept. 16, 2013), available at <http://www.usatoday.com/story/news/politics/2013/09/16/usa-today-pew-poll-health-care-law-opposition/2817169/> (“53% disapprove of the health care law, the highest level since it was signed; 42% approve. By an even wider margin, intensity favors the opposition; 41% of those surveyed strongly disapprove while just 26% strongly approve.”), with Zach Howard, *Vermont Single-Payer Health Care Law Signed by the Governor*, REUTERS (May 26, 2011, 2:44 PM), available at http://www.huffingtonpost.com/2011/05/26/vermont-health-care-reform-law-single-payer_n_867573.html.

⁵⁹⁹ See, e.g., Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 67 (2001) (“In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct.”).

⁶⁰⁰ See, e.g., Gerken, *supra* note 396 (extolling a “new progressive federalism”).

⁶⁰¹ Sherry, *Wrong*, *supra* note 6, at 150.

⁶⁰² *Id.* at 151.

⁶⁰³ 410 U.S. 113 (1973).

⁶⁰⁴ Sherry, *Wrong*, *supra* note 6, at 152–53. Each of these specific claims is highly suspect. It is not clear that the nomination process is any more “politicized” than in the past, at least for Supreme Court justices. And I doubt the fights over the lower federal courts have much to do with federal common law. Academic calls to “take the Constitution away from the courts: enjoyed barely fifteen minutes

This all seems a bit overheated. In the years that *Erie* has been understood primarily as a limitation on judicial lawmaking, the Supreme Court has decided not only *Roe* but also *Lawrence v. Texas*,⁶⁰⁵ *Roper v. Simmons*,⁶⁰⁶ *Citizens United v. FEC*,⁶⁰⁷ and *Bush v. Gore*.⁶⁰⁸ The Court hardly seems deterred either from addressing the great issues of the day or from exercising considerable creativity in doing so. And I doubt that the critics of those decisions will pack up their tents and go home if *Erie* can be shown to be error. Debates about the proper latitude of construction for constitutional provisions and statutes did not start with *Erie*, and they will persist long after *Erie* has been forgotten.

Putting aside the abundant evidence that the Court is doing just fine in terms of its “independence and its ability to lead,”⁶⁰⁹ it is a massive leap to lay current threats to judicial legitimacy at *Erie*’s door. What *Erie* did help to do, however, was to divert federalism doctrine from the highly confrontational track that it had been on prior to the New Deal. Instead, we now have a federalism doctrine that largely defers to the political process, stepping in where necessary to remedy distortions or circumventions of that process.⁶¹⁰ I have argued elsewhere at length that this sort of role not only plays to judicial competence but also avoids the risk of damaging institutional confrontations that characterized the era of dual federalism.⁶¹¹

Similarly, Craig Green’s contempt for *Erie* seems to be motivated by the impediment it poses to his generation’s equivalent to Professor Sherry’s

of prominence before going back out of style, thanks to the appointment of some liberal justices more to the academy’s liking and, possibly, some pretty devastating reviews. See, e.g., Lucas A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 TEXAS L. REV. 855 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005) and demonstrating that the most plausible historical instance of “popular constitutionalism” was the South’s “massive resistance” to school desegregation). And while originalism has become more mainstream as a theory of constitutional interpretation, that is owing largely to its becoming less “utopian”—that is, originalists have loosened the constraints that it purports to impose on judges. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (embracing a “fainthearted” brand of originalism); JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (pushing a brand of “originalism” that is basically the same as living constitutionalism).

⁶⁰⁵ 539 U.S. 558 (2003).

⁶⁰⁶ 543 U.S. 551 (2005).

⁶⁰⁷ 558 U.S. 50 (2010).

⁶⁰⁸ 531 U.S. 98 (2000).

⁶⁰⁹ Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, in PERSILY, CITRIN & EGAN, *supra* note 590, at 333, 348–49 (concluding, based on extensive studies of polling data, that the Supreme Court retained broad public support even after the controversy over *Bush v. Gore*).

⁶¹⁰ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (refusing to invalidate the “individual mandate” to purchase health insurance under the national Affordable Care Act, but limiting Congress’s ability to coerce state participation in the Medicaid expansion and leaving states to make the ultimate judgment about whether to expand their benefit programs).

⁶¹¹ See Young, *Two Federalisms*, *supra* note 305, at 65–121.

substantive due process: customary international law (CIL).⁶¹² The *Erie* doctrine is hardly the only problem with CIL⁶¹³ or with current international human rights litigation in American courts,⁶¹⁴ but *Erie* does provide the most compelling argument against federalizing CIL norms through federal judicial decisions.⁶¹⁵ It is hard to think of many instances nowadays, however, where such federalization is actually important to the agenda of international human rights,⁶¹⁶ and Congress retains the power to federalize customary norms by statute.⁶¹⁷ Significantly, the federal courts *have* asserted the power to make federal common law in foreign-affairs cases, but they have generally used that power to *avoid* making broad statements about international law norms.⁶¹⁸ That tendency suggests that caution would prevail concerning the federalization of CIL norms even if *Erie* had come out differently. In any event, *Erie*'s limits on CIL are plainly in step with the contemporary Court's caution about international law generally.⁶¹⁹

Far from being out of step with the jurisprudence of its era, then, *Erie* has proven critical to the New Deal settlement. As Professor Purcell ultimately acknowledges, *Erie* "established an essential foundation for the continued operation of legal federalism in a new age of centralization, nationalization, and globalization."⁶²⁰ If the current American correlation of political forces tells us anything, it is that contemporary pressures to centralize

⁶¹² See Green, *Repressing*, *supra* note 5, at 623–24.

⁶¹³ See, e.g., Kadens & Young, *supra* note 77 (arguing that CIL is not actually customary); Kelly, *supra* note 76, at 463–65 (arguing that CIL is not even law).

⁶¹⁴ See *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013) (concluding that the Alien Tort Statute does not apply to extraterritorial claims).

⁶¹⁵ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–26 (2004); Bradley & Goldsmith, *supra* note 243, at 827; Young, *CIL*, *supra* note 84, at 493–96.

⁶¹⁶ For many years, the central examples advanced by human rights advocates of CIL norms that might trump state law involved international law limits on the death penalty. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 322–26. But these arguments have become largely moot as the Supreme Court has significantly expanded Eighth Amendment limitations on capital punishment. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (striking down the juvenile death penalty). It is not obvious what will replace the juvenile death penalty as a doctrinal flashpoint for the CIL issue. Ironically—from Professor Green's perspective—the best candidate may involve CIL limits on expropriation of private property, which property-rights advocates might invoke to ratchet up scrutiny in takings cases.

⁶¹⁷ See U.S. CONST. art. I, § 8 (conferring power on Congress "[t]o define and punish . . . offenses against the law of nations").

⁶¹⁸ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (explaining the Court's reluctance to apply controversial CIL norms of expropriation).

⁶¹⁹ See, e.g., *Kiobel*, 133 S. Ct. at 1664 (warning about "the danger of unwarranted judicial interference in the conduct of foreign policy"); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 334 (2006) (refusing to defer to the International Court of Justice on a question of treaty interpretation); *Medellin v. Texas*, 552 U.S. 491, 508 (2008) (holding that an International Court of Justice judgment ordering reconsideration of a domestic capital conviction of a foreign national was not self-executing and thus could not be enforced absent action by Congress).

⁶²⁰ PURCELL, *supra* note 9, at 299.

coexist with resurgent vitality at the state level, even as national governance seems in crisis. *Erie*'s interstitial vision of federal law is thus more central than ever. This is not because subsequent interpreters have twisted *Erie* to suit their own purposes, but rather because Justice Brandeis recovered what the Founders had known all along—that federalism and separation of powers are integrally related, and that the processes by which laws are made may often be more important than substantive constraints on those laws. In so doing, *Erie* put constitutional law on a better footing to deal with the bewildering complexity of modern governance. That is why *Erie* deserves to be understood as the central case of contemporary American federalism.

CONCLUSION

Michael Greve is no doubt right that, as a practical matter, *Erie* stands “unassailable” today.⁶²¹ The decision's correctness and rationale remain worth debating, however, if only because they provide a useful practical frame for some of the most fundamental questions of jurisprudence and constitutional structure. These include not only what we should understand judges to be doing when they decide cases, but also the division of lawmaking power between the branches of the national government and the appropriate model for preserving the federal balance. If *Erie* were otherwise, far more would change than the law applied in diversity cases.

But as often happens, the conventional wisdom turns out to be correct: *Erie* was right, basically for the reasons given in the opinion. The Rules of Decision Act requires federal courts to apply state law in the absence of positive federal law, not because of some dubious inference from the Act's drafting history but because the kind of general common law that the states accepted during the *Swift* era no longer exists. *Erie*'s insistence on vertical uniformity—that federal and state courts sitting in the same state should apply the same law—is far from perfect, but the alternative of horizontal uniformity among federal courts in different states is likely unattainable; in any event, the obstacle to that uniformity is not *Erie* but rather the lack of uniform and territorial choice of law rules. Justice Brandeis's nonconstitutional arguments, in other words, remain sound today.

It is *Erie*'s constitutional reasoning, however, that should claim it a place at the center of the structural canon. If the Civil Procedure teachers will not teach it—an endemic problem in some law schools—then the Constitutional Law faculty should. Because “law in the sense in which courts speak of it today does not exist without some definite authority behind it,”⁶²² the displacement of state law must be traceable to the valid exercise

⁶²¹ GREVE, *supra* note 4, at 373.

⁶²² *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

of federal lawmaking authority. Under the federal separation of powers, that authority generally belongs to Congress, which can legislate only by a difficult process in which the states are represented. Outside the ambit of federal legislation (or, sometimes, uniquely preemptive federal interests), the state law background remains in force. This interstitial view of federal law, with a broad national lawmaking jurisdiction circumscribed by political and procedural safeguards, remains the most promising model for maintaining our federal balance in the modern era.

Attacks on *Erie* generally arise out of dissatisfaction with this model. Federalism is untidy. When one has figured out the optimal legal answer to a pressing problem, it is hard to see why that solution ought not be adopted across the board. Democracy is untidy, too, and it is always tempting for smart people to look to smart judges to fashion new rights or new solutions when the democratic process seems stalled or uninterested. Against these impulses, *Erie*'s vision of federalism and separation of powers stands for humility. Consensus eludes us on many important questions, and federalism's messy patchwork helps us generate new answers or, sometimes, agree to disagree. Likewise, history teaches us that federal judges have their own foibles as lawmakers; our Constitution places its bet on a uniquely American form of mixed government.

However "unassailable" *Erie* may be in its original context of choice of law in diversity cases, the decision's import sweeps far more broadly. It is, as I began by saying, the most important federalism decision of the twentieth century. What remains is for courts and commentators to take *Erie*'s rationale more seriously in the important and related debates that continue to arise in the twenty-first. These include matters of administrative preemption, the domestic status of customary international law, and continuing controversies over the lawmaking authority of federal courts. *Erie*'s wisdom may be conventional, but it still has much to teach us.

ERIE'S STARTING POINTS: THE POTENTIAL ROLE OF DEFAULT RULES IN STRUCTURING CHOICE OF LAW ANALYSIS

*Allan Erbsen**

Abstract

This contribution to a symposium marking the seventy-fifth anniversary of *Erie Railroad Company v. Tompkins* is part of a larger project in which I seek to demystify a decision that has enchanted, entangled, and enervated commentators for decades. In prior work I contended that the “*Erie* doctrine” is a misleading label encompassing four distinct inquiries that address the creation, interpretation, and prioritization of federal law and the adoption of state law when federal law is inapplicable. This article builds from that premise to argue that courts pursuing *Erie*’s four inquiries would benefit from default rules that establish initial assumptions and structure judicial analysis. Considering the potential utility of default rules leads to several conclusions that could help clarify and improve decisionmaking under *Erie*. First, courts deciding whether a state rule has priority over a conflicting judge-made federal rule in diversity cases should default to federal law despite the intuitive appeal of state law. Second, when courts are considering whether to create federal common law, the proponent of a federal solution should bear the burden of persuasion. Third, the Supreme Court should replace the rule from *Klaxon v. Stentor Electric*, which requires federal courts to identify applicable nonfederal law by using the forum state’s choice of law standards, with a default rule that favors forum standards while authorizing federal choice of law standards in appropriate circumstances. Reconsidering how federal courts choose applicable nonfederal laws would also provide an opportunity to reconcile *Klaxon*’s irrebuttable preference for intrastate uniformity with the more flexible default rule in *United States v. Kimbell Foods*, which requires courts crafting federal common law to incorporate state standards unless there is a good reason to create nationally uniform standards. Finally, courts should develop a default rule—which one might label an “*Erie* canon”—to determine whether federal statutes and rules should be interpreted broadly or narrowly to embrace or avoid conflict with otherwise applicable state laws.

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INTRODUCTION

The successive anniversaries of *Erie Railroad Co. v. Tompkins*¹ have an eerie similarity. At each major milestone, commentators extol the decision's importance while grappling with its inscrutability. Within a "few short years" of *Erie*'s birth, Judge Charles Clark observed that the decision "suggested at least as many questions as it has answered."² On its twenty-fifth anniversary, Judge Henry Friendly, speaking in the same endowed lecture series as had Judge Clark, felt a need to defend *Erie* from a "new spate of attacks" by scholars challenging its reasoning.³ On its fiftieth anniversary, scholars again reconsidered doctrinal confusion that arose in the wake of *Erie*'s "vagaries."⁴ Now, in this symposium marking *Erie*'s seventy-fifth anniversary, the next generation gathers to decipher both the decision and its progeny.

The academy's fascination with *Erie* is understandable because the opinion's reach is unavoidable. At a high level of abstraction, *Erie* touches some of the most interesting questions of constitutional law. It implicates the allocation of power between the federal and state governments. It addresses the division of lawmaking authority among federal institutions. And it even contemplates the nature of law itself, raising questions about where legal rules originate and what makes them authoritative.

Yet despite being about so many things, *Erie* says almost nothing. Justice Brandeis's opinion is notorious for addressing weighty questions with minimal analysis and minimal support. The opinion cites "the Constitution," but not any specific clause.⁵ The decision invokes principles of federalism and separation of powers, but does not elaborate on their role or significance. The holding repudiates decades of prior precedent, but does not mark a clear path for the decades to follow. Unsurprisingly, courts and commentators have struggled to apply the skeletal decision to the myriad circumstances that it potentially encompasses.

¹ 304 U.S. 64 (1938).

² Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946).

³ Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384 (1964). Both Friendly and Clark were delivering the annual Benjamin N. Cardozo Lecture to the Association of the Bar of the City of New York. See *id.* at 383.

⁴ Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700 (1988); see also Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 692 (1988) ("[W]e should not be surprised if, in the next fifty years, [holdings building on *Erie*] do not come easily, but only after some confusion.").

⁵ *Erie*, 304 U.S. at 80 ("We merely declare that in applying the doctrine [of *Swift v. Tyson*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.").

This article will focus on one dimension of the ongoing struggle to implement *Erie*: the need to develop default rules that can provide a helpful starting point for judicial analysis. This discussion is part of a larger project in which I seek to demystify the *Erie* doctrine by exploring its assumptions and mechanics. In an earlier article, I explained that confusion surrounding *Erie* stems in large part from the fact that the name “*Erie*” is a label encompassing four distinct inquiries.⁶ Fragmenting *Erie* into these four components helps clarify the unique role that each plays in regulating choice of law within a federal system.⁷ A subsequent article will address how this more granular account of *Erie*’s four inquiries undermines a central pillar of current *Erie* jurisprudence: the “twin aims”⁸ test that governs conflicts between state law and judge-made federal law.⁹ The project’s goal is to show that a seemingly opaque and ethereal doctrine is really an amalgam of relatively familiar and manageable concepts. Revealing these dimensions of *Erie* can help structure judicial analysis and highlight competing values that might guide judicial discretion.

Part I identifies *Erie*’s four components and discusses the potential utility of using default rules to guide courts considering each distinct inquiry. Part II discusses specific potential defaults. These defaults might help in determining when federal procedural common law preempts state law, when federal courts can create federal common law, how federal courts should interpret the scope of ambiguous federal statutes, and whether federal courts should revisit the *Klaxon* rule that governs choice of law in diversity cases.¹⁰ Default rules can clarify implementation of *Erie* and suggest avenues for future scholarship developing *Erie*’s normative foundation and refining its analytical components.

I. THE POTENTIAL VALUE OF DEFAULT RULES IN STRUCTURING *ERIE* ANALYSIS

Understanding why default rules might improve decisionmaking under *Erie* requires understanding what decisionmaking under *Erie* actually entails. The jurisprudence that has come to be known as the *Erie* doctrine is better understood as a composite of four distinct inquiries addressing the *creation, interpretation, and prioritization* of federal law and the *adoption*

⁶ See Allan Erbsen, *Erie’s Four Functions: Reframing Choice of Law in Federal Courts*, 88NOTRE DAME L. REV. (forthcoming 2013) [hereinafter Erbsen, *Four Functions*].

⁷ See *infra* Part I (identifying *Erie*’s four components).

⁸ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

⁹ See Allan Erbsen, *Erie and the Problem of Pedigree: Rethinking the Second-Class Status of Federal Procedural Common Law* (unpublished work in progress on file with author) [hereinafter Erbsen, *Pedigree*].

¹⁰ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal courts adjudicating nonfederal questions in diversity cases must apply the forum state’s choice of law rules).

nof nonfederal law. These four inquiries partially overlap and have subtle dimensions that I have explored in detail elsewhere.¹¹ The following nutshell summary outlines the basic framework.

The creation inquiry considers whether a particular institution can be an authoritative source of binding federal law given the facts of a pending case. Common questions implicating *Erie*'s creation component include whether federal courts can rely on federal common law and whether Congress may preempt state law. Even if a federal actor can create a binding rule, the rule may apply in federal court only if an issue falls within the rule's scope. Identifying that scope implicates *Erie*'s interpretation inquiry. Relevant questions include whether the federal rule creates rights, remedies, or both; whether it addresses collateral issues such as pleading standards and limitation periods; and whether it seeks to displace state law or merely to supplement state law. If a federal rule is valid and encompasses a disputed issue, there is still a question about whether the federal rule should trump inconsistent state law. *Erie*'s prioritization inquiry determines when, if ever, federal law must yield to state law in a system where federal law is generally "supreme."¹² Finally, *Erie*'s adoption inquiry is relevant when federal law does not apply, such that the court must determine the source and content of binding nonfederal rules.

Each of these four inquiries serves distinct purposes by considering distinct factors in light of distinct values. But what purposes, what factors, and what values? These questions have befuddled courts and commentators for seventy-five years. This article suggests that recurring questions might become more manageable if courts can identify a useful starting point for each of *Erie*'s four inquiries. Default rules can potentially supply such starting points.

The need to develop default assumptions to guide *Erie*'s four inquiries becomes apparent when one distinguishes *Erie*'s relevance as a source of general principles about the structure of government from its relevance as a source of rules that judges apply in particular cases. As a source of principles, *Erie* permeates constitutional law addressing federalism and separation of powers. Almost any interesting constitutional question touches *Erie* at some level of abstraction. Yet as a source of rules for courts to follow, *Erie* applies much less frequently. Most choice of law questions are easy, obviating formal *Erie* analysis. One can say that *Erie* is still relevant in easy cases, but only in the sense that all Supreme Court decisions establishing the basic structure of judicial power—such as *Marbury*¹³ and *Martin*¹⁴—

¹¹ See Erbsen, *Four Functions*, *supra* note 6.

¹² U.S. CONST. art. VI, cl. 2.

¹³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

¹⁴ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (establishing that the Supreme Court could review state court decisions applying federal law).

are always relevant to judicial decisionmaking. Caselaw supports the limited need for applying *Erie* to specific disputes: while courts seem to cite *Erie* often, these citations in fact occur in only a tiny fraction of all federal cases, and even of all diversity cases.¹⁵

Given that *Erie* helps courts resolve only a small number of cases each year, courts need guidelines for when to invoke it. Once *Erie* is deemed relevant, guidelines are again necessary to implement *Erie*'s various inquiries.

Default rules can be a helpful source of guidance.¹⁶ Courts might assume that a particular *Erie* inquiry is never necessary absent some triggering concern or that the inquiry is always necessary in a particular context. When an inquiry is necessary, defaults might influence which questions courts ask and which factors shape the answers. As Part II illustrates, default assumptions will differ for each of *Erie*'s four components.

The concept of a "default rule" is laden with baggage because different areas of law reference defaults for different purposes. Common invocations of default rules envision decisionmaking by at least two actors: an actor who creates the default and an actor who reacts to it.¹⁷ For example, in contract law, emphasis on default rules often arises from the parties' ability to establish or reallocate legal entitlements through bargaining. A legislature or court can create defaults to set a baseline that shapes negotiations and

¹⁵ For example, 678 opinions dated from October 2010 to September 2011 in Westlaw's DCT database cite *Erie* (based on a search on Aug. 24, 2013). Many of these citations involve little or no discussion. Only 158 opinions mention *Erie* at least twice and 64 mention *Erie* at least three times. Yet 289,252 civil cases were filed in the district courts in the same period, including 101,366 diversity cases. See ADMIN. OFFICE OF THE UNITED STATES COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 125 (2012) (the report also tabulates the number of pending—as opposed to newly commenced—civil cases, but does not separately identify diversity cases). Even accounting for the fact that many cases do not yield opinions, that many opinions are not available on Westlaw, and that some courts cite *Erie*'s progeny without citing *Erie* itself, discussions of *Erie* appear in only a small fraction of opinions. In contrast, District Courts cite other decisions much more frequently. A Westlaw search for the same time period reveals, for example, more than 15,000 citations to the Court's revision of pleading standards in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

¹⁶ Commentators typically do not address *Erie* from the perspective of default assumptions. The only article extensively considering default rules under *Erie* focuses on different issues than those I consider here. See Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573 (2012) (contending that state and federal procedural law supply competing "defaults" for enforcing entitlements, that *Erie* requires choosing between these enforcement mechanisms, and that the choice can involve setting a default rule that encourages state and federal lawmakers to clarify the relationship between procedural and substantive law). My approach here addresses different concerns because it neither relies on distinguishing substance from procedure nor attempts to identify specific types of state rules that should apply in federal court. Instead, my analysis of defaults focuses on assumptions that provide a starting point for each of *Erie*'s four inquiries.

¹⁷ An actor can wear both the rule-maker and rule-receiver hats simultaneously. For example, two parties might negotiate an agreement that creates waivable defaults governing their relationship. Each party would thus be the source of and target for a particular default.

fills gaps in agreements.¹⁸ This private law model of defaults has rough analogues in public law. For example, some constitutional doctrines—such as the *Miranda* rule requiring warnings to suspects before custodial interrogation as a condition for admitting subsequent testimony¹⁹—incentivize government actors to behave in particular ways without compelling them to do so.²⁰ The rule functions as a default with an unattractive but available opt-out mechanism.²¹ Similarly, regulatory agencies can promulgate default rules that actors may modify if they are willing to accept other burdens, such as providing information to the agency or redirecting their pursuits along paths that the agency prefers.²²

I am using the concept of default rules in a different sense than the conventional account above. Rather than encouraging courts to develop rules that induce a reaction from actors outside the judiciary,²³ I envision default rules as a starting point for judicial implementation of a potentially difficult inquiry. The equally familiar phrase “rebuttable presumption” could replace “default rule.”²⁴ However, a reference to presumptions may be misleading because in some contexts defaults and presumptions are distinct. Defaults embody “substantive principle[s]” that animate analysis, while presumptions sometimes address the “evidentiary effect” of findings

¹⁸ See generally Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

¹⁹ *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

²⁰ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 459–65 (1998) (contending that *Miranda* established a “default” that could have but ultimately did not encourage “democratic experimentalism”); John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 851 (2006) (characterizing *Miranda* as a “model default” because it establishes a template for how actors should behave).

²¹ Legislatures can also opt-out of judicially created default rules if members can agree on a viable alternative. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–93 (2006) (observing that “constitutional defaults” can inspire legislative action by creating a judicial baseline that at least some legislative factions will find unattractive, leading to a statutory compromise that displaces the default).

²² See Bradley C. Karkkainen, *Framing Rules: Breaking the Information Bottleneck*, 17 N.Y.U. ENVTL. L.J. 75, 80–84 (2008).

²³ An example of a judicially created default rule designed to influence other actors is Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which created a framework for analyzing presidential authority that in turn helped frame negotiations between the executive and legislative branches. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2354 n.189 (2006) (analogizing *Youngstown* to a “‘preference-eliciting’ . . . default rule” of statutory interpretation) (quoting Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002)).

²⁴ See Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT’L ARB. 469, 491 (2006) (stating that “a default rule is no more than a rebuttable presumption—the mere beginning of the inquiry”).

based on those principles.²⁵ The terminology of defaults rather than presumptions thus seems more helpful when discussing choice of law, but the concept is more important than the label. The key point is that the sorts of default rules that I discuss would emanate from the judiciary as a form of self-discipline rather than as an effort to alter the behavior of entities affected by decisions, with one exception: in Part II.D, I discuss default rules of interpretation that might influence how lawmakers craft rules.

Thinking about defaults as starting points highlights how a court implementing *Erie* can use defaults to skew its analysis toward favored outcomes unless there is a good context-specific reason to believe that an alternative outcome is preferable. Such skewing would of course need a justification, so a default's legitimacy would hinge on its fidelity to *Erie*'s underlying values. To the extent that those values have a constitutional foundation, defaults would be a form of constitutional common law.²⁶ If portions of *Erie* lack a constitutional foundation, then the relevant defaults would be a federal common law gloss on what is essentially a federal common law doctrine.²⁷

Relying on default rules as starting points for the implementation of public law doctrine can produce a wide variety of benefits. First, default rules can prioritize assumptions that are empirically likely to be valid. These defaults promote efficiency by avoiding wasteful analysis of unlikely scenarios absent a case-specific reason to believe that such analysis is necessary. For example, the "presumption of regularity" in administrative decisionmaking is in effect a default rule that obviates scrutiny of agency behavior absent an unlikely reason to think that the behavior is relevant.²⁸ Second, defaults can mitigate confusion by providing structure to complicated doctrinal inquiries. A court that knows where to begin its analysis and which factors are persuasive is on a clearer path to a justifiable result than a court engaged in a relatively free-form inquiry.²⁹ Third, focusing judicial attention on defaults can highlight conflict between values that might otherwise be resolved without reflection.³⁰ Finally, defaults allocate and define the burden of persuasion, which can facilitate resolving close cases consistently with normative commitments. Familiar examples in con-

²⁵ Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 109 (2009).

²⁶ For discussion of how common law acquires constitutional undertones, see Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

²⁷ For discussion of why *Erie* might be understood as having preconstitutional or extraconstitutional foundations, see Erbsen, *Four Functions*, *supra* note 6; Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813 (2013).

²⁸ *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979) (listing grounds for rebutting the presumption).

²⁹ Canons of interpretation serve a similar function. See *infra* Part II.D.

³⁰ See Ferejohn & Friedman, *supra* note 20, at 838 (contending that "explicit attention" to selecting defaults "might improve the quality of constitutional decisionmaking").

stitutional law are tiers of scrutiny that raise the hurdles a challenged rule must overcome in proportion to the importance of burdened rights.³¹

Default rules thus can in theory help courts implement *Erie*'s four distinct inquiries. The next question is whether particular defaults might be sensible in practice.

II. POTENTIAL DEFAULTS FOR *ERIE*'S FOUR COMPONENTS

Among the benefits of fragmenting *Erie* into its four components is that courts and commentators can separately analyze the default assumptions that should guide each distinct inquiry rather than jumbling them into a confusing morass. This part briefly sketches potential defaults for each component in order to highlight overlooked dimensions of *Erie* and to raise questions for further study.

A. *Prioritization: A Counterintuitive Preference for Federal Law*

Suppose that a federal court sitting in diversity confronts a question for which federal and state law seem to provide conflicting answers. The court must determine which answer has priority. One might think that priority is obvious under the Supremacy Clause: federal law will apply because it is "supreme."³² On this view, *Erie*'s prioritization inquiry is merely a rote formality because the creation and interpretation inquiries do all of *Erie*'s real work when state and federal law conflict. Once a problem falls within the scope of a valid federal law, the Supremacy Clause obviates inquiry into whether that federal law must yield to state law.

However, a quirk of modern *Erie* jurisprudence is that courts do not always treat the prioritization inquiry as a simple formality. Instead, resolving a conflict between state law and a "federal judge-made law"—in contrast to a federal "statute or Rule"—requires considering empirical and policy questions related to *Erie*'s "twin aims."³³ I critique this rule elsewhere, contending that the prioritization inquiry should always favor a valid federal law that actually addresses a disputed question, regardless of the federal

³¹ See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455–56 (2002) (Souter J., dissenting) (observing that "strict scrutiny leaves few survivors" because regulations must be "necess[ary]" to protect a "compelling governmental interest," while "intermediate scrutiny" imposes a "comparatively softer" requirement that regulations be "narrowly tailored" to promote a "significant" interest)(citation and internal quotation marks omitted).

³² U.S. CONST. art. VI, cl. 2.

³³ *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (citation omitted); see also *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (identifying the "the twin aims of the *Erie* rule" as "discouragement of forum-shopping and avoidance of inequitable administration of the laws").

law's source.³⁴ But for present purposes I will assume that courts are correct in holding that *Erie* requires considering the relative priority of state law and judge-made federal law. The issue then becomes: could defaults help guide that inquiry?

One can imagine three potential starting points for a prioritization inquiry. Federal courts might: (1) by default apply federal law unless *Erie* requires applying state law; (2) by default apply state law unless *Erie* justifies applying federal law; or (3) avoid selecting a default, so that the choice between federal and state law would require an *Erie* analysis in every case.³⁵

We can quickly dispense with the third option—no defaults—because it is inefficient. As discussed below, most prioritization questions are easy. This observation suggests that the no-defaults option is wasteful because tediously implementing a multifactor *Erie* test would not alter the outcome in most cases. Courts can simply assume that either federal or state law applies (depending on which default they adopt) and depart from that assumption with minimal effort when circumstances warrant. In these easy cases, either default should produce the same result.

The two remaining options—defaulting to federal or state law—should in theory reach the same result if the adversarial system functions as intended. If the parties are diligent, they will notice subtle prioritization problems, bring them to the court's attention, and raise all relevant arguments favoring both state and federal law. Wise judges will then carefully parse competing arguments and reach the optimal result. Either state or federal law should always have a stronger claim of authority over a particular issue on which they conflict, and that priority will become apparent through the application of *Erie*. Even if arguments for state and federal law seem

³⁴ See Erbsen, *Pedigree*, *supra* note 9.

³⁵ The parties could attempt to modify the prioritization default by including a choice of law clause in a contract. But that clause would not obviate analysis of which law governed enforcement of the contract, which in turn requires a prioritization inquiry. For example, suppose that a federal court adjudicating a diversity case in Texas must decide whether state or federal law governs a particular procedural issue. The court initially concludes that federal law has priority. Now further suppose that the court learns of a contract between the parties specifying that California law will govern the procedural issue. The contract would seem to resolve the prioritization inquiry by selecting state law over federal law and then by selecting California law over Texas law. However, the contract's choice of law clause would be relevant only if it is enforceable. State law ordinarily would govern enforcement of the clause. See *MidAmerica Constr. Mgmt. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1260 (10th Cir. 2006) (“[W]here subject matter jurisdiction is based on diversity of citizenship, federal courts must look to the forum state's choice-of-law rules to determine the effect of a contractual choice-of-law clause.”). However, if the clause conflicts with an otherwise applicable federal rule, there would still be a question about whether the federal rule preempts private agreements. If the federal rule would be preemptive then the contract would not override the court's initial determination that federal law has priority. For a discussion of when and how parties can contract around otherwise applicable federal procedural rules, see Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011).

equally balanced, such that allocating the burden of persuasion might matter, a “tie” is impossible because the Supremacy Clause presumably tips the scale in favor of federal law.³⁶

This faith (again, in theory) that judges can successfully parse difficult prioritization problems does not mean that the *Erie* inquiry is objective—it clearly is not.³⁷ Instead, the point is that in idealized conditions a judge should reach the same result regardless of the starting default because the default becomes irrelevant once all arguments are on the table and fully understood.

In practice, however, defaults are extremely important. First, one cannot assume that courts will notice latent prioritization issues. Choice of law inhabits a foreboding corner of the legal landscape that many judges and lawyers seem to dread and often overlook, leading them to miss subtle *Erie* problems.³⁸ In these tricky cases where courts overlook conflicts of law, the default law becomes the operative law without any scrutiny. Second, even when courts notice prioritization issues, the difficulty of applying *Erie* to close cases creates a risk of weak or misguided reasoning.³⁹ Difficult cases also create a risk that a default will be sticky—the default law will apply by inertia absent a compelling reason to apply a different law. To the extent that default rules might channel this reasoning in a specific direction, choosing the appropriate default is important. But which default is superior?

Choosing an appropriate prioritization default requires favoring one kind of troubling error over another. Competing default rules would skew the risk of error toward incorrectly applying federal law or incorrectly applying state law. Both types of error are troubling. Federal law should not exceed the limited bounds of its authority, but neither should state law in-

³⁶ The Supremacy Clause arguably does more than resolve ties; it creates a definitive rule prioritizing federal law, further justifying a default favoring federal law. See Erbsen, *Pedigree*, *supra* note 9. In some cases, federal and state law might be identical. This lack of conflict obviates choosing between them absent a reason to care, such as a need to determine if a claim “arises under” federal law for jurisdictional purposes. 28 U.S.C. § 1331 (2012); *cf.* *Graves v. BP Am., Inc.*, 568 F.3d 221, 223 (5th Cir. 2009) (“This [diversity] case does not require us to decide the choice-of-law issue because . . . federal and state law dovetail to provide the same outcome.”).

³⁷ The choice of law inquiry under *Erie* is less subjective than under the prior regime, which permitted courts to search far and wide for suitable governing rules. See *Swift v. Tyson*, 41 U.S. 1, 19 (1842) (“The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord MANSFIELD . . . to be in a great measure, not the law of a single country only, but of the commercial world.”). But modern doctrine still leaves room for judicial discretion due to its imprecise methods for interpreting and characterizing federal and state rules.

³⁸ See, e.g., Richard D. Freer, *Erie’s Mid-Life Crisis*, 63 *TULANE L. REV.* 1087, 1108 (1989) (noting that “[r]emarkably,” some district courts have “failed even to recognize” recurring *Erie* problems regarding enforcement of forum selection clauses). A similar phenomenon is evident on law school exams, where subtly disguised *Erie* issues have been the bane of countless students.

³⁹ See, e.g., EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 3 (2000) (observing that *Erie* has been “widely misunderstood”).

fringe that authority.⁴⁰ The key question is: which error is preferable in the context of *Erie*'s prioritization inquiry? Three factors suggest that a default favoring federal law is preferable.

First, federal courts in diversity cases spend the vast majority of their time applying federal law, especially as a case progresses.⁴¹ The daily grind of motions and fact development primarily implicates federal rules governing practice, such as pleading, discovery, evidence, and case management.⁴² Defaulting to state law in diversity cases would therefore be inefficient given the ubiquity of federal law in federal court.

Second, a default favoring federal law is unlikely to suppress important state interests because state laws that should apply in federal court under *Erie* are likely to stand out. These laws typically create and limit rights to sue, remedies, and defenses, so at least one of the parties will have an incentive to bring them to the court's attention. In most cases, the prioritization issue will be easy, as in *Erie* itself, where state law obviously determined a railroad's duty of care once the Court rejected the existence of "federal general common law."⁴³ In rare cases where the prioritization issue is difficult, a default to federal law still provides ample opportunity for the parties to convince a judge that state law should apply.⁴⁴

Third, to the extent that a default favoring federal law tips the scales against state law, that result is normatively defensible. As the prior discussion indicates, the scale tipping occurs in only two scenarios: where the parties and court do not notice that state law should apply or when competing arguments favoring state law and federal law are difficult to resolve. In both scenarios, a rebuttable preference for federal law is defensible.

To see why a federal law default is normatively sound, recall the distinction between *Erie*'s creation, interpretation, and prioritization components. The creation component prevents federal courts from inventing federal rules absent a source of constitutional, legislative, or inherent authority.

⁴⁰ Compare U.S. CONST. amend. X (reserving power to states), with U.S. CONST. art. VI, cl. 2 (federal law is "supreme").

⁴¹ The calculus is different early in a case, when a motion to dismiss for failure to state a claim might rely primarily on questions of state law. See FED. R. CIV. P. 12(b)(6). However, the relevance of state law is likely to be obvious when adjudicating most motions to dismiss, such that a default favoring federal law will not skew a court's choice of law decision from the correct result. See *infra* text accompanying note 43.

⁴² See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (describing a "shift in the focus of federal litigation to the pretrial phase").

⁴³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). State law thus had priority in the sense that there was no potentially applicable federal law capable of displacing state law. In *Erie*, the only question on remand concerned the content of state law. See *id.* at 80.

⁴⁴ Courts would need a standard for evaluating competing arguments about which law has priority. Determining the content of that standard is beyond the scope of this article, which focuses on whether the proponent of state or federal law should have the burden of persuasion under whatever standard controls the prioritization inquiry.

The interpretation component prevents federal courts from applying federal rules to issues beyond their scope. But the prioritization component assumes that a given issue is within the scope of a valid federal rule. So the only remaining inquiries are whether the issue is also within the scope of a valid state rule and, if so, which rule has priority. In effect, the question is whether the state rule displaces the otherwise applicable federal rule.⁴⁵

Framing the prioritization problem in terms of displacing a valid and otherwise applicable federal rule raises a new question: if nobody would otherwise notice that state law might apply, or the arguments favoring state law are roughly equal to the arguments favoring federal law, why should federal courts default to state law? The state's interests presumably are not dispositive—otherwise the arguments for applying state law would be more apparent and stronger.⁴⁶ Federal interests favoring federal law presumably are strong because of federal judges' expertise in applying federal law and the general desire for uniform procedural rules in federal court (even if judicial discretion renders uniformity elusive in practice).⁴⁷ Comity con-

⁴⁵ Blurring *Erie's* distinct components can lead to confusion. For example, Donald Doernberg has contended, contrary to my analysis below, that the default rule in *Erie* cases implicating “vertical choice-of-law” should be that “state law applies.” Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 645 (2007) [hereinafter Doernberg, *Unseen Track*]; see also Donald L. Doernberg, “*The Tempest*,” 44 AKRON L. REV. 1147, 1151 n.26 (2011) (“viewing the applicability of state law as the default rule makes a good beginning point for accurate *Erie* analysis”). He supports that conclusion by citing the limited scope of federal power under Article I, which determines what subjects Congress may regulate but does not directly control interpretation of a valid statute's scope. See Doernberg, *Unseen Track*, *supra*, at 645. Doernberg therefore seems to be proposing a default rule addressing the creation of federal law rather than prioritization of an otherwise valid federal law. If so, then he and I may agree on the optimal content of default rules despite the apparent disagreement. See *infra* Part II.B (discussing my proposed default for *Erie's* creation component).

⁴⁶ Even when *Erie* issues are not apparent, altering the default rule to favor state law might not make the application of state law more likely. For example, Adam Steinman has suggested that state law should supply the summary judgment standard for diversity cases. See Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 301–02 (2008). If this argument is correct, then courts are routinely overlooking an important *Erie* issue. Yet courts presumably would overlook this issue even if the default rule favored state law because the prevailing view of *Erie* posits that the Federal Rules of Civil Procedure should apply in diversity cases. See *Hanna v. Plumer*, 380 U.S. 460, 470 (1965). The problem therefore is not that a default rule is obscuring a potential *Erie* issue, but rather that current accounts of *Erie* do not deem the issue to be difficult. A new approach to summary judgment in diversity cases would therefore require a new understanding of *Erie's* requirements rather than a new default. Cf. Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1413–14 (1997) (noting that *Erie* generates assumptions about federal and state power that persist until “contestation within a certain discourse undermines the authority of an earlier practice or claim”).

⁴⁷ See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929 (1989) (“Proponents of the Enabling Act and of the original Federal Rules sold both on the promise that uniform federal procedure would be superior to federal procedure under the Conformity Act of 1872, which yielded a melange of state and federal law. . . . [However,] it would be hard to call federal procedure uniform today. The Federal Rules may appear

cerns might in theory justify deferring to state law.⁴⁸ But those concerns seem misplaced in diversity cases because the mistrust of state courts partially underlying the constitutional grant of diversity jurisdiction is the antithesis of comity.⁴⁹ Indeed, this mistrust might justify favoring federal law in close cases if state law would undermine national interests.⁵⁰

The three arguments above suggest that the optimal default rule for *Erie*'s prioritization component is that federal courts should apply federal law—assuming a valid and applicable federal law exists—unless analysis under *Erie* requires applying state law.⁵¹ When there is a good reason to think that state law should displace federal law, the default can be overcome. In this way, courts devote time to *Erie*'s prioritization inquiry only when the court or a party identifies a choice of law problem that requires further scrutiny.⁵²

uniform, but many of them merely empower district judges to make ad hoc decisions.”); *cf.* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (noting in the context of upholding jurisdiction over federal questions embedded in state claims the “experience, solicitude, and hope of uniformity that a federal forum offers on federal issues”).

⁴⁸ Comity is typically a rationale for federal judicial deference to state interests when the question is whether a federal court should defer to or abstain in favor of a state proceeding, rather than whether it should apply state law. See Michael L. Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981). However, before *Erie*, the Court sometimes invoked comity as a justification for deferring to decisions by state courts when important federal interests were not at stake. See, e.g., *Mut. Life Ins. Co. v. Johnson*, 293 U.S. 335, 339 (1934) (“The summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance.”).

⁴⁹ See CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3601 (3d ed. 2009) (“It is unclear what prompted the concern about the inadequacy of or bias in the state courts and whether it was justified.”). For a discussion of whether *Erie* issues should be treated differently depending on whether they arise through supplemental rather than diversity jurisdiction, see Erbsen, *Four Functions*, *supra* note 6.

⁵⁰ See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1855 (2006) (criticizing *Klaxon*'s preference for forum rather than federal choice of law rules because it “weakens one of diversity jurisdiction’s core purposes in protecting out-of-state litigants from in-state bias”); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 625 n.38 (1999) (noting possibility that the Diversity Clause may originally have been understood to provide not just “a neutral forum, but also neutral laws”).

⁵¹ The Rules of Decision Act, 28 U.S.C. § 1652 (2012), does not create a contrary default. See Erbsen, *Four Functions*, *supra* note 6 (discussing the Act’s opaque and apparently circular text).

⁵² State courts take a similar approach when adjudicating interstate cases by assuming that local law applies absent a reason to consider rules from other jurisdictions. See, e.g., *Gleim v. Roberts*, 919 N.E.2d 367, 370–71 (Ill. App. Ct. 2009) (“In the absence of a conflict in the relevant laws of the two states, the law of the forum state applies. . . . As the parties seeking a choice-of-law declaration, it was the defendants’ burden to present evidence establishing that such a declaration was necessary.”); *Akro-Plastics v. Drake Indus.*, 685 N.E.2d 246, 248 (Ohio Ct. App. 1996) (“Local law applies if the party alleging that the law of a foreign jurisdiction applies fails to demonstrate a conflict between local law and the law of that jurisdiction.”).

A default rule favoring federal law is counterintuitive because diversity cases by definition generally do not involve claims that arise under federal law and thus courts must usually apply some state law.⁵³ But the applicability of these state laws will often be obvious. The default affects outcomes only where prioritization issues are close or hidden. In those cases, defaulting to federal law is efficient and promotes federal interests without undermining substantial state interests.

Defaulting to federal law would be more efficient than current practice.⁵⁴ Current jurisprudence implementing *Erie* does not use the terminology of defaults. However, a common judicial mantra is that federal courts adjudicating diversity or supplemental claims “apply state substantive law and federal procedural law.”⁵⁵ This way of thinking in effect creates two prioritization defaults: one for substantive law and one for procedural law (although in practice current doctrine also considers whether a law is made by judges or by Congress, independent of whether the law is substantive or procedural).⁵⁶ The problem is that drawing a line between substance and procedure is “notoriously shadowy.”⁵⁷ Default rules are alluring in part because they provide an opportunity to avoid unnecessary complexity, so a default framed in terms of an indeterminate line is counterproductive.

Accordingly, as counterintuitive as it may seem, federal courts adjudicating claims arising under state law should apply a default rule favoring the prioritization of federal law. The default can be easily overcome when state law obviously applies and can be overcome with greater effort when the court or a party identifies a good reason to believe that state law should govern a particular issue. The next question for a court to consider would be: what constitutes a good reason for preferring state law in close cases? I consider that question in other work, where I contend that courts should focus on the scope of federal rules to determine whether they displace inconsistent state rules.⁵⁸

⁵³ Diversity claims can arise under federal law in rare instances when federal question jurisdiction is unavailable. See, e.g., *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 336 (2d Cir. 2006) (Sotomayor, J.) (holding that a federal court could exercise diversity jurisdiction over a claim under the federal Telephone Consumer Protection Act, which divests federal question jurisdiction); see generally Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89–98 (1997) (discussing historical role of diversity jurisdiction as a mechanism for litigating federal questions in federal court).

⁵⁴ I discuss current prioritization rules more thoroughly in Erbsen, *Pedigree*, *supra* note 9.

⁵⁵ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

⁵⁶ See Erbsen, *Pedigree*, *supra* note 9.

⁵⁷ Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 461–62 (1997) (“many legitimate rules of court have substantive consequences, just as much substantive law has procedural implications”) (footnotes omitted).

⁵⁸ See Erbsen, *Pedigree*, *supra* note 9.

B. *Creation: The Proponent of Federal Common Law Must Justify its Application*

Erie analysis requires a different default when a court addresses the creation of federal law rather than its prioritization. For the sake of brevity, I will focus here on the creation of federal common law by federal courts. Similar analysis also applies to the creation and judicial review of statutes and treaties, but with additional complexities.⁵⁹

A federal court's inquiry into whether it can create federal common law has two potential starting points: (1) federal courts cannot create federal common law absent an affirmative justification; or (2) federal courts can create federal common law absent a challenge to their lawmaking authority.⁶⁰ As with the prioritization inquiry, the choice between competing creation defaults is likely to affect outcomes only in difficult cases where the scope of federal judicial authority might be either overlooked or closely contested.

In the context of thinking about defaults, the creation and prioritization inquiries differ in three material respects. First, the creation inquiry cannot rely on the prioritization inquiry's assumption that a potentially applicable federal rule exists because the creation inquiry is the source of that later assumption. *Erie*'s creation component requires lawmakers to consider whether they possess authority to create particular federal rules. Only if such authority is present can the prioritization inquiry later assume that a valid federal law is available to govern a disputed issue.

Second, because the creation inquiry requires courts to justify the existence rather than the priority of federal law, it raises more difficult questions about federalism and separation of powers. In the creation context, *Erie* considers the scope of federal authority in a system of divided sovereignty and the scope of judicial authority in a system of separated powers. These constraints make *Erie* an obstacle to federal and judicial action, such

⁵⁹ See Erbsen, *Four Functions*, *supra* note 6. There is no judicial remedy for a violation of *Erie*'s limits on Congress's ability to create federal law until after a plaintiff raises a justiciable challenge, so in practice the application of *Erie* to legislation occurs in the context of judicial review rather than during the lawmaking process. Nevertheless, legislators take an oath that arguably requires considering constitutional limits on their authority—including any limits derived from *Erie* if those limits have a constitutional foundation—even without judicial intervention. See U.S. CONST. art. VI, cl. 3 ("Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution."); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1697, 1697 n.20 (2011) (noting debate between "departmentalists" and "judicial supremacists" regarding the Supreme Court's "power to bind the political branches").

⁶⁰ This section focuses on the creation of "federal common law" in the traditional sense of laws that are "supreme" and under which federal question suits may "arise." U.S. CONST. arts. III, § 2, VI; see also Erbsen, *Four Functions*, *supra* note 6 (discussing potential justifications for federal common law). This sort of lawmaking is distinct from pre-*Erie* efforts by federal courts to fashion binding rules of "general" law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75–76 (1938).

that the creation of federal law and federal common law require an initial defense.⁶¹ Although the Supreme Court has not framed this need for a defense in terms of defaults, it has counseled courts to consider the justification for judicial lawmaking before creating federal common law.⁶² A similar sentiment applies to legislation, albeit with greater deference to the choices of a politically accountable branch of government.⁶³

Third, a creation default cannot fully share a prioritization default's concern about efficiency. The prioritization inquiry focuses in part on resolving thousands of disputes in an adversarial system in which federal law is available and difficult conflicts with state law should stand out. A prioritization default can therefore aspire to efficiency even as it considers other values in close cases. Yet favoring the creation of federal law simply to promote efficient decisionmaking would be normatively unsound in light of the federalism and separation of powers concerns limiting the scope of federal law. The possibility that a federal common law or statutory rule may resolve a regulatory problem more efficiently than would a state rule might be a factor in determining whether a federal rule is available, but it cannot be the only factor.⁶⁴

The foregoing distinctions suggest that when federal courts consider whether they may create common law to govern a particular problem, the default should be that judicial lawmaking is inappropriate absent considera-

⁶¹ *Erie* may also serve other goals, but at a minimum it requires thinking carefully about the allocation of power between different levels of government and different government institutions. See generally Erbsen, *Four Functions*, *supra* note 6.

⁶² See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (noting that federal common law is an exception to *Erie*'s "general[]" limit on judicial lawmaking authority and emphasizing the need for restraint in crafting common law rules); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (stating that "the existence of Congressional authority under Art. I" does not "mean that federal courts are free to develop a common law to govern those areas until Congress acts"); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812) (rejecting existence of a federal common law crime because "judicial power . . . is a constituent part" of "concessions from the several states—whatever is not expressly given to the [federal government], the latter expressly reserve").

⁶³ See *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.").

⁶⁴ See *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution"); *id.* at 959 ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made . . ."); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954) ("[T]he mere complexity of the legal system for purposes of comprehensive summary is seen to be irrelevant. For legal and governmental systems are not designed for simple ease of nutshell description any more than for ease of central command. The systems are to be judged from the point of view neither of officials nor of expositors but from that of the people whose activities they are supposed to facilitate.").

tion of the principles (whatever they may be)⁶⁵ underlying *Erie*'s limits on federal judicial power. This assumption that federal courts should not create federal law without an affirmative justification enforces a normative constraint on federal judicial power by allocating the burden of persuasion to the proponent of federal law. In practice, this burden will be easy to carry when judicial power rests on settled precedent governing established enclaves of federal common law. But closer analysis will be necessary when addressing assertions of judicial authority in novel contexts or considering extensions of settled authority past established boundaries. Federal common law may still be appropriate in these new contexts,⁶⁶ but its propriety cannot be assumed.⁶⁷

The proposed default is consistent with current jurisprudence counseling courts to be cautious when creating or extending federal common law.⁶⁸ Introducing the terminology of defaults ties the creation problem into *Erie*'s other components and highlights how courts must consider who has the burden of persuasion, what counts as a persuasive argument, and the weight of each argument.

C. *Adoption: Replacing Klaxon's Irrebuttable Requirement for State Choice of Law Rules with a Rebuttable Default that Permits Federal Choice of Law Rules in Appropriate Circumstances*

Erie's adoption component currently relies on an essentially irrebuttable rule that might benefit from conversion into a rebuttable default. The adoption inquiry proceeds from two related premises. First, a court with jurisdiction needs to find law from an appropriate source. Second, all law comes from either a federal source or a nonfederal source.⁶⁹ When *Erie*'s three other components conclude that federal law either does not exist or cannot apply, the adoption component considers which nonfederal source fills the void. Historically, federal courts often relied on "general law"

⁶⁵ See *infra* note 101 (discussing how uncertainty about *Erie*'s foundations complicates its implementation).

⁶⁶ See, e.g., Allan Erbsen, *Horizontal Federalism*, 93MINN. L. REV. 493, 555–60 (2008) (discussing the role of federal common law in regulating interstate relationships).

⁶⁷ This section considered how courts should decide whether they can create federal common law. If federal common law is available, courts would then need to determine the optimal content of federal common law rules. A default rule might be helpful in this second creation context. See *infra* text accompanying notes 81–84 (discussing how courts decide whether to create uniform federal common law rules in lieu of incorporating state law); cf. Hart, *supra* note 64, at 529 (addressing the related problem of whether courts should fill gaps in federal statutes by "adopt[ing]" state law).

⁶⁸ See *supra* note 62.

⁶⁹ For a more detailed account of the adoption inquiry's assumptions, see Erbsen, *Four Functions, supra* note 6.

when federal law was unavailable.⁷⁰ *Erie* foreclosed that option and therefore required developing a mechanism for choosing an authoritative nonfederal law.⁷¹

The *Klaxon* rule embodies the modern alternative to reflexively invoking general law by instead requiring federal courts to invoke the choice of law doctrine of the state in which the federal action is pending.⁷² Local choice of law rules in turn might select law from a particular state, foreign law, international law, or even general law.⁷³ The fact that applying the forum state's law would make little sense—either because the forum state has a tenuous connection to the dispute or would select law from a seemingly disinterested extrinsic source—is not a basis for circumventing *Klaxon*.⁷⁴

I have criticized *Klaxon* elsewhere,⁷⁵ as have many other scholars.⁷⁶ There is no need to rehash these critiques here. It suffices to observe that the *Klaxon* rule rests on a rickety foundation for at least two reasons: it may be imprudent as a matter of policy and unjustified as a matter of theory.

⁷⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938); *see also* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842) (distinguishing questions “dependent upon local statutes or local usages of a fixed and permanent operation” from “questions of a more general nature,” such as “questions of general commercial law”).

⁷¹ *See* *Erie*, 304 U.S. at 75–79. For a discussion of general law's modern relevance, *see* Erbsen, *Four Functions*, *supra* note 6; Anthony J. Bellia, Jr. & Bradford Clark, *General Law in Federal Court*, 54 *WM. & MARY L. REV.* 655 (2013).

⁷² *See* *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941). The rule has only narrow exceptions and otherwise “appears completely immune from attack.” 19 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4506 (2d ed. 2010).

⁷³ An interesting question is whether *Klaxon* would require respecting a state choice of law rule that selected religious law as a rule of decision. *Cf.* *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 131 (1952) (Jackson, J., dissenting) (suggesting that *Erie* and *Klaxon* might require a federal court to respect a state's choice “allowing ecclesiastical law to govern” a particular dispute). For a discussion of how law that does not originate from state actors challenges conventional choice of law methodologies, *see* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 *N.Y.U. L. REV.* 1231 (2011); Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 *WAYNE L. REV.* 1209 (2005).

⁷⁴ *See* *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (applying Mississippi's statute of limitations to a claim by a Pennsylvania resident against a Delaware corporation based on an injury in Pennsylvania; the plaintiff had sued in Mississippi to avoid Pennsylvania's statute of limitations and then obtained a transfer to Pennsylvania); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (“A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.”).

⁷⁵ *See* Erbsen, *Four Functions*, *supra* note 6.

⁷⁶ *See, e.g., In re* *Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 690, 693 (1984) (“We recognize that *Klaxon* has been widely criticized and that learned scholars have suggested on the basis of policy and possible constitutional grounds that a federal conflicts of law rule should be applied in diversity cases. . . .”).

Any new insight into *Klaxon's* potential weaknesses can therefore be helpful in an ongoing debate about its viability.

For present purposes, *Klaxon* is interesting because it avoids considering default rules despite their potential utility. The adoption inquiry at first glance appears unable to rely on a default because privileging a single lawmaker would be impossible. One cannot plausibly contend, for example, that North Dakota law presumptively governs every diversity dispute for which federal law is not available. But even if courts cannot default to a particular lawmaker, they can default to a methodology for selecting the appropriate source of law. Selecting an appropriate default (and the circumstances under which it can be rebutted) is important because competing methodologies implicate different values and produce different outcomes.

If the Court were writing on a clean slate, the adoption inquiry could take one of three basic forms: it could promote horizontal uniformity, vertical uniformity, or a hybrid of both. First, federal courts could rely on nationally uniform criteria to select nonfederal governing law. For example, courts might develop a uniquely federal choice of law standard or borrow an existing standard, such as the Second Restatement's multifactor test.⁷⁷ Either way, the answer to the question "which nonfederal law applies?" would be identical in every federal district for any given set of facts. The rule would thus be horizontally uniform—i.e., uniform across states, setting aside variations in how individual judges exercise discretion. Second, federal courts could apply a vertically uniform rule, meaning that the choice of law inquiry in federal court would mirror the inquiry in a local state court and thus be uniform within the state. That is the approach in *Klaxon*.⁷⁸ Third, a hybrid approach would generally seek vertical uniformity, but would contain criteria for switching to a nationally uniform standard in appropriate circumstances. For example, the forum state's choice of law rules might yield to federal rules in cases implicating strong federal interests in regulating disputes involving foreign parties or foreign conduct.⁷⁹

The hybrid approach is a textbook example of a default rule. It posits that a particular outcome is generally preferable (vertical uniformity), recognizes that an alternative outcome (horizontal uniformity) might be appropriate in some cases, and thus defaults to the preferred outcome while providing criteria for identifying outlier cases that overcome the default.

⁷⁷ See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

⁷⁸ Vertical uniformity can be elusive in practice because state and federal courts may not reach the same conclusions when there is no controlling precedent governing a difficult legal question. *Cf. Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) (stating that a diversity court must "determine what the New York courts would think the California courts would think on an issue about which neither has thought").

⁷⁹ See, e.g., Donald Earl Childress III, *When Erie Goes International*, 105 NW. L. REV. 1531, 1574 (2012) (contending that in diversity cases with an international component "the role of the federal court should be to critically evaluate whether the application of a state's conflict-of-laws rule supports federal objectives").

One can quibble over whether the default should be sticky or relatively easy to overcome. But the alluring benefits of both vertical and horizontal uniformity suggest that a rule entirely abandoning one in favor of the other might be less desirable than a nuanced hybrid relying on a rebuttable default.

A striking feature of *Klaxon* is that it endorses vertical uniformity rather than horizontal uniformity or a hybrid/default approach with virtually no analysis. The *Klaxon* Court seemed to think that its holding followed inexorably from *Erie* when in fact *Erie* granted more discretion than *Klaxon* acknowledged.⁸⁰ *Klaxon* therefore implicitly rejected the hybrid/default approach without carefully considering any of the questions one might expect a court to ask before selecting one of three competing approaches to choice of law. Examples of potentially fruitful inquiries that *Klaxon* skirted include: whether states have a legitimate interest in having federal courts mimic their choice of law standards; whether there are countervailing federal interests; whether litigants (especially repeat players who participate in a national market) have relevant interests that should shape the choice of law inquiry; whether judicially administrable criteria are available for implementing a hybrid rule; and whether a materially significant difference in outcomes would occur with sufficient frequency to justify the effort of creating a hybrid rule rather than adopting a bright-line preference for state law.

Reasonable minds can differ about whether the answers to these questions support or undermine the *Klaxon* rule. But thinking about *Erie*'s adoption inquiry in the context of default rules highlights how *Klaxon* overlooks the possibility of using a rebuttable default rule rather than a fixed rule for the adoption inquiry. That omission is troubling given the utility of defaults in the prioritization, creation, and interpretation components of *Erie* analysis.

Klaxon's blindness to the potential hybrid/default approach contrasts starkly with the Court's approach to a related problem in the creation context involving the uniformity of federal common law rules. Suppose that a court concludes that it may create a federal common law rule to govern a particular problem. The rule can take either of two forms. It can be nationally uniform, such that it has the same content in every state. Or the rule can borrow from state law, such that the content of the rule is a function of a dispute's geographic features (for example, where an accident occurred, where the litigants reside, where the suit was filed, etc.). The recurring need to choose between uniformity and localization raises the possibility of adopting a default to guide judicial discretion. That is exactly what the Court did in *United States v. Kimbell Foods*.⁸¹ The Court's default assump-

⁸⁰ *Klaxon* claims to "extend[]" *Erie* without explaining why *Erie* compels the holding. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941); see also Erbsen, *Four Functions*, *supra* note 6.

⁸¹ 440 U.S. 715 (1979).

tion is that incorporating state law into federal common law is generally appropriate, but this default can yield to strong reasons for preferring a uniform national rule.⁸²

Klaxon and *Kimbell Foods* seem to address an identical problem inconsistently. In both cases, the Court was creating a federal common law methodology governing choice of law.⁸³ The two contexts both require considering whether federal common law should be horizontally or vertically uniform. Yet *Kimbell Foods* adopted a hybrid/defaults approach, while *Klaxon* categorically favored incorporating state law. There may be sound reasons for the difference in approaches,⁸⁴ but they are not self-evident. The Court has never explained why *Kimbell Foods* used a different approach than *Klaxon*; indeed, the Court has never even cited the two cases in

⁸² *See id.* at 728–29 (considering the need for “uniformity,” whether state law would “frustrate specific [federal] objectives,” and “the extent to which application of a federal rule would disrupt commercial relationships predicated on state law”); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 628 (6th ed. 2009) (characterizing *Kimbell Foods* as creating a “presumption” favoring incorporation of state law); Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 111 (2008) (“in exercising its power to fashion federal common law in discrete areas of federal concern, the courts presumptively define the content of federal law as state law”).

⁸³ *See Erbsen, Four Functions, supra* note 6 (explaining why *Klaxon* is a form of federal common law).

⁸⁴ For example, perhaps the *Kimbell Foods* context requires greater flexibility because courts must create a wide variety of federal common law rules, while a bright-line approach is more appropriate for the *Klaxon* context to address a single frequently recurring problem (albeit one that arises in many distinct factual circumstances). From this perspective, *Klaxon* would be an issue-specific implementation of *Kimbell Foods* rather than a departure from *Kimbell Foods*. Nevertheless, the fact that *Klaxon*’s preference for national uniformity is irrebuttable in all of the myriad circumstances where federal courts must adopt nonfederal law still seems inconsistent with the more context-sensitive methodology in *Kimbell Foods*.

the same opinion.⁸⁵ Commentators likewise have not attempted to reconcile the decisions.⁸⁶

Klaxon's failure to consider the hybrid/defaults option is another crack in its threadbare armor. Further scholarship about *Klaxon* might profitably explore whether a flexible defaults-based approach would be superior to mandatory reliance on forum choice of law rules.⁸⁷

D. *Interpretation: The Need for an "Erie Canon" to Determine Whether the Scope of Federal Law Should be Read Broadly or Narrowly to Minimize Conflicts with State Law*

Erie's interpretation component is another vexing source of confusion that would benefit from a default rule. The scope of a federal rule is often the central disputed issue in *Erie* cases,⁸⁸ yet the Court has tied itself in

⁸⁵ One case cites to *Klaxon* and *Kimbell Foods* in different opinions without any effort to compare or contrast them. See *Danforth v. Minnesota*, 552 U.S. 264, 290 n.24 (2008) (citing *Kimbell Foods*, 440 U.S. 715); *id.* at 307 n.3 (Roberts, C.J., dissenting) (citing *Klaxon*, 313 U.S. 487). An issue in *Danforth* was whether state courts could rely on state law to give retroactive effect to newly created federal constitutional rights when federal law would not apply the rights retroactively. The Court held that federal courts should not impose a federal common law rule preempting state remedies. See *Danforth*, 552 U.S. at 289–90. In contrast, the dissent argued that federal law governing retroactivity in effect created a choice of law rule barring state courts from applying new law to old cases. See *id.* at 307–10 (Roberts, C.J., dissenting). The majority thus implicitly framed the problem as relating to *Erie*'s creation component—i.e., whether federal law should create an exclusive remedy or leave room for additional state remedies. But the dissent implicitly framed the problem as relating to *Erie*'s interpretation component—i.e., whether the issue of remedies was within the scope of existing federal law governing retroactivity. Closer attention to distinctions between *Erie*'s components would have highlighted how the competing positions differed, which in turn could have suggested additional perspectives for evaluating their merit.

⁸⁶ One scholar has noted the relevance of *Kimbell Foods* to the problem of designing a federal common law choice of law rule for "cases raising international issues." Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 508–09 (2002) (observing that the federal rule should conform to *Kimbell Foods* by borrowing state rules absent a "significant conflict with specific federal interests").

⁸⁷ For discussion of potential alternatives to *Klaxon* in particular contexts, see Childress, *supra* note 79 at 1573–79 (disputes with international components); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027–34 (2008) (nationwide class actions after the Class Action Fairness Act of 2005).

⁸⁸ See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980) ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437–39 (2010) (interpreting FED. R. CIV. P. 23); Kermit Roosevelt III, *Choice of Law in Federal Courts, From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 12 (2012) ("The court's task . . . is first to determine the scope of the different sovereigns' laws . . .").

knots trying to explain how to determine that scope.⁸⁹ A default rule could streamline doctrine while advancing *Erie*'s normative goals.

The interpretation inquiry is relevant when federal law purports to address a disputed issue. For example, assume that *Erie*'s creation component validates a particular federal rule. Further assume that *Erie*'s prioritization component deems that federal rule to trump an otherwise applicable state law in the context of a pending case. Those two assumptions do not alone mean that the federal rule will apply in lieu of the state rule. A question remains about whether the federal rule's scope encompasses the disputed issue. If not, then the federal rule is irrelevant; there is no conflict with the otherwise applicable state law. Accordingly, knowing whether a federal rule applies under *Erie* requires interpreting the rule. Regardless of the federal rule's origin—whether from the Constitution, treaty, statute, regulation, procedural code, or federal common law—courts must know what the federal rule means.

Defaults are common when interpreting the scope of legal rules.⁹⁰ These defaults—often called canons—help courts determine the meaning of ambiguous texts.⁹¹ Commentators disagree about whether particular defaults are sensible, but there is little doubt that defaults can be a useful analytical tool when carefully crafted and prudently applied.⁹²

⁸⁹ See Erbsen, *Four Functions*, *supra* note 6 (discussing inconsistent modern precedents interpreting the FRCP).

⁹⁰ See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. B (4th ed. 2007) (categorizing dozens of canons).

⁹¹ I am treating canons as a species of default rules that apply when courts interpret statutes and similar texts. One can imagine a different nomenclature in which default rules are an especially sticky species of canon. See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 166, 169 (Richard A. Epstein & Michael S. Greve eds., 2007) ("A default rule . . . is stronger than a canon of interpretation. . . . [It] function[s] like a clear statement rule—a principle that dictates a result unless Congress overrides the outcome with a specified degree of clarity.").

⁹² Among the benefits of interpretative defaults (if used wisely) are promoting efficiency by avoiding the need to repeatedly reconsider how to handle recurring sources of ambiguity, minimizing arbitrary decisionmaking by structuring judicial discretion, maximizing the probability that the interpreter reaches a justifiable result, signaling to rulemakers how their work will be understood and thus how it should be written to convey an intended meaning, articulating norms that might shape the content of rules by encouraging drafters to consider the consequences of textual choices, and linking the interpretative enterprise to broader jurisprudential commitments. A large and rich literature discusses the potential virtues and vices of interpretative defaults. For an introduction to the debate, see EINERELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008) (developing a theory of how defaults might produce optimal outcomes); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395, 401–06 (1950) (illustrating how the availability of canons and counter-canons governing the same issue can invite subjectivity into the interpretative enterprise); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *HARV. L. REV.* 2085 (2002) (considering whether Congress rather than the judiciary should create rules governing statutory interpretation); Bertrall L. Ross II, *Against Constitu-*

Although defaults often focus on ambiguities arising from grammar and word choice, they can also be used to enforce normative constraints on the scope of a rulemaker's power within a system that fragments regulatory authority.⁹³ Examples of such defaults include the constitutional avoidance canon (which reads statutes narrowly to avoid potential constitutional infirmities),⁹⁴ the canon favoring a narrow interpretation of judge-made federal rules that might exceed the rulemaking authority delegated in the Rules Enabling Act,⁹⁵ and clear statement requirements that skew toward narrow interpretations of federal statutes that might undermine state interests.⁹⁶ Defaults even exist to manage conflicts of law in a federal system. For example, courts might interpret a federal rule broadly or narrowly to invite or avoid preemption of potentially inconsistent state rules,⁹⁷ and courts might adopt default choice of law rules that Congress can modify in appropriate circumstances.⁹⁸ These and similar defaults all function as thumbs on

tional Mainstreaming, 78 U. CHI. L. REV. 1203 (2011) (assessing interpretative defaults in the context of tension between competing normative preferences animating judicial and legislative actors); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (reviewing distinct interpretative methods); Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1373 (2010) (considering how "structural values" animating the Constitution inform statutory interpretation).

⁹³ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 924 (2013) (distinguishing between "textual" and "substantive" canons).

⁹⁴ See, e.g., *Solid Waste Agency v. U.S. Army Corp. of Eng'rs*, 531 U.S. 159, 174 (2001) (interpreting a statute "as written to avoid the significant constitutional and federalism questions raised by" a competing interpretation).

⁹⁵ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (holding that Federal Rule of Civil Procedure (FRCP) 23 "must be interpreted with fidelity to the Rules Enabling Act"). For a discussion of whether substantive canons can aid in resolving disputes about the scope of FRCP provisions, see Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067 (2011); Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187 (2013).

⁹⁶ See, e.g., *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (abrogation of state sovereign immunity requires a "clear statement from Congress"); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (discussing rationale for clear statement rules that protect state interests). For a discussion of whether clear statement rules are consistent with specific constitutional clauses and values, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

⁹⁷ See Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 654–55 (2013) (categorizing competing presumptions). Judicial abstention can serve a related coordination function by allocating interpretative authority between state and federal courts when issues implicate both state and federal law. See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (holding that a federal court may abstain from deciding a federal constitutional question that a state court's resolution of a state law question would avoid).

⁹⁸ See, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1531 (2007) (contending that Article IV creates "default" constraints on interstate choice of law that Congress can alter); Young, *supra* note 86, at 503 ("The debate about customary international law [in the choice of law context] is generally about default rules. Whatever the usual status of customary

the scale favoring normatively preferred outcomes when other interpretative factors are roughly indeterminate.⁹⁹

Erie's interpretation inquiry may benefit from a default similarly imbued with normative preferences about the optimal interaction between state and federal law. Implementing *Erie's* interpretation component requires asking whether a federal rule should be read broadly or narrowly to encompass or avoid a disputed issue.¹⁰⁰ In close cases where the rule is susceptible to both interpretations, the norms animating *Erie* might skew the interpretative conclusion. If one believes that *Erie* primarily exists to promote federalism values by limiting federal interference with state law, then one might default to a narrow interpretation. If instead one views *Erie* as primarily concerned with the proper allocation of lawmaking authority between federal institutions, then there is less need to cabin federal laws that have already survived scrutiny under *Erie's* creation component. Other theories of *Erie's* normative purposes might further favor skewing interpretation toward a broad or narrow reading.¹⁰¹

Identifying an appropriate default—or an “*Erie* canon”—requires considering several questions that are ripe for further scholarship. First, a de-

norms in the hierarchy of American law, Congress retains the power under Article I to federalize them or, in the exercise of its other powers, to relieve the states of any obligation of compliance.”).

⁹⁹ Evolution of the Court's normative commitments alters the range of permissible defaults. For example, before *Erie*, federal courts interpreting unsettled state law often adopted a “default” assumption that state law was consistent with “general law” principles. Michael G. Collins, *Before Lochner – Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1283 (2000). This default enabled federal judges to create “a uniform but nonfederal body of public law and constitutional law” to constrain state regulatory authority. *Id.* at 1321. *Erie's* emphasis on the distinction between state, federal, and general law required a new interpretative approach.

¹⁰⁰ A similar need to choose between broad and narrow interpretations arises when federal courts assess the scope of state law. The difference is that the appropriate method for interpreting federal law is clearly a question of federal law, while the appropriate method for interpreting state law might itself be a question of state law. Federal judges applying *Erie* may therefore have more flexibility to skew the interpretation of federal law based on principles drawn from *Erie* than they do when interpreting state law. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as Law and the Erie Doctrine*, 120 YALE L.J. 1898, 1906–07 (2011) (advocating a “default rule” requiring that “federal courts should apply state rules of statutory interpretation to state law questions” absent a reason to believe that federal law displaces state interpretative preferences). *But cf.* Campos, *supra* note 16, at 1628–30 (suggesting that federal courts could interpret state law using default rules that encourage states to distinguish substantive and procedural rules; these defaults appear to be federal common law rules for interpreting state statutes).

¹⁰¹ There is no consensus about what purposes *Erie* serves and which provisions of the Constitution animate the decision. See, e.g., Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1289 (2007) (observing that *Erie's* “constitutional rationale . . . has remained elusive for almost seventy years”). The optimal default might hinge on which values are relevant in particular contexts. For example, if a strong tradition supports federal uniformity with respect to a particular regulatory field (such as foreign relations) then a default might favor broadly interpreting federal rules in that field. Similarly, in regulatory fields where federal lawmakers were unlikely to have intended to displace state law in diversity cases, defaulting to a narrower interpretation might be appropriate.

fault is sensible only if it furthers an appropriate norm, so courts would need a more precise account of *Erie*'s norms than current jurisprudence provides. Identifying a guiding norm will determine whether courts should err in favor of construing federal statutes broadly or narrowly to embrace or avoid conflict with otherwise applicable state laws. The answer might differ depending on the subject being regulated (e.g., primary conduct or behavior during litigation) and the source of federal law (e.g., treaty, statute, rule or common law). Developing an *Erie* canon would thus entail a more systematic treatment of the interpretative questions that the Supreme Court already considers in its preemption jurisprudence.¹⁰² Second, to the extent that defaults operate as a thumb on the scale favoring a particular outcome, courts must decide how heavy a thumb to wield. Finally, defaults are tools for resolving ambiguity, which raises a question about how courts can determine when a rule's scope is sufficiently ambiguous to justify skewing interpretation toward a broad or narrow reading.¹⁰³

CONCLUSION

Erie will never be easy to understand and implement, but it need not remain the befuddling muddle that it has become. Fragmenting *Erie* into its components and identifying defaults to guide each distinct inquiry can help to refine choice of law analysis and highlight relevant norms. The initial sketch of default rules in this article provides a foundation and blueprint for further scholarship exploring when federal courts may apply federal law and how they select alternatives.

¹⁰² See Gluck & Bressman, *supra* note 93, at 942 (discussing "federalism-enforcing canons," including "clear statement rules" and the "presumption against preemption"). For recent efforts to consider how *Erie* might influence interpretative canons in particular contexts, see Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013) (treating canons as a form of federal common law and considering how *Erie* limits their creation and application); Thomas, *supra* note 95 (proposing rules for interpreting FRCP provisions that might conflict with state law).

¹⁰³ See *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (quipping that "ambiguity is apparently in the eye of the beholder").

AN EMPIRICAL STUDY OF THE EFFECT OF *SHADY GROVE V. ALLSTATE* ON FORUM SHOPPING IN THE NEW YORK COURTS

William H.J. Hubbard *

Given the considerable prominence of forum-shopping concerns in the jurisprudence and academic literature on the so-called Erie doctrine, courts and commentators may benefit from data on whether, and to what extent, forum shopping in fact responds to choice-of-law rulings under the Erie doctrine. Prior to this article, however, no empirical study quantified the changes in forum-shopping behavior caused by a court decision applying the Erie doctrine. I study changes in filing patterns of cases likely to be affected by the Supreme Court's recent decision in Shady Grove v. Allstate, and find evidence of large shifts in the patterns of original filings and removals in federal courts in New York that are consistent with the predicted forum-shopping response to Shady Grove. In addition to providing the first empirical evidence of vertical forum shopping induced by a decision applying the Erie doctrine, this article seeks to serve as a proof of concept for empirical research in this area. While there are significant obstacles to empirical research on the effects of Erie and its progeny, this article outlines a methodology that may be feasible for future projects in this area.

INTRODUCTION

Since the *Erie* case itself,¹ the so-called *Erie* doctrine² has been preoccupied with concerns about the “injustice” of vertical forum shopping.³ In

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¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

² I say “so-called” because of the ambiguity surrounding exactly what one is referring to when one intones the words “*Erie* doctrine.” For example, as Allan Erbsen explains in an article appearing in this volume, even the ramifications of *Erie* itself are best understood as a bundle of no less than four distinct doctrines. Allan Erbsen, *Erie's Four Functions and the Fragmentation of Doctrine*, 10 J.L. ECON. & POL'Y, 125 (forthcoming 2013). For purposes of this article, I simply mean to refer to the holdings of *Erie* and the cases that, by their terms, follow it. I include *Hanna* and its progeny, including *Shady Grove*, although one might distinguish them as Rules Enabling Act cases rather than Rules of Decision Act cases. *Hanna v. Plumer* 380 U.S. 460 (1965); *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.* 559 U.S. 393, 130 S. Ct. 1431 (2010).

³ *Erie*, 304 U.S. at 76. By “vertical forum shopping,” I mean the selective choice of federal versus state court to gain a strategic advantage in litigation. In contrast, “horizontal forum shopping”

Erie, Justice Brandeis began his broadside against the doctrine of *Swift v. Tyson*⁴ by raising the specter of vertical forum shopping as embodied in the notorious *Black & White Taxicab* case.⁵ *Hanna v. Plumer* famously characterized “discouragement of forum shopping” as one of “the twin aims of the *Erie* rule.”⁶ And, even though *Hanna* distinguished cases implicating the Rules of Decision Act⁷ (to which *Erie* applies) from cases implicating the Rules Enabling Act⁸ (to which *Erie* does not apply), subsequent cases involving the Federal Rules of Civil Procedure and state law continue to struggle with concerns about vertical forum shopping, whether or not they are, strictly speaking, *Erie* cases rather than *Hanna* cases.⁹

In addition, numerous scholars have argued that the *Erie* doctrine involves a tradeoff between vertical and horizontal forum shopping: when federal courts employ state rules, they discourage vertical forum shopping but encourage horizontal forum shopping, which takes advantage of courts’ tendencies under modern conflicts-of-law rules to employ forum law.¹⁰ Judgments about whether the *Erie* doctrine represents good policy therefore

would refer to selectively choosing among state courts for the most favorable forum. Although “forum shopping” usually has a negative connotation, this article takes no position on whether any particular type of forum shopping is desirable or undesirable.

⁴ *Swift v. Tyson*, 41 U.S. 1 (1842).

⁵ As characterized by the *Erie* Court, the plaintiff corporation in *Black & White Taxicab* reincorporated in a new state for the purpose of manufacturing diversity in order to benefit from more favorable federal law that would be available in federal court, thanks to the doctrine of *Swift*. *Erie*, 304 U.S. at 73–74 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)) (holding that the court did not have to apply state law).

⁶ *Hanna*, 380 U.S. at 468.

⁷ 28 U.S.C. § 1652 (2012).

⁸ 28 U.S.C. § 2072 (2012).

⁹ See *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 466 (1996) (Scalia, J., dissenting) (“What seems to me far more likely to produce forum shopping is the consistent difference between the state and federal *appellate* standards, which the Court leaves untouched.”); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 234 (1991) (“The twin aims of the *Erie* doctrine—discouragement of forum-shopping and avoidance of inequitable administration of the laws—are components of the goal of doctrinal coherence advanced by independent appellate review.”) (internal quotation marks and citations omitted); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) (“This significant encouragement to forum shopping is alone sufficient to warrant application of state law.”); *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001) (“[A]ny other rule would produce the sort of forum-shopping . . . and . . . inequitable administration of the laws that *Erie* seeks to avoid . . .”) (internal quotation marks omitted).

¹⁰ Compare Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1281 (1999) (arguing that horizontal and vertical forum shopping do not raise equally serious concerns), with Michael S. Greve, *THE UPSIDE-DOWN CONSTITUTION* 234 (2012) (“[T]his regime encourages relentless forum shopping for hospitable state venues.”), and Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 30 (2010) (noting that horizontal forum shopping has become a greater problem since *Erie*), and Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1854–56 (2006) (noting that horizontal uniformity in law is undermined by strict adherence to vertical uniformity in choice of law).

turn in part on the relative benefits and harms from vertical and horizontal forum shopping.¹¹

All of this suggests that the contours of the *Erie* doctrine may (or should) depend on the extent to which forum shopping in fact responds to choice-of-law decisions under the *Erie* doctrine. Yet in the seventy-five years following the *Erie* decision, there has not been (to my knowledge) a single empirical study quantifying how vertical forum shopping responded to a decision applying the *Erie* doctrine. This article presents the first such study.

This article makes use of recently released administrative data on case filings in federal court, supplemented by a unique dataset of complaints filed in New York federal court, to quantify the changes in filing and removal patterns among cases whose claims were likely to have been affected by the Supreme Court's decision in *Shady Grove v. Allstate*.¹² I predict an increase in federal court filings by plaintiffs and a decline in removals to federal court by defendants following the *Shady Grove* decision. Analysis of the data largely confirms these predictions, and this article demonstrates the results both graphically and statistically.

This empirical evidence supports what has long been believed on the basis of anecdotal evidence: court decisions applying the *Erie* doctrine induce changes in choice of forum by both plaintiffs and defendants. Further, the evidence suggests that the changes in forum choice induced by *Shady Grove* were fairly dramatic in terms of magnitude. At least in this one context, it appears that vertical forum shopping is not a *de minimis* concern for judges or policymakers.

In addition to providing the first empirical evidence of vertical forum shopping induced by a decision applying the *Erie* doctrine, this article seeks to serve as a proof of concept for empirical research in this area. While there are significant obstacles to empirical research on the effects of *Erie* and its progeny, this article outlines a methodology that may be feasible for future projects in this area.

The remainder of this article proceeds as follows. Part I briefly reviews the *Shady Grove* decision and its expected effects on vertical forum shopping. Part II reviews empirical research on related questions of choice of law and forum shopping. Part III outlines the data and methodology employed. Part IV presents results.

¹¹ Academic commentary has also argued that for the Rules Enabling Act analysis under *Hanna*, “the risk of vertical forum shopping [may be] so great that substitution of the federal rule for the state does indeed ‘abridge, enlarge or modify any substantive right’ in contravention of the Rules Enabling Act.” Borchers, *supra* note 10, at 33.

¹² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431 (2010).

I. *SHADY GROVE* AND VERTICAL FORUM SHOPPING

Shady Grove Orthopedic Associates was a medical care provider that submitted insurance claims to Allstate.¹³ Allstate paid the claims, but paid them late, and it refused to pay the two percent per month interest rate on late benefits payments required by New York Insurance Law § 5106(a) (“Section 5106(a)”).¹⁴ Shady Grove then brought suit against Allstate to recover the unpaid statutory interest. It filed the suit in the Eastern District of New York, invoking the diversity jurisdiction of the federal court. The suit was a putative class action, seeking to sue on behalf of everyone to whom Allstate owed statutory interest under Section 5106(a).¹⁵

Shady Grove’s individual claim was for only a small sum (approximately \$500), so the linchpin to its litigation strategy was certification of its case as a class action. The complication here was that New York law prohibits class certification of claims for statutory damages, such as the statutory interest awarded under Section 5106(a).¹⁶ New York Civil Practice Law § 901(b) (“Section 901(b)”) states, “Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”

This presented an *Erie/Hanna* question: given that Federal Rule of Civil Procedure 23 provides criteria for the certification of a class action, is a federal court sitting in diversity in a case seeking class certification of claims for statutory damages under New York law bound by Section 901(b)? The district court and the Second Circuit held Section 901(b) applied in a federal diversity suit. The Supreme Court granted certiorari and reversed.

While no opinion commanded a majority of the Court, five justices agreed that Section 901(b) could not apply in federal court. In the wake of *Shady Grove*, lower courts have noted its application to statutory damages regimes under New York law other than Section 5106(a).¹⁷ Indeed, there are a number of provisions under the New York General Business Law and

¹³ *Shady Grove*, 130 S. Ct. at 1436.

¹⁴ *Id.*

¹⁵ *Id.* at 1436–37.

¹⁶ *Id.* at 1437.

¹⁷ See *Pefanis v. Westway Diner, Inc.*, No. 08-cv-00002, 2010 WL 3564426, at *7 (S.D.N.Y. Sept. 7, 2010) (holding that after *Shady Grove*, plaintiffs may “now seek liquidated damages authorized by [New York Labor Law §§ 198(1-a), 663(1)] as part of a Rule 23 class action in federal court”); *McBeth v. Gabrielli Truck Sales, Ltd.*, No. 09-cv-04112, 2010 WL 3081534 (E.D.N.Y. Aug. 5, 2010) (allowing amendment to class action complaint to add claim for liquidated damages under Labor Law § 663(1) pursuant to *Shady Grove*).

the New York Labor Law that provide for statutory damages in one form or another.¹⁸

Notably, the issue of forum shopping was squarely in the Supreme Court's sights as it decided *Shady Grove*. The plurality in *Shady Grove* expressly noted what they perceived as the likely effect of the Court's decision:

We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. . . . But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.¹⁹

Scholars too have been quick to predict that “the *Shady Grove* decision will encourage federal forum shopping by plaintiffs to avoid the limiting effects of state provisions that prohibit certain types of class actions.”²⁰ Practitioners,²¹ and even New York state court judges,²² have concurred in this prediction. Nonetheless, this view is not quite unanimous.²³

¹⁸ See, e.g., N.Y. Gen. Bus. Law § 349(h) (“[A]ny person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section.”); N.Y. Lab. Law § 198(1-a) (“In any action instituted in the courts upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney’s fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due.”).

¹⁹ See *Shady Grove*, 130 S. Ct. at 1447–48 (Scalia, J., plurality opinion).

²⁰ Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448, 479–80 (2011); see also Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1028 (2011) (“[*Shady Grove*] will produce forum shopping, as the federal courts become more hospitable to class actions than some states.”); Elizabeth Guidi, *Shady Grove: Class Actions in the Context of Erie*, 77 BROOK. L. REV. 783, 811 (2012) (“The Court’s decision in *Shady Grove* . . . violates the twin aims of *Erie* because it will increase forum shopping and the inequitable distribution of the laws.”).

²¹ See Aaron D. Van Oort & Eileen M. Hunter, *Shady Grove v. Allstate: A Case Study in Formalism Versus Pragmatism*, ENGAGE, Sept. 2010, at 105, 109 (“As the dissent emphasizes, the plurality’s formalist approach—and the concurrence’s measured formalist approach as applied in this case—will increase forum-shopping.”).

²² See Thomas A. Dickerson, John M. Leventhal & Cheryl E. Chambers, *New York State Consumer Protection Law and Class Actions in 2010*, N.Y. ST. B. ASS’N J., May 2011, at 38, 41 (“Clearly, there will be an increase in federal class actions and defendants may be less anxious to remove such cases to federal court under the Class Action Fairness Act.”). The Hon. Thomas A. Dickerson, Hon. John M. Leventhal, and Hon. Cheryl E. Chambers are Associate Justices of the New York Appellate Division, Second Department.

²³ See W. Daniel “Dee” Miles, III, *Shady Grove v. Allstate: An Erie Sequel(?) and its Effects Moving Forward*, SS015 ALI-ABA 183, 190 (2010) (arguing that *Shady Grove* will not necessarily

II. EMPIRICAL RESEARCH ON FORUM SHOPPING

To my knowledge, this is the first empirical study of the effect of the *Erie* doctrine on vertical forum shopping. There have been, however, various efforts made at the theoretical and empirical study of choice of law and forum shopping more generally. Most closely related is the handful of studies that have attempted to identify empirical patterns in vertical forum shopping, though not in the *Erie* context. Specifically, studies have focused on the strategic use of filing in state court by plaintiffs and removal by defense attorneys.²⁴

A related literature examines empirical evidence of horizontal forum shopping,²⁵ explores the causes of horizontal forum shopping,²⁶ studies the use of choice-of-forum clauses,²⁷ and looks for empirical evidence of possi-

increase class action filings and noting that “[a contrary outcome in *Shady Grove*] would have done little to stop class-action lawsuits from occurring in total”).

²⁴ See generally Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (observing plaintiff win rates of 71 percent in original diversity cases but 34 percent in removed diversity cases); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992) (analyzing a national sample of attorneys in removal cases on their forum selection decisions and views of the federal judiciary).

²⁵ See generally Scott E. Atkinson et al., *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411 (2009) (estimating extent of forum shopping in patent cases before and after establishment of the Federal Circuit); James D. Cox et al., *Do Differences in Pleadings Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WISC. L. REV. 421 (finding weak evidence of forum shopping); Ahmed E. Taha, *Judge Shopping: Testing Whether Judges’ Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007 (2010) (finding that differences in the political orientation of judges across federal district courts lead to differences in the filing rates of certain categories of cases); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (providing an empirical examination of trends in transnational forum shopping).

²⁶ See generally Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (finding that plaintiffs prevail much less often in federal cases that are transferred than cases adjudicated in the forum in which the plaintiff filed); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999) (attempting to explain patterns of forum shopping in the context of bankruptcy actions from 1980–1997).

²⁷ See generally Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005) (examining why so few parties contract out of national law in international transactions); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475 (2009) (analyzing a dataset of 2,882 contracts for choice of law and choice of forum clauses).

ble effects of horizontal forum shopping.²⁸ Other work provides theoretical models of strategic forum-shopping decisions.²⁹

An important methodological difference between this study and most of this literature is that I use a discrete change in a legal rule to identify the causal relationship between the legal rule and litigant behavior. Almost none of the studies cited above were designed to do this.³⁰ While this approach is not always feasible, it has the advantage of allowing one to compare the behavior of litigants in the *same types of cases* and in the *same courts* but under *two* different legal rules. To this extent, the approach this study takes controls for the characteristics of a given set of cases and courts. With this in mind, I turn now to a description of my datasets and methodology.

III. METHODOLOGY AND DATA

This study seeks to shed light on the larger question of the relationships between the *Erie* doctrine and forum shopping. This larger question, though, frames an entire research agenda, to which this article can only make an initial contribution. The precise question this article asks is a narrow one: What effect did the Supreme Court's decision in *Shady Grove* have on the rates at which putative class actions seeking statutory damages under New York law were either filed by plaintiffs in, and removed by defendants to, federal court?

Shady Grove, as an exposition of the current state of the *Erie* doctrine, is hardly transparent. The Court offers three separate opinions, none of which command a majority of the justices, and each of which presents a different vision of how to go about deciding the dispute.³¹ But for purposes of the empirical question this article poses, the decision is crystal clear: On March 31, 2010, the Supreme Court held that Rule 23 applied, and that Section 901(b) did *not* apply, to diversity cases raising claims for statutory damages under New York law in federal court. Just as crucially, this deci-

²⁸ See generally Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365 (2006) (examining empirically the effect of forum choice on case outcomes).

²⁹ See generally Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (characterizing and modeling forum choice decisions as a strategic game).

³⁰ An example of a study that takes something similar to this approach is Atkinson, Marco, and Turner's examination of filing patterns before and after the change in the appellate structure of the federal district courts brought on by the creation of the Federal Circuit. See generally Atkinson et al., *supra* note 25. Taha's paper on forum shopping in response to judges' political orientations also uses an empirical strategy that exploits within-district variation over time. Taha, *supra* note 25, at 1031–32. However, there may be some concern about endogeneity of the variation in that context.

³¹ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448, 1460 (2010).

sion reversed the contrary judgment of the Second Circuit Court of Appeals.

Consequently, on March 31, 2010, there was a sharp break in the applicable choice-of-law rule for diversity cases brought under New York law seeking statutory damages and class certification. Before March 31, 2010, Section 901(b) applied in federal court. After March 31, 2010, it did not.³² I utilize this clear break in the application of the *Erie* doctrine in New York federal courts to identify how patterns of forum shopping respond to that application of the *Erie* doctrine. My methodology, in essence, is to examine the patterns of putative, diversity-jurisdiction class action filings in New York federal courts. I compare the rates at which plaintiffs file in, and defendants remove to, federal court before and after March 31, 2010.

To the extent that *Shady Grove* has affected vertical forum shopping, one should expect not only to see changes in filing rates, but changes in a predictable direction. In this regard, I assume that in most cases involving statutory damages claims, plaintiffs prefer class treatment and defendants do not.³³

First, *Shady Grove* should make plaintiffs' attorneys more willing to file their cases in federal court rather than state court. Original filings in federal court—that is, cases that are initially filed in federal court rather than removed to federal court—should rise after the *Shady Grove* decision.

Second, to the extent that putative class actions are still filed in state court, defendants in state court will be less willing than before to remove these cases to federal court. This change in attitude should appear in the

³² Between May 4, 2009, when the Supreme Court granted certiorari in *Shady Grove*, and March 31, 2010, the future status of § 901(b) in federal court was more uncertain due to the pending, rather than final, status of the *Shady Grove* litigation. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 129 S. Ct. 2160, 2160 (2009) (granting certiorari). Nonetheless, during this interim, the Second Circuit decision remained the governing precedent in New York federal court. And, so long as the decision of the Supreme Court was not a foregone conclusion, March 31, 2010, represents a sharp break in judges' and practitioners' understandings of whether § 901(b) would apply in federal court. In this respect, the close vote in the *Shady Grove* decision supports the inference that the outcome of the case was uncertain prior to March 31, 2010. Attorneys and judges would have had difficulty predicting the outcome of *Shady Grove* and adjusting their behavior in anticipation of the decision prior to March 31, 2010. Of course, the closeness of the Supreme Court decision is not necessary for such an inference (nor might it be sufficient), and I have argued elsewhere that in some circumstances even a fairly lopsided Supreme Court decision can come as a shock and surprise to both the bar and the bench. See generally William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35 (2013) (examining how plaintiffs and defendants file and settle their cases in an unpredictable court system).

³³ In *Shady Grove*, the plaintiffs invoked federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), arguing that their putative class action was a diversity suit in which the damages sought exceeded \$5 million. See 28 U.S.C. § 1332(d); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 469 (E.D.N.Y. 2006). While CAFA is largely structured to ensure greater access to federal court for class action defendants, it clearly favors plaintiffs when Section 901(b) would otherwise apply in state court.

data as a decline in the number of cases that enter the federal court system by way of removal from state courts.

To test these hypotheses I bring to bear two related datasets. My primary dataset is composed of administrative data on cases filed in federal court compiled by the Administrative Office of the U.S. Courts (“AO”) and made available to the public on a restricted use basis.³⁴ This data (“AO Data”) contains basic information—such as filing date, jurisdictional basis, nature of suit category, and district of filing—for every case filed in federal court.

From the AO Data, I draw a dataset of cases (“Administrative Dataset”) most likely to involve the same types of claims as *Shady Grove*—statutory damages claims under New York law invoking diversity jurisdiction. It is impossible, though, to determine from the AO Data whether or not New York law applies in a particular case, let alone whether the plaintiff is seeking statutory damages or whether Section 901(b) might be implicated. Thus, my goal in creating the Administrative Dataset was to identify a set of cases most similar to the *Shady Grove* case itself, and thus, plausibly more likely to involve statutory damages claims under New York law. To do this, I focused on cases that were:³⁵

1. Filed in federal court in New York;³⁶
2. Brought by a represented party;³⁷
3. Invoked either original diversity jurisdiction or removal diversity jurisdiction;³⁸
4. Not reopenings of earlier filed cases or appeals from administrative proceedings;³⁹
5. Coded as cases involving either contract law generally, insurance, or fraud;⁴⁰ and

³⁴ See Federal Judicial Center, Federal Court Cases: Integrated Database Series, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH. For codebooks and information on this database series, see <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072>.

³⁵ For the purpose of facilitating replication of this study, footnotes 36–42 and 44 refer to variable names in the AO Data and the numerical codes for the indicated values of those variables. Further details on the AO data and methods for processing this data are provided in Hubbard, *supra* note 32.

³⁶ This corresponds to *district* codes 06 through 09 for the four districts in New York.

³⁷ I excluded observations coded as *pro se* or *in forma pauperis* in the variables *prose* and *ifp*, respectively.

³⁸ This corresponds to *jurisdiction* code 4 (“diversity of citizenship”).

³⁹ This corresponds to *origin* codes 1 (“original proceeding”) and 2 (“removed from state court”).

⁴⁰ This corresponds to *natureofsuit* codes 110 (“insurance”), 190 (“other contract”), and 370 (“other fraud”). I also included in the scope of the database codes 371 (“truth in lending”), 480 (“con-

6. Filed in the period from November 19, 2008, through September 30, 2010 (representing the time from the Second Circuit decision in *Shady Grove*⁴¹ through six months after the *Shady Grove* decision, which is the latest date for which complete federal court filing data is available).⁴²

I focus on insurance, contract, and fraud cases because these appear to be the most likely to involve claims similar to those in *Shady Grove*. *Shady Grove* itself involved a claim arising out of an alleged breach of contract and New York insurance law, and consumer fraud is an area in which statutory causes of action often provide for statutory damages.⁴³

I further divide the Administrative Dataset into two groups of cases: (1) a “treatment” group of cases coded as involving class action allegations; and (2) a “control” group of cases sharing all of the characteristics of the treatment group other than putative class action status.⁴⁴ Because Section 901(b) and Rule 23 affect only putative class actions, the treatment group may be affected by *Shady Grove*, while the control group will not be.⁴⁵ Summary statistics for the Administrative Dataset appear in Table 1.

sumer credit”), 690 (“other forfeiture and penalty suits”), and 890 (“other statutory actions”), but no observations fell within these categories, presumably because most cases in these categories are brought under federal question jurisdiction and invoke federal statutes.

⁴¹ *Shady Grove Orthopedics, P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 137 (2d Cir. 2008).

⁴² Filing date information was derived from the variables *fileyear*, *filemonth*, and *fileday*. While a longer time period after *Shady Grove* would be ideal, the AO Data currently available provides complete data on filed cases only through September 30, 2010.

⁴³ For citations to relevant New York law, see *supra*, notes 13–18 and accompanying text.

⁴⁴ Putative class action status was derived from the *classaction* variable.

⁴⁵ Note that the predictions above assume that the underlying rate at which plaintiffs’ attorneys have the opportunity to file cases does not change dramatically around the time of the *Shady Grove* decision. If, however, there simply were not any statutory damages claims to bring in the months following *Shady Grove*, one would not see an increase in federal court filings, even if plaintiffs’ attorneys became more willing to file in federal court. To address this concern, I use a difference-in-differences empirical strategy. This approach relies on a second, “control” group of cases similar to the treatment group, such that trends over time in the filing rates of the two groups are likely to be similar. Rather than only looking at the change in filing rates of treatment group cases after *Shady Grove* (the “difference”), I also compare the change in treatment group cases after *Shady Grove* with the change in control group cases (the “difference-in-differences”).

Table 1. Summary Statistics, Administrative Dataset⁴⁶

	Dec. 2008– Mar. 2009	Apr. 2009– Sept. 2009	Oct. 2009– Mar. 2010	Apr. 2010– Sept. 2010
Number of Observations	573	799	711	662
Class Allegation	0.02	0.03	0.02	0.06
Original Jurisdiction	0.85	0.84	0.80	0.85
Insurance	0.16	0.19	0.23	0.20
Other Contract	0.79	0.74	0.72	0.74
Fraud	0.05	0.07	0.05	0.07

My second dataset supplements the first. One weakness of the AO Data, as noted above, is that it does not contain sufficient information to determine whether Section 901(b) is actually implicated in a given case. Rather, the Administrative Dataset relies only on proxies for cases most similar to *Shady Grove*.⁴⁷ In addition, past research has found that the *class action* variable was less reliably coded than other variables.⁴⁸ For these reasons, I created a second dataset of information drawn from individual, human review of a sample of complaints (and notices of removal) from cases in the Administrative Dataset (“Complaints Subset”).

With the assistance of a team of research assistants, I conducted automated word searches and individualized, manual review of representative samples of complaints and notices of removal from cases in the Administrative Dataset to identify complaints in which (1) the plaintiff was *clearly* alleging that class certification was appropriate; (2) the plaintiff was *clearly* making a claim for statutory damages under New York law; or (3) both.

⁴⁶ Values in all rows other than “Number of Observations” represent shares.

⁴⁷ It is important to note here that this measurement error in the Administrative Dataset leads to untreated observations being coded as belonging to the treatment group. Consequently, the bias introduced by the measurement error is attenuation bias, i.e., bias toward a finding of no effect. Nonetheless, I find statistically significant effects on forum shopping consistent with the predictions above.

⁴⁸ THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CENTER, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 198–99 (Fed. Judicial Ctr. 1996) (examining class action codes from 1989 to 1994), available at <https://bulk.resource.org/courts.gov/fjc/rule23.pdf>.

For this reason, the Complaints Subset represents a subsample of the Administrative Dataset for which I have high confidence that the treatment-group cases involved statutory damages and class action allegations. This attempts to counterbalance the risk that the “treatment” group in the Administrative Data is overinclusive, in that it contains cases not involving class action allegations or statutory damages. It creates the converse risk, however, of a sample that includes far fewer cases than actually were affected by *Shady Grove*.⁴⁹ The small sample size of the Complaints Subset means that this data has little statistical power. Thus, I rely on it to supplement the Administrative Dataset but do not subject it to regression analysis. Notably, all of the observed effects in the Complaints Subset match the direction of the effects in the Administrative Dataset. Summary statistics for the Complaints Subset appear in Table 2.

Table 2. Summary Statistics, Complaints Subset⁵⁰

	Dec. 2008–Mar. 2010	Apr. 2010–Sept. 2010
Number of Observations	94	21
Class Allegation	0.32	0.19
Original Jurisdiction	0.26	0.24
Statutory Damages	0.22	0.19
Insurance	0.24	0.48
Other Contract	0.71	0.52
Fraud	0.04	0.00

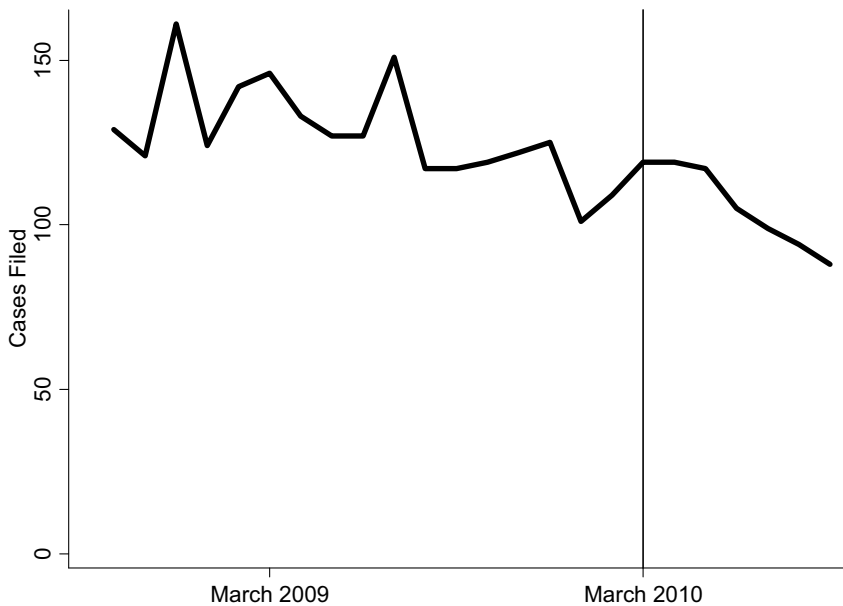
⁴⁹ Note that under federal pleading rules, there is no requirement that the original complaint allege that the plaintiff will seek class certification, nor that the plaintiff clearly distinguish claims for statutory damages from claims for actual, nominal, or punitive damages. See FED. R. CIV. P. 8.

⁵⁰ Values in all rows other than “Number of Observations” represent shares. Note that this dataset is heavily skewed toward removed cases relative to the Administrative Dataset as a whole. This reflects deliberate effort to oversample removed cases due to the relative infrequency of removed class action cases involving statutory damages. Despite this oversampling, I was unable to find any removed, putative class action involving statutory damages claims after *Shady Grove*.

IV. RESULTS

I begin with an informal, graphical presentation of results.

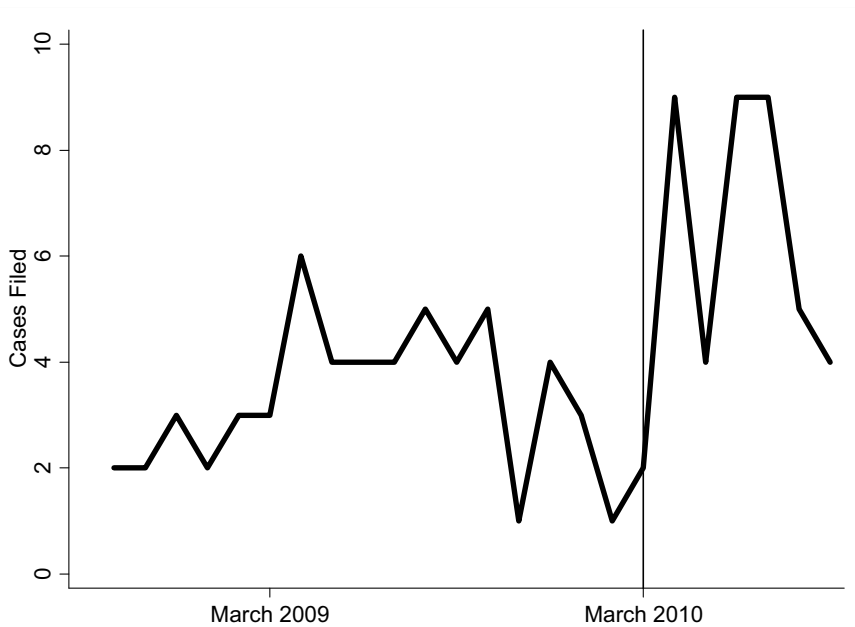
Figure 1. All Cases, Filings per Month, Administrative Dataset



I first establish a baseline for what federal court filing rates look like for cases within the scope of the Administrative Dataset *including those cases in the “control” group*. Given that the vast majority of cases are not class actions, we should expect the overall rate of case filings not to be affected by the *Shady Grove* decision on March 31, 2010—this is exactly what I find. Figure 1 plots the per-month number of insurance, contract, and fraud cases based on diversity jurisdiction filed in or removed to the federal courts of New York during the two-year period from November 19, 2008, through September 30, 2010. While there is a slight downward trend over time, this trend is steady throughout the time period and appears no different after *Shady Grove* than before.

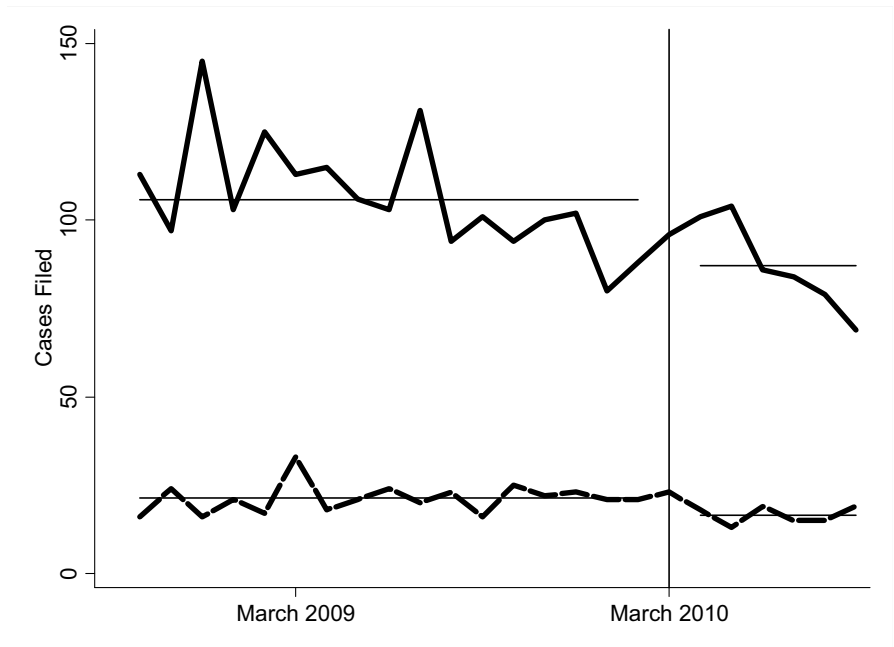
If I look only at cases coded as putative class actions however, a very different picture emerges. Beginning in April 2010, there is an immediate spike in class action filings. This sudden and dramatic rise in class action filings stands in contrast to the continued and gradual decline in overall filings in the Administrative Dataset.

Figure 2. Class Action-Coded Cases, Filings per Month, Administrative Dataset



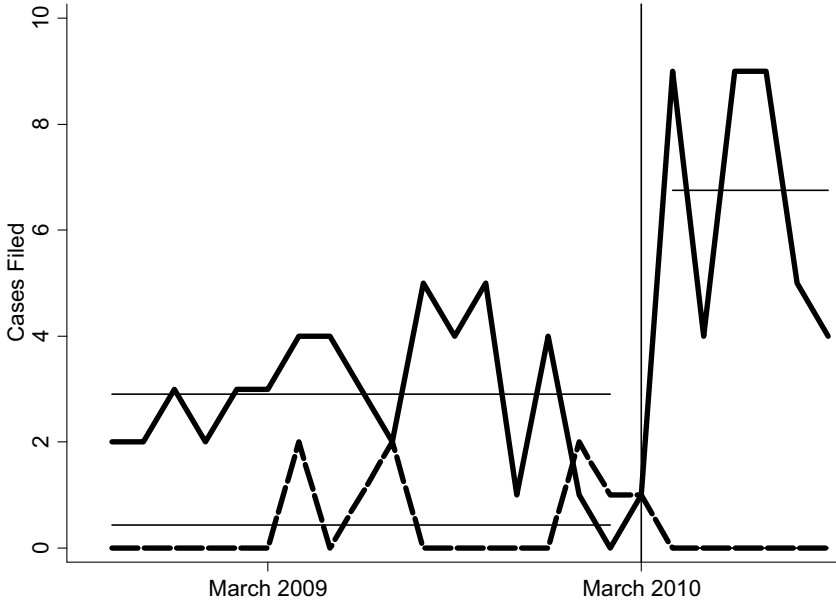
Breaking down the Administrative Dataset based on case origin—that is, original filing versus removal—is even more illuminating. Among all cases, we should expect to see no overall effect of *Shady Grove* on original filings or removals. This is in fact what I find, as Figure 3 reports. The thick, solid line represents original filings, while the dashed line represents removals. The thin lines indicate the average numbers of filings in each category over the pre- and post-*Shady Grove* periods. As the thin lines indicate, the average for original filings is somewhat lower, reflecting the gradual downward trend in filings. The average for removals is about the same before and after, although slightly lower in the later period.

Figure 3. All Cases, Filings per Month, Original Versus Removal Jurisdiction



When focusing on class action cases, we should expect to see original filings rise after *Shady Grove*, but removals to fall as defendants no longer see federal court as a friendlier forum for defending a class action. Figure 4 presents the data for putative class actions in the Administrative Dataset, and the patterns match the predictions exactly. There is a sharp jump in original filings beginning April 2010. And, although few putative class actions were ever removed in this dataset, the already low rate of removals goes to zero after *Shady Grove*. There was literally *not one* class action removed after March 31, 2010.

Figure 4. Class Action-Coded Cases, Filings per Month, Original Versus Removal Jurisdiction



Regression analysis largely confirms that significant changes occurred in the pattern of filings and removals in the wake of *Shady Grove*. To estimate the effect of *Shady Grove* on original filings of putative class actions, I first estimate the following model:

$$(1) \text{ Filings} = \beta \text{ Shady} + \gamma \text{ Trend} + \delta + \varepsilon,$$

where *Shady* is an indicator equal to one for all months after March 2010, *Trend* is a monthly linear trend variable, and δ is a vector of fixed effects for judicial district. The outcome variable is the number of putative class actions filed in a district in a month. Column 1 of Table 3 presents the ordinary least squares (OLS) regression estimate results for Equation 1. The estimated effect of *Shady Grove* is statistically significant at the one percent level and is extremely large—the average number of putative class action filings per month per district in this sample is approximately 1.02, so a coefficient of 1.21 implies that *Shady Grove* led to more than a doubling of the rate of original filings of putative class actions.

Although OLS represents the simplest and most familiar estimation model, it is worth considering an alternate regression method. The outcome I am measuring, filings per month, is a “count”—a non-negative, whole

number. Further, there are a large number of “zeros” in the data—district-month observations in which no putative class actions were filed. For this reason, an estimation method suited to count data with large numbers of zeros, such as the negative binomial regression or the zero-inflated Poisson regression, may be appropriate.⁵¹ Column 2 in Table 3 reports results using a negative binomial model. I report marginal effects, rather than estimation coefficients, so that the negative binomial results are comparable to the OLS results.⁵² The results are robust, insofar as the estimates in Column 2 are nearly identical to those in Column 1.

Table 3. Class-Only Regression Results, Original Jurisdiction Cases, Administrative Dataset⁵³

Model	(1) OLS	(2) NB	(3) OLS	(4) NB
Scope	All NY	All NY	SD NY	SD NY
<i>Shady</i>	1.352 (0.420)**	1.358 (0.437)**	5.219 (1.201)**	5.343 (1.714)**
Time Trend	-0.035 (0.029)	-0.046 (0.030)	-0.152 (0.084)	-0.198 (0.118)
District FE	Y	Y	NA	NA
Constant	0.438 (0.261)		1.482 (0.747)	
<i>N</i>	88	88	22	22

⁵¹ The problem with OLS in this context is that it assumes a linear relationship between the regressors and the dependent variable. For any non-zero coefficient vector, this implies that there are values of the regressors such that the dependent variable is negative, which is impossible for counts data. In many contexts, this is a theoretical rather than a practical concern, but given that most counts in this data were at or close to zero, this may not be the case here.

⁵² Results using a Poisson or zero-inflated Poisson model were quite similar for all specifications reported herein, although the zero-inflated Poisson failed to converge for some specifications.

⁵³ Note: (*) and (**) denote statistical significance at the 5 percent and 1 percent levels, respectively. OLS indicates ordinary least squares regression and NB indicates negative binomial regression. For negative binomial regressions, marginal effects are reported.

A related concern with the estimates in Column 1 is the fact that for most district–month observations for districts other than the Southern District of New York, the number of filings is zero.⁵⁴ Thus, the Southern District may be the only district with a sufficiently regular class action practice to support statistical inferences about class actions. For this reason, Columns 3 and 4 repeat the analysis from the first two columns, but restrict the data to observations in the Southern District. Once again, the effects are highly significant. For the Southern District, *Shady Grove* appears to have tripled the rate of filings—a huge effect, but not surprising given Figure 4.

A third and final concern with relying on the straightforward OLS results in Table 3 is the fact that it may be desirable to compare the changes for putative class actions in the Administrative Dataset with a “control” group in order to control for any changes in filing patterns over time that are caused by unobserved factors. To account for this possibility, I employ a difference-in-differences strategy, which I estimate as follows:

(2)

$$Filings = \beta Shady + \theta Class + \rho (Shady \times Class) + \gamma Trend + \delta + \varepsilon$$

where, in addition to the variables from Equation 1, *Class* is an indicator equal to one for putative class actions and *Shady*×*Class* is an interaction term equal to one for putative class actions filed after *Shady Grove*. I now use the entire Administrative Dataset, rather than only the cases coded as involving class allegations. Thus, there are two observations per district per month: one for putative class action filings in that district in that month, and one for all other filings. This allows me to use the non-class action cases as a control group against which to compare the change in filing rates after *Shady Grove*.

Column 1 of Table 4 presents OLS regression estimates for Equation 2. Note that for the difference-in-differences specification, the coefficient of interest is the coefficient for *Shady*×*Class*, not *Shady*. The estimated effect of *Shady Grove* is large, but not statistically significant. Column 2 presents the results of the negative binomial regression, and Columns 3 and 4 report the results for the Southern District only. For these latter three columns, the estimated effects of *Shady Grove* are highly statistically significant (although implausibly large).

In reporting regression estimates for the Administrative Dataset, I have focused exclusively on estimates of the effect of *Shady Grove* on original filings. Given the relatively small numbers of removed class actions in the sample, I am reluctant to draw inferences from specifications that rely on

⁵⁴ Only four district-month observations outside the Southern District have non-zero values for class action filings.

removal numbers to estimate the effect of *Shady Grove*. Thus, the results for the Administrative Dataset that I report examine the effect of *Shady Grove* on original filings only. Unreported results of regressions on removals⁵⁵ broadly confirm the predictions for removal rates, although many of the estimates are not statistically significant.

Table 4. Difference-in-Differences Regression Results, Original Jurisdiction Cases, Administrative Dataset⁵⁶

Model	(1) OLS	(2) NB	(3) OLS	(4) NB
Scope	All NY	All NY	SD NY	SD NY
<i>Shady</i>	-0.728 (4.141)	1.294 (1.098)	0.363 (5.315)	6.587 (3.495)
Class	-25.80 (2.320)**	-47.60 (2.294)**	-66.63 (2.977)**	-112.9 (6.290)**
<i>Shady</i> × Class	5.672 (4.442)	13.81 (2.967)**	17.63 (5.701)**	37.33 (8.196)**
Time Trend	-0.362 (0.245)	-0.339 (0.075)**	-1.313 (0.315)**	-1.275 (0.232)**
District FE	Y	Y	NA	NA
Constant	23.79 (2.072)**		59.40 (3.164)**	
<i>N</i>	176	176	44	44

⁵⁵ On file with the author.

⁵⁶ Note: (*) and (**) denote statistical significance at the five percent and one percent levels, respectively. OLS indicates ordinary least squares regression and NB indicates negative binomial regression. For negative binomial regressions, marginal effects are reported.

I now turn to the Complaints Subset. The number of cases in the Complaints Subset clearly involving *both* statutory damages and class action allegations was quite small—fourteen to be exact. But, because the Complaints Subset contains information on both class action allegations and statutory damages claims, it permits two approaches to the difference-in-differences methodology.

First, one can look at putative class actions and compare those with and without statutory damages claims. The prediction for original filings would be that statutory-damages class actions would rise relative to all class actions after *Shady Grove*. The reverse would be true for removals. Rows 1 and 3 in Table 5 do this for original filings and removals respectively.

Second, one can look at cases with statutory damages claims and compare those with and without class action allegations. The prediction for original filings would be that statutory damages class actions would rise as a share of all statutory damages cases after *Shady Grove*. The reverse prediction would apply to removed cases. Rows 2 and 4 in Table 5 do this for original filings and removals respectively.

Table 5. Difference-in-Differences Statistics, Complaints Subset

	Dec. 2008– Mar. 2010	Apr. 2010– Sept. 2010
(1) Original Jurisdiction Cases with Class Allegations	14	4
Share with Statutory Damages Claim	64%	75%
(2) Original Jurisdiction Cases Claiming Statutory Damages	10	3
Share with Class Allegations	90%	100%
(3) Removed Cases with Class Allega- tions	6	0
Share with Statutory Damages Claim	33%	--
(4) Removed Cases Claiming Statutory Damages	10	1
Share with Class Allegations	20%	0%

Rows 1, 2, and 4 show shifts after *Shady Grove* consistent with the predictions. Row 3 does not allow a comparison of data to prediction, but the reason is telling: as noted above, within the scope of the cases in the Administrative Dataset, no class actions have been removed since *Shady Grove*. Overall, the patterns of case filings within the Complaints Subset reinforce the findings based on the Administrative Dataset.⁵⁷

CONCLUSION

Courts and commentators have long assumed that vertical forum shopping results when federal courts apply the *Erie* doctrine in ways that preference federal rules. Prior to this article, however, no empirical study had quantified the changes in forum-shopping behavior caused by a court decision applying the *Erie* doctrine. In this article, I study changes in filing patterns of cases likely to be affected by the *Shady Grove* decision and find evidence of large shifts in the patterns of original filings and removals in federal courts in New York.

While the existence of vertical forum shopping has scarcely been doubted, its extent has not been systematically studied, and evidence regarding the magnitude of vertical forum-shopping activity can inform the debate about the merits of the many facets of the *Erie* doctrine. I conclude by noting three key limitations of this study and opportunities for further inquiry.

First, I have examined only the effect of a single decision on vertical forum shopping. Whether future decisions, the Federal Rules, or statutes will have similar effects remains an open (and potentially very important) question. It is worth noting that in some ways *Shady Grove* may represent the “worst case” scenario for vertical forum shopping, in that it presents a situation in which forum choice is maximally sensitive to the vertical choice-of-law rule. Section 901(b) is unusual in that it uniformly benefits plaintiffs and its application or nonapplication changes the stakes of a lawsuit by orders of magnitude. Other rules implicating the *Erie* doctrine may not have such stark consequences.⁵⁸

⁵⁷ A final piece of evidence emerges from the Complaints Subset, although it is merely anecdotal in character. Prior to *Shady Grove*, a few class action complaints *explicitly disclaimed* that they were seeking statutory damages under New York law. See *Friedman-Katz v. PNC Bank, Nat’l Assoc.*, No. 7:09-cv-03219 (S.D.N.Y. Apr. 2, 2009) (“No penalties, liquidated damages or punitive damages, whether statutory or otherwise, are sought by plaintiff for himself or on behalf of the class in this action, and any such relief is expressly waived.”); see also *O’Dell v. AMF Bowling Ctrs., Inc.*, No. 1:09-cv-00759 (S.D.N.Y. Jan. 27, 2009) (“Plaintiff does not seek liquidated damages under the NYLL on behalf of the Rule 23 class.”). No such language has appeared since *Shady Grove*.

⁵⁸ Consider, for example, the New York rule governing the review of jury awards that was the subject of *Gasparini v. Center for Humanities* (subsection (c) gives courts the power to “determine that

Second, this study used only federal court data. Data from the state courts would be a useful check on inferences drawn from patterns in federal court data. The relative inaccessibility of most state court data, however, remains an impediment to ambitious projects in this area.

Third, and most importantly, a full consideration of forum shopping also requires quantifying the scope and scale of the response of *horizontal* forum shopping to decisions applying the *Erie* doctrine. Indeed, a central criticism of the *Erie* doctrine has been that it seeks to discourage vertical forum shopping, but it ignores its effects on horizontal forum shopping.⁵⁹ Examining patterns of forum shopping across state courts, however, requires the collection of relatively less accessible state (as opposed to federal) court data and careful consideration of the fact that horizontal forum shopping requires the consideration of as many as fifty alternative forums; vertical forum shopping requires considering only two. This is a serious challenge for future research.

an award is excessive or inadequate”—a standard that could help the defendant or the plaintiff, depending on the case). *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 416 (1996).

⁵⁹ See 28 U.S.C. § 2072 (2012).

A POX ON BOTH YOUR HOUSES: WHY THE COURT CAN'T FIX
THE *ERIE* DOCTRINE

*Suzanna Sherry**

INTRODUCTION

As *Erie Railroad Co. v. Tompkins*¹ celebrates its 75th anniversary, it is becoming more apparent that it is on a collision course with itself. The Court keeps trying—and failing—to sort out the tensions within the *Erie* doctrine, and between it and the Federal Rules of Civil Procedure. The Court's latest *Erie* decision, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,² was yet another attempt to separate substance from procedure and navigate the strait between the Rules of Decision Act³ and the Rules Enabling Act.⁴ It was a disaster. It produced two distinct methodological approaches, three opinions—none commanding a majority—and a rash of academic commentary choosing sides between the two approaches. What it did not produce, unfortunately, is any recognition that the source of the problem is the internal incoherence of the *Erie* doctrine itself and its profound incompatibility with the guiding principles of the Federal Rules of Civil Procedure. In this article, I identify the problem and suggest a solution.

Shady Grove brings to the forefront two key questions that the Court has failed to confront, one technical and doctrinal and the other more broadly jurisprudential. The doctrinal question is how a court in a diversity case should treat a Federal Rule of Civil Procedure that, in general, has no effect on substantive rights but that affects substantive rights in particular states or particular types of cases. *Shady Grove* itself is an example of this type of Rule; Rule 23 has no significant substantive effect in most states or most cases, but does so in cases seeking statutory damages under New York law. But the same problem also underlies other recent *Erie* cases. Courts have three real options in this situation: (1) the Federal Rule governs regardless of its effect on state substantive rights, (2) the Federal Rule governs unless it has a demonstrable effect on state substantive rights, or (3) the Federal Rule governs only when it has no imaginable effect on state substantive

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¹ 304 U.S. 64 (1938).

² 130 S. Ct. 1431 (2010).

³ 28 U.S.C. § 1652 (2012).

⁴ 28 U.S.C. § 2072 (2012).

rights. Choosing among those three options requires a normative justification. That justification, in turn, depends on whether we place a greater value on the uniformity and transsubstantivity of the Federal Rules of Civil Procedure, or on states' ultimate authority to define substantive rights.

My suggestion is that instead of filtering that normative choice through the convoluted and self-contradictory *Erie* doctrine, we confront it directly. Courts make exactly this value choice in other, similar contexts, including certain choice-of-law decisions, the dormant commerce clause doctrine, the application of federal common law in limited "enclaves," and the determination of whether state law should be preempted on the ground that it serves as an obstacle to the fulfillment of the purpose of a federal statute. Courts confronting a possible conflict between federal and state law in the *Erie* context should use the same overarching framework that governs those situations.

That framework, like *Erie* itself, ultimately raises the deeper jurisprudential question: Under what circumstances is lawmaking by the federal judiciary justified? I contend that we should give the same answer in the *Erie* context that we do in these other contexts: whenever federal interests are sufficiently important to warrant judicial protection.

Framing the question as one of judicial authority reveals that a large part of the problem with *Erie* is that it, contrary to these other cognate doctrines, depends on two false dichotomies (which my proposal eliminates). First, by allowing the federal legislature but not the federal judiciary to determine that federal interests justify overriding state substantive law, *Erie* draws an unwarranted distinction between federal legislative power and federal judicial power. Second, by allowing some "enclaves" of federal common law to remain, the *Erie* doctrine draws an unspoken and unjustified distinction between those federal interests that require legislative codification before the judiciary can act and those federal interests that can be protected by the judiciary without prior legislative authorization.

Reframing the *Erie* inquiry as asking whether protecting the transsubstantivity and uniformity of the Federal Rules of Civil Procedure is a sufficiently important interest to justify overriding state substantive law makes *Erie* both internally coherent and consistent with kindred doctrines. It also solves the *Shady Grove* puzzle. And, as I note briefly at the end of this article, it has broader implications for cases arising out of our nationalized consumer economy.

I. DEFINING THE PROBLEM

The difficulty stems from the underlying goals of the *Erie* doctrine. According to Justice Brandeis's majority opinion, the decision in *Erie* was

necessary because of two major problems with *Swift v. Tyson*⁵: *Swift* led to unfair differences in the treatment of similarly situated litigants,⁶ and it transgressed the state's primary authority by allowing the federal judiciary to "invad[e] rights which . . . are reserved by the Constitution to the several states."⁷ Two decades later, the Court reaffirmed these purposes of *Erie*, although without the constitutional gloss, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*⁸ The *Byrd* Court described the core of *Erie* as a command that "the federal courts in diversity cases must respect the definition of state-created rights and obligations" and thus must apply state law if that law is "bound up with [state] rights and obligations."⁹ In addition, according to *Byrd*, the *Erie* doctrine "evinces a broader policy" that federal courts should follow all state rules—even procedural ones not bound up with rights and obligations—if "the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply" state law.¹⁰ These policies are the same as the two identified by *Erie*, in reverse order. Then, in the seminal case of *Hanna v. Plumer*¹¹ the Court again reiterated one of the policies, noting that *Erie* was rooted in "a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court."¹²

One goal underlies both of these frequently invoked policies and forms the core purpose of, and justification for, the *Erie* doctrine. This key unitary goal is that our dual court systems should not result in disparate regulation of what Justice Harlan later called "primary decisions respecting human

⁵ 41 U.S. 1 (1842).

⁶ *Erie*, 304 U.S. at 74.

⁷ *Id.* at 80. The Court also reinterpreted the Rules of Decision Act, 28 U.S.C. § 1652 (2012). For critiques of this decidedly creative act of statutory interpretation, see Samuel Issacharoff, *Federalized America: Reflections on Erie v. Tompkins and State-Based Regulation*, 10 J.L. ECON. & POL'Y 199 (2013); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 133–37 (2011).

⁸ 356 U.S. 525 (1958).

⁹ *Id.* at 535.

¹⁰ *Id.* at 536–37. The *Byrd* Court went on to balance the potential for different outcomes against "countervailing" federal interests. *Id.* at 537–38. The adoption of such a balancing test has never been explicitly reaffirmed by the Supreme Court, and is probably limited to *Byrd* itself. See Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie–Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 998–99 (1998). The status of the balancing test, however, is entirely distinct from the two goals identified in text, which are uncontroversial.

¹¹ 380 U.S. 460 (1965).

¹² *Id.* at 467. The Court also focused on the need to prevent forumshopping, but for purposes of identifying the goals underlying *Erie*, there is little or no difference between unfairness and forumshopping. The *Hanna* Court did not mention the policy of protecting state authority, perhaps because by 1965 the constitutional basis for *Erie* had been discredited. There is nothing in *Hanna* to indicate abandonment of the basic concept of keeping state and federal authority within proper bounds.

conduct.”¹³The consequences of behavior that takes place outside the courtroom should not vary as a result of which seal adorns the courthouse door.

But the *Erie* doctrine is, and has to be, more nuanced than the mechanical implementation of this goal, because we do have dual court systems. And so accommodating differences between those systems—drawing lines between what happens inside the courtroom and what happens outside it—is a necessary part of the doctrine. As the Court found—to its detriment—early in the application and development of *Erie*, we cannot blithely assert that any state rule that affects the outcome in a diversity case must be applied notwithstanding contrary federal rules. Every difference between state and federal rules, however minor or “procedural,” has the potential to affect the outcome of litigation. To direct that in every such case the state rule controls is to ignore the reality of dual court systems with different legislative bodies exercising control over their procedures. And Congress *has* exercised its control over federal court procedures by adopting the Rules Enabling Act (REA).¹⁴ The REA authorized the creation of uniform rules of procedure for federal courts, which, in a well-recognized irony, took effect the same year as *Erie*.

The REA thus requires courts to adapt the *Erie* doctrine by taking into account the existence of the Federal Rules of Civil Procedure. And I contend that this accommodation, whatever form it takes, *is* a part of the *Erie* doctrine—*pace* John Ely¹⁵—because it stems from the same sources and serves the same goals as *Erie* itself. In determining whether a state rule (of any kind) or a Federal Rule (of Civil Procedure) governs, we are necessarily specifying exactly how far the *Erie* doctrine extends. At its broadest, the *Erie* doctrine might command that a Federal Rule give way any time its application would result in a different outcome than the one that a state court, applying state rules of procedure, would reach. At its narrowest, *Erie*’s command to use state law might be fully trumped by any applicable Federal Rule, despite its effect on state policies or litigation outcomes. But in either case—and all the cases in between—it is the *Erie* doctrine that we are delineating. As Richard Freer noted more than two decades ago, the *Erie* doctrine “is actually comprised of two separate principles of vertical choice of law,” one embodied in the Rules Enabling Act and the other in the Rules of Decision Act.¹⁶

¹³ *Id.* at 475 (Harlan, J., concurring).

¹⁴ 28 U.S.C. § 2072 (2012).

¹⁵ See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 697–98 (1974) (suggesting that the validity and applicability of a Federal Rule of Civil Procedure does not implicate either *Erie* or the Rules of Decision Act). *But see* Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 752 (1974) (“[N]ot even the most luminous analytic framework relieves us of the necessity of discerning the state and federal policies at stake in cases involving a choice between state and federal law, whether the case arises under the Rules of Decision Act or the Enabling Act.”).

¹⁶ Richard D. Freer, *Erie’s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1089–90 (1989). He adds: “Together, these principles are intended to protect state sovereignty by ensuring that a federal court

Navigating the boundaries of *Erie* has not proven easy. Over the years, the Court has suggested several different approaches to accommodating the commands of *Erie* in the context of the Federal Rules. In a spate of cases in the 1940s, the Court appeared to adopt an extremely broad reading of *Erie*, refusing to apply the Rules in diversity cases if they produced a litigation outcome different from the outcome a state court would have reached.¹⁷ Almost simultaneously, however, the Court in *Sibbach v. Wilson & Co.*¹⁸ upheld a district court order under Rule 35—requiring a plaintiff to undergo a physical examination—in a diversity case in which it was quite likely that a state court would have lacked authority to issue such an order. Without even mentioning *Erie* (then only three years old), the Court found that Rule 35 “really regulates procedure” and thus had to be applied.¹⁹ *Sibbach* might be viewed as representing a very narrow reading of *Erie*, the polar opposite of the 1940s cases.

These early cases reflect significant confusion about the breadth of *Erie* and its relationship to the Federal Rules. The Court tried to sort out the confusion in *Hanna v. Plumer*.²⁰ *Hanna* reconciled the conflicting lines of precedent by arranging them along a new axis. The Court distinguished situations “covered by one of the Federal Rules”²¹ (like *Sibbach*) from those in which there is no governing Federal Rule (like the 1940s cases). In the former, the *Sibbach* test applies, and a federal court should follow the Federal Rule unless it does not really regulate procedure. To do otherwise, the Court suggested, would “disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”²² In other words, *Erie*’s contours and scope are limited by the existence of the federal power to adopt rules of procedure for federal courts. But in the absence of a Federal Rule—which the Court called “the typical, relatively unguided *Erie* choice”²³—the *Hanna* Court adopted a modified “outcome-determinative” test: A federal court should follow the state rule if applying federal law would run afoul of the “twin aims” of *Erie*—“discouragement of forum-shopping and avoidance of inequitable administration of the laws.”²⁴ As Ely pointed out, the *Hanna* Court thus

enforcing state claims acts substantively as a court of the state would act. At the same time, these principles also recognize the legitimate need of the federal courts, as a separate judicial system, to dictate their own procedures.” *Id.* at 1090.

¹⁷ See *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533–45 (1949); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555–56 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537–38 (1949); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 111–12 (1945).

¹⁸ 312 U.S. 1(1941).

¹⁹ *Id.* at 14.

²⁰ *Hanna*, 380 U.S. at 468.

²¹ *Id.* at 471.

²² *Id.* at 473–74.

²³ *Id.* at 471.

²⁴ *Id.* at 468.

protected state prerogatives more vigorously in the absence of a Federal Rule than in the presence of one.²⁵

This solution may reconcile the precedents, but it does not solve the underlying problem. The *Erie* doctrine tells us that federal courts sitting in diversity must respect state policy choices on matters of substance, to avoid both unfairness and the aggrandizement of federal court authority. But the doctrine also tells us—in *Sibbach* and reaffirmed in *Hanna*—that federal courts sitting in diversity must apply all valid Federal Rules of Civil Procedure. What should we do when the application of an otherwise valid Federal Rule runs afoul of a state policy choice on a matter of substance?

Commentators have recognized a form of this dilemma, but have wrongly attributed it to the Court's failure to give any meaning to the second section of the Rules Enabling Act, which prohibits federal rule makers from adopting procedural rules that "abridge, enlarge or modify any substantive right."²⁶ According to many scholars, the problem is that the Court has wrongly ignored the possibility that a "procedural" Federal Rule might nevertheless impair substantive rights and therefore be invalid as beyond the rule makers' authority.²⁷

But framing the question as one of the validity of the Federal Rule under the REA—as *Sibbach* did—hides the real *Erie* issue: Application of a Federal Rule might impair substantive rights in one state but not in another, or in one type of case but not another. And it is the *Erie* doctrine, not the REA, that controls the decision of whether a particular state rule prevails over a conflicting federal one. The REA is all or nothing; if a Federal Rule is invalid, it is invalid in all cases—including not only in diversity cases in which there is no conflicting state law but also in federal-question cases. Alternatively, as Kevin Clermont puts it so nicely, a Rule that is valid under the REA is "immune to any 'as-applied' challenge."²⁸ *Erie*, however, is quite explicitly tailored to protecting the substantive law and policies of individual states and thus allows federal law to operate in some states but not others.

For example, consider a situation that has been before the Supreme Court twice. Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." State law in Kansas and Oklahoma (and some but not all other states) provides that the statute of

²⁵ Ely, *supra* note 15, at 720–22.

²⁶ 28 U.S.C. § 2072(b) (2012).

²⁷ Ely, *supra* note 15, at 718–20; *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1033–35 (1982); Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 48–62 (1998); Martin Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26–34 (2008).

²⁸ Kevin Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1017 (2011); *see also* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1182–83 (2011).

limitations is tolled only when the defendant is served, not when the complaint is filed. If we conclude—as the Court did in two cases thirty years apart²⁹—that the service requirement is bound up with, or an integral part of, state substantive law, then *Erie* seems to prohibit a federal court from concluding that the statute of limitations is tolled by filing, regardless of what Rule 3 says. But that does not mean that Rule 3 is invalid under the REA or that it cannot be applied to toll the statute of limitations in federal-question cases or in diversity cases applying the law of states that do not have a law like the ones in Kansas and Oklahoma. (I will return later to how the Court managed to avoid confronting that issue in these cases.) The applicability of Rule 3 in any particular diversity case is an *Erie* question, not an REA question.

Thus, we must face the question of what to do when the application of a truly procedural Federal Rule, valid under the REA, nevertheless impairs substantive state rights.³⁰ The two halves of the *Erie* doctrine—protecting state substantive policies and accommodating dual court systems—collide in such a case. And there is precedential support on both sides: *Sibbach* suggests that the Federal Rule should prevail, and *Byrd* suggests that state law should prevail. This tension within the *Erie* doctrine is exacerbated when we try to harmonize *Erie* with the goals underlying the Federal Rules of Civil Procedure. One primary guiding principle of the Federal Rules of Civil Procedure is transsubstantivity: the Rules should apply uniformly in all cases in federal court. This principle is in obvious tension with the half of *Erie* that prohibits applying a Federal Rule if, and only if, it impairs state rights and obligations.

Shady Grove squarely raised the question of whether to apply a Federal Rule that impairs state substantive rights in some states but not in others. As the next section elaborates, four Justices explicitly followed *Sibbach* and five implicitly followed *Byrd*—although one of the *Byrd* Justices concluded that there was no impairment of state substantive rights and thus joined the four *Sibbach* Justices to direct application of the Federal Rule. Unfortunately, none of the Justices confronted the incompatibility between the two parts of the *Erie* doctrine.

²⁹ *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750–53 (1980).

³⁰ Commentary prior to *Shady Grove* addressed this question from a different angle, missing the problem that I seek to identify. In defining what *counts* as affecting substantive rights, one might take any of three approaches: (1) nothing procedural counts; (2) anything that has any effect on a substantive right counts; or (3) anything that has more than an incidental effect on a substantive right counts. See-Redish&Murashko,*supra* note27, at 28–30. My concern is not about the scope of the effect, but rather about what should happen if the requisite effect is found.

II. TWO PATHS THROUGH *SHADY GROVE*

The facts of *Shady Grove* are mundane, although the implications are anything but. *Shady Grove* tendered a claim for insurance benefits to Allstate, which eventually paid the claim, but not within the thirty days required by a New York state statute. Allstate also refused to pay the statutorily required interest of 2% per month on the late payment. Alleging that Allstate routinely paid claims late without paying the statutory interest, *Shady Grove* filed a class action in federal court under diversity jurisdiction. The minimum jurisdictional amount was satisfied only if the suit could be maintained as a class action, because the actual interest due to *Shady Grove* alone was less than \$500.³¹

Although the suit apparently met all the requirements of Federal Rule 23 for a class action, the district court dismissed for lack of jurisdiction because it found that under New York law the suit could not be maintained as a class action.³² New York Civil Practice Law § 901(b) prohibits class actions “to recover a penalty, or minimum measure of recovery, created or imposed by statute,”³³ which, the district court found, included the statutory interest provision at issue. The court of appeals affirmed,³⁴ and the Supreme Court had to decide whether Rule 23 or § 901(b) governed.

Eight of the Justices approached the issue as a technical question of interpretation of the Federal Rules. The case lent itself to that approach because of the way the Court had avoided the internal *Erie* tensions in prior precedent. In *Walker v. Armco Steel Co.*,³⁵ one of the Rule 3 cases described earlier, the Court had sidestepped the question of what to do when a Federal Rule impairs state substantive rights. It did so by interpreting Rule 3 as not intended to toll a statute of limitations but rather to set the date from which timing requirements within the Federal Rules run. The Federal Rule was therefore irrelevant to the tolling question, and did not apply. *Walker* directed that the Rules should be interpreted according to their “plain meaning”³⁶ and should apply only if they are “sufficiently broad to control the

³¹ The total amount in controversy for the whole class, however, was more than \$5 million, and thus there was federal jurisdiction over the class action (but not the individual actions) under the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2) (2012).

³² *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 471–72 (E.D.N.Y. 2006).

³³ N.Y. C.P.L.R. § 901(b)(Consol. 2012).

³⁴ See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 549 F.3d 137 (2d Cir. 2008).

³⁵ 446 U.S. 740 (1980). The earlier of the two cases, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), was one of those decided in the 1940s, when the Court seemed unsure of how to accommodate the Federal Rules; it simply held that because the suit would have been barred in a Kansas court, it could not be brought in a federal court.

³⁶ *Walker*, 446 U.S. at 750 n.9.

issue”³⁷—that is, if there is a “direct collision” between the Federal Rule and a state rule.³⁸

Under *Walker*, then, the fate of Shady Grove’s class action hung on whether there was a direct collision between Rule 23 and § 901(b). If so, then under *Sibbach* and *Hanna*, Rule 23 governed unless it was itself invalid as beyond Congress’s power to regulate. If not, then § 901(b) governed under *Hanna*’s modified “outcome-determinative” test, for surely a case that could be brought as a class action in federal court but not in state court would create inequities and induce forumshopping.³⁹

Four Justices took a mechanical and formalist approach to interpreting Rule 23. Justice Scalia, writing for a plurality that included Chief Justice Roberts, Justice Thomas, and (for part of the opinion) Justice Sotomayor, placed the two rules side by side and concluded that there was a direct conflict between them. Rule 23 states that a class action “may be maintained” but § 901(b) says that a class action may not be maintained. Hence, under *Hanna*’s reading of *Sibbach*, Rule 23 trumps § 901(b) unless Rule 23 is itself invalid. And since (unsurprisingly) no Justice was willing to hold Rule 23 invalid, the plurality held that the suit could be maintained as a class action, New York state law notwithstanding.

Four Justices adopted a more functionalist approach to interpreting Rule 23. Justice Ginsburg, dissenting in an opinion joined by Justices Kennedy, Breyer, and Alito, argued that Rule 23’s potential to “transform a \$500 case into a \$5,000,000 award”⁴⁰ required the Court to interpret Rule 23 more narrowly to prevent “trench[ing] on state policy prerogatives.”⁴¹ Justice Ginsburg—like the courts below—argued that while Rule 23 governs the considerations relevant to class certification, New York’s § 901(b) instead governs the availability of a particular remedy. As she pointed out, § 901(b) would not be an obstacle to a class action in a New York state court if the only remedy sought were actual damages or an injunction; New York law bars class actions only in suits to recover statutory penalties. Because there was no conflict between state and federal law, both could be given their intended scope. Hence, under *Hanna*’s reading of *Erie*, state law should govern because there was no conflicting Federal Rule of Civil Procedure and applying state law would prevent inequities and forumshopping.

³⁷ *Id.* at 749.

³⁸ *Id.*

³⁹ It seems problematic to have to resort to *Hanna*’s outcome-determinative test once the Court has concluded that the Federal Rule does not apply: after all, if there is no applicable Federal Rule, the only source of law is state. But the Court in *Walker* did invoke the “twin aims” of *Erie* to conclude that state law should apply, even though it had already concluded that the Federal Rule was not broad enough to reach the question. That, however, is the least of *Walker*’s problems.

⁴⁰ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting).

⁴¹ *Id.* at 1461.

Is this just a simple difference of interpretive opinion? No, as Justice Stevens's separate opinion—concurring in the judgment only—makes clear. Justice Stevens agreed with the plurality that Rule 23 conflicts with § 901(b). And Justice Stevens ultimately agreed that Rule 23 should prevail. But he did so only after concluding that the New York legislature did not intend § 901(b) as a substantive rule. In other words, he followed (without citing or quoting⁴²) the *Byrd* suggestion that *Erie* commands the use of *any* state law, however procedural it may appear, if it is “bound up with [the] rights and obligations” of the parties. The dissent's approach is just a version of this same *Byrd* analysis. While Justice Stevens—like *Byrd* itself—makes the character of the state law an independent inquiry, the dissenting Justices fold it into the interpretation of Rule 23. Either way, if the state legislature intended the state rule to operate substantively rather than procedurally, the Federal Rule must give way.

In the end, then, the opinions in *Shady Grove* break down into two opposite approaches to this basic *Erie* dilemma. One—that of the plurality—makes the character of the state law irrelevant; the only question is whether the *federal* Rule is procedural. As the plurality put it: “[I]t is not the substantive or procedural nature of the state law that matters, but the substantive or procedural nature of the Federal Rule.”⁴³ The other—that of both the concurrence and the dissent—makes the character of the *state* law dispositive: Justice Stevens “agree[d] with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies.”⁴⁴

The varying approaches in *Shady Grove* thus expose the real problem with the *Erie* doctrine's command—made most explicit in *Hanna*—to follow the Federal Rules of Civil Procedure but avoid impairing state substantive rights and obligations. Whenever a doctrine or statute has dual rationales, of course, the possibility exists that a case will arise pitting one rationale against the other. *Shady Grove* is that case, and the three opinions in the case perfectly illustrate the three responses to such a dilemma: privilege one rationale, privilege the other rationale, or pretend that the rationales can be harmonized. Justice Scalia's plurality opinion, by applying *Sibbach* despite acknowledging its imperfections in cases that implicate state policy choices, opts for the transsubstantivity of the Federal Rules. Justice Stevens favors state policy choices, even though doing so might mean that Rule 23

⁴² He did quote *Byrd* once, for the platitude that federal courts sitting in diversity operate as “an independent system for administering justice to litigants who properly invoke its jurisdiction.” *Id.* at 1448 (Stevens, J., concurring).

⁴³ *Id.* at 1444 (plurality opinion).

⁴⁴ *Id.* at 1448 (Stevens, J., concurring).

applies differently in different states or different causes of action.⁴⁵ And the dissenters try to have it both ways by interpreting Rule 23 in light of state policy choices—but that is a false alternative, because it means that Rule 23 would be interpreted differently in a diversity case applying New York law than in a diversity case applying the law of a state that had not adopted the policies underlying § 901(b). Academic commentators on *Shady Grove* can likewise be divided into those who think Justice Scalia got it right, those who think Justice Stevens got it right, and those who try to make the problem go away.⁴⁶

The underlying issue, therefore, is not merely a question of interpreting Federal Rules or separating substance from procedure. The real question is what should be done when a federal procedural rule conflicts with a state substantive rule—however we ultimately define “procedural” and “substantive.” Unfortunately, the *Erie* doctrine itself provides conflicting answers. Both of the approaches in *Shady Grove* are fully supported by *Erie* and its progeny. And the tension between them is inherent in the *Erie* doctrine; it cannot be resolved as long as that doctrine remains established law. The next section shows that while *Shady Grove* may be the most recent—and perhaps the clearest—example of this unresolvable tension, it has manifested itself in many of the Court’s recent *Erie* cases.⁴⁷ And, as in *Shady*

⁴⁵ Because Justice Stevens ultimately concluded that New York’s § 901(b) does *not* represent a substantive policy choice, he did not have to live with the uniformity-undermining consequences of his approach. Nevertheless, his opinion indicates quite strongly that he would be willing to do so.

⁴⁶ Those supporting Justice Scalia’s plurality approach include Jennifer S. Hendricks, *In Defense of the Substance–Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); Richard A. Nagareda, *The Litigation–Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011); Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907 (2011). Those supporting Justice Stevens’ concurring approach include Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041 (2011); Struve, *supra* note 28. Those supporting Justice Ginsburg’s dissenting approach include Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011); Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 320–30 (2010); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 52 (2012); *see also* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17 (2010) (criticizing the Court generally).

⁴⁷ The same issue also arises frequently in lower courts. For example, one current dispute is how to apply the relatively relaxed pleading standards of Fed. R. Civ. P. 8 and the minimal requirements of Fed. R. Civ. P. 11 to cases in which the applicable state law requires that malpractice complaints be accompanied by an affidavit or certificate attesting that the claim has merit. *Compare, e.g., Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011), *with, e.g., Braddock v. Orlando Reg’l Health Care Sys., Inc.*, 881 F. Supp. 580 (M.D. Fla. 1995). One scholar has also suggested that “procedure is embedded in substantive law” insofar as the drafters of the law assumed particular procedures when calibrating the law to the desired level of deterrence. Thomas O. Main, *The Procedural Foundations of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010). If he is correct, then virtually every diversity case raises the *Shady Grove* issue.

Grove, different Justices have had different responses to the conflict; moreover, some Justices have used different and inconsistent approaches in different cases.

III. A RECURRENT PROBLEM

As several commentators have noted, *Shady Grove* was in many ways a replay of *Gasperini v. Center for Humanities, Inc.*⁴⁸ but with the opposite side prevailing. In *Gasperini*, the Court was faced with a conflict between state and federal standards for review of an allegedly excessive jury verdict. A New York statute instructed courts of appeals to overturn an award if it “deviate[d] materially” from reasonable compensation.⁴⁹ Federal courts, by contrast, adhered to the commonlaw rule that a jury’s verdict should stand unless it was so unreasonable that it “shock[ed] the conscience.”⁵⁰ Justice Ginsburg wrote the majority opinion, taking the same “split the baby” approach as in her *Shady Grove* dissent. After concluding that Federal Rule 59—governing the grant of a new trial—did not mandate the adoption of a “shocks the conscience” test, and that the New York statute represented a substantive policy choice, she held that both the state and federal interests could be accommodated by having federal trial courts—rather than appellate courts, as the New York statute dictated—apply the “deviates materially” standard.⁵¹ Justice Scalia’s vehement dissent instead interpreted Rule 59 as incorporating the “shocks the conscience” standard and insisted that under *Hanna*, Rule 59 must prevail even over a contrary state policy decision on substantive rights.⁵² As in *Shady Grove*, then, Justice Scalia chose federal-court uniformity over the state’s substantive policy choice, and Justice Ginsburg preferred to pretend that accommodating state choices was not in conflict with the Federal Rules or with transsubstantivity.⁵³

⁴⁸ 518 U.S. 415 (1996). See, e.g., Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1146–47 (2011).

⁴⁹ N.Y. C.P.L.R. §5501(c) (Consol. 2012).

⁵⁰ See *Gasperini*, 518 U.S. at 422 (describing the federal standard).

⁵¹ *Id.* at 437–39.

⁵² Justice Scalia also argued that the Seventh Amendment precluded the use of the “deviates materially” standard and that the Court misapplied even the “unguided” *Erie* prong in finding the difference between the two standards to be substantive. *Id.* at 464–68 (Scalia, J., dissenting).

⁵³ The different results in the two cases were not due to any Justice changing his or her mind, but rather to a change in personnel. Justice Stevens dissented in *Gasperini* on technical grounds, but noted that he “agree[d] with most of the reasoning in the Court’s opinion.” 518 U.S. at 439. As noted earlier, he similarly agreed with the reasoning, but not the result, of the dissenters in *Shady Grove*. His vote made no difference in *Gasperini* because there were five votes without him, but in *Shady Grove* his vote was the deciding one because Justice Ginsburg had lost an ally. Justices Kennedy and Breyer voted consistently with Justice Ginsburg for state policy choices, Justice Thomas voted consistently with Justice Scalia for the Federal Rules, and Chief Justice Roberts replaced Chief Justice Rehnquist as an additional vote for the Federal Rules. But, although Justices O’Connor and Souter both voted with

Gasperini thus provides an example of the Justices disagreeing about how to resolve the *Erie* dilemma. But in *Walker v. Armco Steel Corp.*, the Rule 3 case previously discussed, a unanimous Court was seemingly unaware of the problem.⁵⁴ Recall that under Rule 3 “[a] civil action is commenced by filing a complaint with the court.”⁵⁵In *Walker*, the plaintiff in a diversity suit had filed—but had not served the defendant—before the statute of limitations expired; state law required service of the complaint in order to toll the statute. The Court, purportedly interpreting Rule 3 according to its “plain meaning,” held that Rule 3 had nothing to say about tolling the statute of limitations and thus that it was not in conflict with the state law: “Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”⁵⁶

A few years later, however, in *West v. Conrail*,⁵⁷ the Court interpreted Rule 3 in a federal-question case and held that filing *does* toll the statute of limitations. Ironically, Justice Stevens’ unanimous opinion in *West* distinguished *Walker* in a footnote:

Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit 'be considered part and parcel of the statute of limitations.' . . . This requirement, naturally, does not apply to federal-question cases.⁵⁸

Having first interpreted Rule 3 in *Walker* supposedly without regard to state policies (ignoring the problem), the Court then offhandedly and unself-consciously adopted what has now become the hotlycontested position that Rules should apply differently—or at least be interpreted differently—depending on whether state substantive policies are at stake.

In contrast, a unanimous Court took exactly the opposite approach in *Burlington Northern Railroad v. Woods*,⁵⁹a case decided between *Walker* and *West*. The Court ignored the problem by applying *Hanna* without any discussion of the possible substantive nature of the state law. *Burlington Northern* presented a conflict between Federal Rule of Appellate Procedure

Justice Ginsburg in *Gasperini*, their successors split, with Justice Alito joining Justice Ginsburg’s dissent in *Shady Grove* and Justice Sotomayor joining most of the majority opinion (although not the portion directly taking issue with Justice Stevens’s concurrence). Because Justice Sotomayor appears not to have taken a strong position, and Justice Kagan has replaced Justice Stevens, it is impossible to predict where the Court will go in the future. The only certainty is that the Court will face this question again, and it will implicate the same conflicting rationales.

⁵⁴ 446 U.S. 740 (1980).

⁵⁵ See FED. R. CIV. P. 3.

⁵⁶ *Walker*, 446 U.S. at 751.

⁵⁷ 481 U.S. 35 (1987).

⁵⁸ *Id.* at 39 n.4.

⁵⁹ 480 U.S. 1 (1987).

38—which makes the award of costs and damages for a frivolous appeal discretionary—and an Alabama statute that made such an award mandatory for unsuccessful appeals in particular circumstances. The Court concluded that the Federal Rule could “reasonably be classified as procedural” and would under *Hanna* displace the Alabama statute.⁶⁰ There was no discussion of the purposes behind the state statute or whether it might be “part and parcel” of, for example, substantive state tort-reform policies.⁶¹

Although *Walker*, *West*, and *Burlington Northern* were all unanimous—but not consistent with one another—dissension arose a year after *Burlington Northern*, as the Court began to fracture along the line between federal uniformity and state substantive policy. Surprisingly, however, it was Justice Scalia who urged attention to state policies. *Stewart Organization, Inc. v. Ricoh Corp.*⁶² involved a clash between a federal court’s discretionary power to transfer venue under 28 U.S.C. § 1404(a) and an Alabama statute that prohibited the enforcement of contractual forum-selection clauses. The majority viewed the case as a straightforward *Hanna* issue, concluding that because the two laws directly conflicted and § 1404(a) was within Congress’s power to enact, federal law governed. Justice Scalia dissented, arguing (in language later quoted by the dissent in *Shady Grove*) that “in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.”⁶³ The majority responded to this argument much as Justice Scalia himself eventually did in *Shady Grove*: “Not the least of the problems with the dissent’s analysis is that it makes the applicability of a federal statute depend on the content of state law.”⁶⁴

In another recent situation, the Court avoided the problem by recharacterizing the issue as not about the *Erie* doctrine at all. At the same time, its reasoning highlighted and further confused the core problems of *Erie*. In *Semktek International Inc. v. Lockheed Martin Corp.*,⁶⁵ a California federal

⁶⁰ *Id.* at 8.

⁶¹ Contrast this absence of discussion to the majority opinion in *Gasperini*, which carefully noted that the New York statute “invit[ing] more careful appellate scrutiny” of damage awards was “part of a series of tort reform measures.” *Gasperini*, 518 U.S. at 423.

⁶² 487 U.S. 22 (1988).

⁶³ *Id.* at 37–38 (Scalia, J., dissenting) (quoted in *Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting)).

⁶⁴ *Id.* at 31 n.10 (majority opinion); cf. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1441 (2010) (plurality) (“The dissent’s approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature . . . would mean . . . that one State’s statute could survive preemption (and accordingly affect the procedures in federal court) while another State’s identical law would not.”); *id.* at 1440 n.6 (stating that “nothing in our decision [*in Walker*] suggested that a federal court may resolve an obvious conflict between the texts of state and federal rules by resorting to the law’s ostensible objectives”).

⁶⁵ 531 U.S. 497 (2001).

court sitting in diversity dismissed *Semtek*'s California state-law claims with prejudice on statute-of-limitations grounds. *Semtek* refiled the claims in a Maryland state court under Maryland law; Maryland had a longer statute of limitations. The question before the Supreme Court was whether the federal-court dismissal was claimpreclusive, barring the Maryland suit. After concluding that neither precedent nor Federal Rule of Civil Procedure 41(b) answered the question, the Court held that the preclusive effect of a federal-court judgment is governed by federal common law, but that in diversity cases the content of federal preclusion law is the law that would be applied in state court.

Semtek is a minefield under *Erie*, and Justice Scalia's unanimous opinion tiptoed across it, bobbing and weaving to avoid disaster. *Erie* itself made several cameo appearances, each one creating more questions than answers.

To begin with, the *Semtek* Court suggested that to interpret Rule 41(b)⁶⁶ as directing that all dismissals "on the merits" be accorded claimpreclusive effect—regardless of whether state law would give such dismissals preclusive effect—would "arguably" violate both the Rules Enabling Act and *Erie* by modifying substantive rights and encouraging forumshopping.⁶⁷ This is exactly the kind of state-sensitive interpretation of the Federal Rules that the Court adopted in *Walker* and that the dissent urged in *Shady Grove*. The citation to the REA in *Semtek* might distinguish *Walker* and *Shady Grove* and resolve the tension between following state substantive policies and applying the Federal Rules transsubstantively; the Court seems to be suggesting that Rule 41(b) can *never* be interpreted to equate "on the merits" with claimpreclusion. But in an odd footnote, Justice Scalia acknowledged the possibility that Rule 41(b) might be interpreted differently in different situations:

Rule 41(b), interpreted as a preclusion-establishing rule, would not have the two effects described in the preceding paragraphs—arguable violation of the Rules Enabling Act and incompatibility with *Erie*—if the court's failure to specify an other-than-on-the-merits dismissal were subject to reversal on appeal *whenever it would alter the rule of claim preclusion applied in the State in which the federal court sits*. No one suggests that this is the rule, and we are aware of no case that applies it.⁶⁸

In other words, although one might interpret Rule 41(b) as preclusion-determinative only when doing so did not impair state rights, that interpretation is not plausible under the caselaw. But both the plurality in *Shady Grove* and the majority in *Stewart* rejected the possibility of differential

⁶⁶ Rule 41(b), governing involuntary dismissals, provides in relevant part that any nonvoluntary dismissal (with three exceptions not relevant to the case) "operates as an adjudication on the merits" "[u]nless the dismissal order states otherwise." FED. R. CIV. P. 41(b).

⁶⁷ *Semtek*, 531 U.S. at 503–04.

⁶⁸ *Id.* at 504 n.1 (citation omitted and emphasis added).

application of the Federal Rules as a matter of principle, not precedent. That is a far cry from the unadorned suggestion, in the *Semtek* footnote just quoted, that differential application is not supported by precedent. So *Semtek* ultimately leaves the dilemma unresolved: Maybe *Erie* and the Rules Enabling Act work together to invalidate any interpretation of any Federal Rule that might possibly impair substantive rights in any state, or maybe they are still at cross-purposes insofar as *Erie* commands interpreting or applying the Rules in light of particular state law.

Even more peculiar is the Court's treatment of the ultimate question in *Semtek*: the source of law governing the preclusive effect of a federal-court diversity judgment. At first glance, this seems like a straightforward *Erie* question. Because there is no Federal Rule or statute on point, the Court should apply *Erie* (as articulated in the portion of *Hanna* dealing with the "unguided" *Erie* choice) and ask whether applying federal commonlaw preclusion doctrines, rather than state law, would create inequities or encourage forumshopping.

But the Court did not take that route. It instead held that federal common law *always* governs the preclusive effect of a federal court judgment, but that in diversity cases, the content of federal common law should ordinarily mirror that of the state in which the diversity court sits: "This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."⁶⁹ At the same time, however, the Court supported this conclusion by citing *Gasperini*, *Walker*, and other *Erie* cases. It also went on to suggest that "any other rule would produce the sort of 'forum-shopping . . . and . . . inequitable administration of the laws' that *Erie* seeks to avoid."⁷⁰

In *Semtek*, then, the Court used the principles underlying the *Erie* doctrine to require application of state preclusion law, but explicitly denied that *Erie* and its progeny were dispositive. One benefit of this approach becomes apparent when the reader gets to the next paragraph of the opinion. The Court noted there that "[t]his federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests."⁷¹ Absent resurrection of the *Byrd* balancing test—which no Justice seems to favor—this preference for federal interests could not be accomplished under the *Erie* doctrine.⁷² Holding *Erie* obliquely rather than

⁶⁹ *Semtek*, 531 U.S. at 508. Not the least of the peculiarities of this holding is that it seems to ignore the teaching of *Klaxon Co. v. Stentor Electric Manuf. Co.*, 313 U.S. 487 (1941) by applying the preclusion law of the state in which the court sits rather than the preclusion law that that state would choose to apply. That oddity, however, is not relevant to my thesis.

⁷⁰ *Semtek*, 531 U.S. at 508–09.

⁷¹ *Id.* at 509.

⁷² Patrick Woolley has recognized the linkage between *Byrd* and *Semtek* (and considers *Gasperini* to be similar). He contends that all three cases illustrate a required balancing between two interests: "(1) the federal interest in avoiding differences in outcome (the *Erie* policy), against (2) the federal interest

directly relevant allows the Court an escape from state substantive policies of which it does not approve.⁷³

The Court thus avoided the central dilemma of *Erie*—what to do when a state’s substantive policy decisions clash with application of an arguably procedural federal rule⁷⁴—by not applying *Erie* at all. There is no need for the interpretive contortions of a case like *Walker*: In federal-question cases, the courts are free to fashion any federal-common-law preclusion doctrines they like, while in diversity cases they avoid any clash between federal preclusion law and state substantive policies by “borrowing” state preclusion law. And if a case arises in which the Court thinks that some federal interest—akin to the interest in the transsubstantive application of the Federal Rules—should trump state preclusion law, the Court will say so directly rather than insisting that it is the procedural nature of the federal interest that requires application of federal law.⁷⁵

Notice, however, that this result is accomplished only by pretending that the *Erie* doctrine does not exist. Perhaps we should take that as a hint that the *Erie* doctrine *should* not exist. In other words, while most of the recent *Erie* cases illustrate the unavoidable internal conflict within the *Erie* doctrine, *Semtek* instead shows us an alternative to *Erie* that provides a way out of the dilemma. It is to that alternative that I now turn.

in applying uniform rules to the issue in question.” See Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527, 559, 563–64 (2003). My proposal extends this linkage to all *Erie* cases.

⁷³ Like both *Byrd* balancing and the ad hoc accommodation of state and federal interests by the *Gasperini* majority and the *Shady Grove* dissent, this expansion of judicial discretion has been criticized. See, e.g., Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What’s Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707 (2006); C. Douglas Floyd, *Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.*, 1997 B.Y.U. L. REV. 267; Hendricks, *supra* note 46, at 103.

⁷⁴ Some scholars have suggested that preclusion law should be considered substantive. See Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 609–14, 638–44 (2006). Perhaps it should, in the end. But the whole point of the post-*Erie* cases I have been discussing is that the Court has interpreted “arguably procedural” to include anything that is not unarguably substantive; “arguably procedural” thus includes essentially everything other than core issues of standards of liability, elements of a cause of action, and related concepts that govern outside-the-courtroom activities.

⁷⁵ That *Semtek* in fact allows the Court to sidestep *Erie* is illustrated by a comparison between two scholars: Professor Stephen Burbank argues that *Semtek* adopted his view that state law should govern the preclusive effect of federal-court judgments in diversity cases because of “the limitations the Enabling Act places on the Court’s power” over preclusion law, and Professor Patrick Woolley argues that it stands for the proposition that “neither the *Erie* policy nor the REA prevents recognition of the very strong federal interest in uniform federal rules of preclusion.” Stephen B. Burbank, *Semtek, Forum Shopping and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1055 (2002); Woolley, *supra* note 72, at 529.

IV. THE ONLY VIABLE SOLUTION

The inescapable internal tension between the two rationales of the *Erie* doctrine has produced an unpredictable and inconsistent set of precedents as the Court—and sometimes an individual Justice—vacillates between one rationale and the other without recognizing the underlying dilemma. We could solve the problem by getting rid of diversity jurisdiction, which would eliminate the need for any kind of *Erie* doctrine.⁷⁶ We could also solve it by repealing the Rules Enabling Act and resurrecting the Conformity Act, which directed federal courts to apply state procedural rules in diversity cases. Neither of those options seems realistic.⁷⁷ The remaining solution is to eliminate the source of the problem by eliminating the *Erie* doctrine and substituting a different and more coherent way to accommodate state substantive policies with the demands of a separate and independent federal judicial system.

What would the world look like without *Erie*? In 1938, perhaps, it had to look like *Swift*. But seventy-five years later, there is no particular reason to return to *Swift*'s illusory distinction between local and general law or its invocation of a naturalist and antipositivist jurisprudence.⁷⁸ Instead, we can take a cue from *Semtek* and look at whether federal interests trump state policy choices in particular circumstances. If federal interests should prevail, federal law applies; if there is no pressing federal interest, the default option is to apply state law—not as a matter of constitutional command, but for the practical reasons recognized by the Court in both *Erie* and *Semtek*.⁷⁹

⁷⁶ Maybe. State-law questions might still arise under supplemental jurisdiction, see 28 U.S.C. § 1367, and in cases in which a federal-law question is embedded in a state cause of action, see *Grable & Sons Metal Prods., Inc. v. DarueEng'g&Mfg.*, 545 U.S. 308 (2005).

⁷⁷ Although there is a lot to be said for eliminating diversity jurisdiction. See Suzanna Sherry, *Against Diversity*, 17 CONST. COMMENT 1 (2000); Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97.

⁷⁸ Jack Goldsmith and Steven Walt make a good case that *Erie*'s commitment to legal positivism is irrelevant to its holding. Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998); Steven Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to Erie*, 2 WASH. U. JURISPRUDENCE REV. 75 (2010).

⁷⁹ One scholar defends a similar presumption in favor of state law as constitutionally required on the ground that “a judicially created federal rule that imposes or overrides substantive rights requires a justification other than the mere authority to assert federal court jurisdiction or to regulate federal procedure.” Adam N. Steinman, *What is the Erie Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 319 (2008). Steinman makes this argument in the context of defending simultaneously the prescriptions of the *Erie* doctrine (in all its complexity) and the existence of enclaves of federal common law that trump state law. He thus uses an argument about federal interests to limit federal judicial power, while I use it to expand federal judicial power.

In short, perhaps a *Semtek*-inspired “new *Erie*” doctrine should look like implied preemption of the “purposes-and-objectives” type⁸⁰: A presumption that state-law policy choices govern in diversity cases unless there is reason to believe that applying state law would interfere with some important federal interest or objective. Similarly, a focus on the state law’s effect on federal interests would mirror current doctrine under the dormant Commerce Clause, which also allows uncodified federal interests to overcome state regulation.⁸¹ Ironically, patterning the new *Erie* doctrine after implied preemption should be less controversial than the implied preemption doctrine itself.⁸² Under implied preemption, the Court relies on federal interests to determine what happens in *state* court: a state-law claim that is preempted cannot be brought in either *state* or federal court. Under my proposal, the Court uses federal interests to determine only what happens in *federal* court, a much more justifiable result.⁸³

And, despite its novelty, my proposal draws on existing doctrine. *Semtek* is not alone in its insistence that federal common law sometimes displaces state law notwithstanding *Erie*. The Court has applied federal common law that is inconsistent with state law when it finds that the differences between the two are not likely to produce forumshopping or inequities.⁸⁴

More broadly, the Court has consistently held—beginning with a case decided on the same day as *Erie*⁸⁵—that federal common law governs, even

⁸⁰ As the Supreme Court has explained, even in the absence of an express preemption provision in a federal statute, a state law is impliedly preempted when it “stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *accord*, *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

⁸¹ *See, e.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

⁸² For criticism of implied preemption see, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR* 265 (2008); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000); *Wyeth v. Levine*, 555 U.S. 555, 587–89 (2009) (Thomas, J., concurring).

⁸³ Under the current *Erie* doctrine, state courts are not bound to follow what are frequently called “*Erie* guesses” by federal courts (including the Supreme Court) interpreting state law. Even under *Swift*, state courts did not consider themselves bound to follow the common law decisions of the Supreme Court. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 77 (2009) (“Neither federal nor state courts considered the other’s decisions on questions of general law to be binding in subsequent cases”); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1561 (1984) (citing *Waln v. Thompson*, 9 Serg. & Rawle 115, 122 (Pa. 1822)); *see also* *Stalker v. M’Donald*, 6 Hill 93 (N.Y. Sup. Ct. 1843) (declining to follow the substantive holding of *Swift*).

⁸⁴ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51–54 (1991). The Court in *Walker* hinted at this possibility by resorting to the “twin aims” analysis after finding no directly controlling Federal Rule of Civil Procedure. *See supra* note 39.

⁸⁵ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110–11 (1938).

in diversity cases, if the suit implicates “uniquely federal interests.”⁸⁶ State law is displaced whenever there exists a “significant conflict between some federal policy or interest and the use of state law.”⁸⁷ To date, the Court has endorsed this use of federal common law in only six limited “enclaves,”⁸⁸ and scholars have defended these enclaves largely on historical or structural grounds.⁸⁹ My proposal generalizes from these limited enclaves to create a broader concept of conflict preemption: Courts may create and apply federal common law *whenever* doing so is necessary to protect federal interests that would be frustrated by the application of state law.

The primary difference between my proposal and the existing doctrines authorizing the use of federal common law, then, lies in its level of generality. Rather than creating narrow categories of federal enclaves and adding categories piecemeal by analogy, I suggest a new overarching standard to govern the displacement of state law. Replacing the Court’s current categorical approach with a generalized standard has all the usual advantages of such a move, and is all the more beneficial in a jurisprudence as beset with problems and inconsistencies as the *Erie* doctrine.⁹⁰

The final advantage of my proposal is that it eliminates the two unjustified dichotomies I mentioned earlier. It makes federal judicial power congruent with federal legislative power, and it treats *all* federal interests as potentially subject to judicial protection regardless of whether those interests fall into particular identifiable categories. Ironically, expanding federal judicial power in this way can itself be seen as mandated by one of *Erie*’s most basic moves. In overruling *Swift*, the *Erie* court dictated that *state* legislative and judicial lawmaking be treated identically. But current doctrine does not accord the same courtesy to *federal* judicial lawmaking; my proposal would align state and federal judicial (*vis-à-vis* legislative) power.⁹¹

⁸⁶ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

⁸⁷ *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966).

⁸⁸ The term “enclaves” is widely used. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–30 (2004). Two scholars have recently traced the term to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964), and identified the six accepted enclaves. Tidmarsh & Murray, *supra* note 74, at 588 n.16.

⁸⁹ *See, e.g., Tidmarsh & Murray, supra* note 74; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

⁹⁰ My theory has the additional benefit of harmonizing the federal courts’ authority to make common law with their authority in diversity cases; as many scholars have noted, there is a tension between *Erie* and the continued existence of even these pockets of federal law. “[T]he statutory, policy, and constitutional rationales of *Erie* are in tension with the continued existence of federal common law. . . . If federal (and state) courts have broad powers to make federal common law, then the power refused to federal courts in *Erie* pales in comparison to the power retained by federal (and state) courts to establish federal rules of decision.” Tidmarsh & Murray, *supra* note 74, at 586–87.

⁹¹ My proposal also eliminates a further distinction between state and federal court obligations. Currently, state courts are not bound under *Erie* to apply the law of a sister state to disputes arising in that sister state, and even when they do apply another state’s law they often presume—sometimes al-

V. CONSEQUENCES

I turn finally to the consequences of adopting my new proposal. In many run-of-the-mill *Erie* cases—such as an auto accident between citizens of different states—the new *Erie* doctrine probably would not differ much from the old one. As long as there is no federal interest in a uniform federal auto-accident tort law, state law will apply to those cases by default.⁹²

But replacing the *Erie* doctrine with a preemption approach would produce very different results in two particular types of cases. First, there are the cases that form the heart of this article, in which the old *Erie* doctrine issues conflicting commands. Under my proposal, the Court would instead have to decide explicitly whether the federal interest in uniform, transsubstantive procedural rules for federal courts is more important than allowing states to make substantive policy choices. If it is, then the Federal Rules will always prevail, even over a state law intended to operate substantively. That answer supports the *Shady Grove* plurality, the *Gasperini* dissent, and the unanimous *Stewart* and *Burlington Northern* cases; it undermines the *Shady Grove* concurrence and dissent, the majority in *Gasperini*, and the *Walker* and *West* combination. Determining that uniformity and transsubstantivity are not sufficiently important to trump state policy choices produces the opposite results. Whether a federal interest in uniformity and transsubstantivity *should* be considered important enough to override state substantive law is a separate question, which I do not address here.⁹³

The key point is not how these cases should come out, but rather that the Court would be deciding them transparently and in the name of an over-

most irrebuttably—that the other state’s law mirrors their own. See Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1240 (2011) (documenting lack of *Erie* obligation on state courts and arguing that *Erie* should bind state courts as well as federal courts).

⁹² It is possible that a persuasive case can be made for a strong federal interest in uniform auto-accident tort law. In one sense, every accident is local and unique, and thus state law should apply. On the other hand, one might argue that factors such as the interstate highway system and the increased mobility of the population suggest the need for uniformity. As I will argue shortly, products-liability law necessarily affects federal interests; whether general tort law does so is an open question.

⁹³ In the interest of transparency, I note that I lean toward favoring transsubstantivity. But one reason I do not want to address that question definitively in this essay is that I am not sure whether the Rules should remain transsubstantive even in federal-question cases. Although the Court insists that the Rules *are* transsubstantive, it seems to be applying them differently in different types of cases. Compare *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Erickson v. Pardus*, 551 U.S. 89 (2007), with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). One way to reconcile these cases (and to cabin the potentially harmful effects of the latter two) is to suggest that transsubstantivity has outlived its usefulness. In addition, there are other contexts in which federal law varies depending on the content of state law, and a full discussion of the value of transsubstantivity would have to take these into account. Under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971), for example, the availability of an implied federal right of action under the Constitution depends in part on the adequacy of state-law remedies. See, e.g., *Minneci v. Pollard*, 132 S. Ct. 617 (2012).

riding federal interest, rather than denying the existence of a conflict or pretending that the result turns on an interpretation of the Federal Rules of Civil Procedure.⁹⁴ In one sense, then, adopting a *Semtek*-like preemption approach in these cases takes a jurisprudential dispute that is currently being fought underground (or through proxies) and moves it into daylight where it can be addressed directly. The cases would also be more predictable—either the interest in uniformity or transsubstantivity is sufficient to overcome any state policy choice, or it is not. The case-by-case approach that has led to the confusing vacillation would disappear under my approach. The current doctrine is incoherent; my proposal at least yields coherence.⁹⁵ It is difficult to see why anyone would oppose a change with such salutary effects, except perhaps out of nostalgia, a misplaced allegiance to the purported constitutional basis for *Erie*,⁹⁶ or a visceral dislike of any doctrine that openly admits that judges actually exercise—and should exercise—discretion.

One further question about conflicts between state substantive law and Federal Rules remains to be discussed. Is the weighting of federal uniformity a one-time decision applicable across the board to all Federal Rules and all state laws, or does it depend on either the particular state interest or the particular Federal Rule?

As to variations in state laws, anything short of an all-or-nothing decision is simply a return to the current regime, albeit on a more transparent basis. There is little predictability in a jurisprudence that lets judges weigh each individual state interest against a federal interest in uniformity and allows different conclusions with regard to different state policies. In this, my proposal is unlike the analysis under preemption or dormant Commerce Clause doctrines, which depend on the actual threat that the particular state law poses to implementation of the federal interest. The reason for the difference lies in the different nature of the federal interest in the *Erie* proce-

⁹⁴ See Clermont, *supra* note 28, at 1029 (noting that lower court judges following Justice Ginsburg's lead will be engaging in "manipulation" that "hide[s] the real stakes"); Burbank & Wolff, *supra* note 46, at 37 (suggesting that under the current regime, "it is no surprise that . . . the Justices have lurched from one extreme to the other" in interpreting Federal Rules).

⁹⁵ Some scholars do defend the coherence of at least parts of the current doctrine, including two of my favorite procedure scholars, whose views I usually agree with and always greatly respect. See Rowe, *supra* note 10; see also Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 923 (2011).

⁹⁶ For criticisms of the constitutional basis of *Erie*, see, e.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 226–32 (2012); see generally Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595 (2008); Sherry, *supra* note 7, at 142–47. Underlying a constitutional basis for *Erie* is the expectation that state and federal courts can be substitutes for one another in diversity cases. While that expectation might have been accurate at one time, it seems inaccurate now that state and federal judges are selected and tenured in diametrically different ways. See generally Brian Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98VA. L. REV. 839 (2012).

dural cases: unlike an interest in particular federal policies (as in preemption) or free-flowing interstate commerce (as in the dormant Commerce Clause), an interest in *uniformity* is always necessarily undermined by allowing it to vary depending on the interests arrayed against it.⁹⁷

I am more agnostic about whether the interest in uniformity and trans-substantivity might vary across different Federal Rules of Civil Procedure. It is certainly possible that uniformity might be more important for some Rules than for others, and thus the Court might conclude that some Rules apply regardless of their impact on state substantive choices and others do not. Such an approach sacrifices some predictability, but still retains the core idea of transparently analyzing the conflict as one between enabling state policy decisions and fostering the underlying goals of the Federal Rules.

The second type of case affected by my suggestion is likely to generate considerably more controversy, both because it is of more practical consequence and because it is further afield from the core question (*Erie* in the procedural context) of this article. For those reasons, I sketch my arguments only briefly; I hope to develop them further in a later article.

In our national (or global) consumer economy, much corporate activity is what Sam Issacharoff has labeled national market activity: “conduct that arises from mass produced goods entering the stream of commerce with no preset purchaser or destination.”⁹⁸ If the goods are defective or cause injury, the effect is felt nationwide but liability is imposed state by state under potentially different substantive laws and policies. Those laws and policies, in turn, offer different protections for consumers in different states and also necessarily affect the incentives of corporations in their design and manufacturing of products. One state’s law has the capacity to drive national standards; different state requirements might impose conflicting obligations on manufacturers; and consumers in some states may suffer uncompensated damage for which consumers in other states are compensated.⁹⁹ Particularly with regard to defendants, then, the substantive products-liability law of any given state has nationwide implications and effects. In short, substantive state policy judgments have the potential to wreak havoc on our national

⁹⁷ There is some dispute about which of these two categories best describes the federal interest justifying enclaves of federal common law. See Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008) (citing *Tex. Indus. Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

⁹⁸ Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1842 (2006).

⁹⁹ For a thorough and interesting discussion of the economic implications of a “market for law,” see generally ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009) (discussing how these different laws create a “market for law” and what should be done about it).

economy.¹⁰⁰ Regardless of whether Congress chooses to federalize products-liability law,¹⁰¹ there is thus a strong federal interest in uniform liability rules for corporations whose products are distributed indiscriminately to consumers in every state. On my theory, that interest is enough to override individual state policy choices and require federal courts to develop and apply a federal common law of products liability in diversity cases.

Using federal law to protect a national economy has a historical pedigree that predates even *Swift v. Tyson*. In 1821, Chief Justice Marshall equated the federal interest in national commerce with the federal interest in foreign affairs: “That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people.”¹⁰² This sentiment accords with the generally accepted basis of diversity jurisdiction as protecting national commercial interests from parochial state laws.¹⁰³

The consequences of a replacing state substantive law with a federal common law of products liability are twofold. First, nationwide class actions under Rule 23, currently rarely certified, would become viable. As Judge Richard Posner has pointed out in denying certification to a nationwide class, “[t]he voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.”¹⁰⁴ Those different tunes mean that the same law will not apply to all members of a nationwide class of consumers, and thus certification is inappropriate for many—if not most—nationwide classes. My proposal, by requiring the application of federal common law to these national-market claims, makes the different tunes irrelevant and allows certification of a nationwide class. The flip side, however, is that once a nationwide class is certified in federal court—or even if individual suits are brought in federal court—federal, not state, law would determine liability. And because federal jurisdictional statutes require only minimal diversity in large class actions,¹⁰⁵ plaintiffs who prefer to stay in state court to take advantage of state law would be able to do so

¹⁰⁰ See generally, Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (describing these “spillover” effects and how various doctrines work to cabin them).

¹⁰¹ I have previously suggested that Congress *did* intend to federalize products-liability law by enacting the Class Action Fairness Act. See generally Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135 (2008).

¹⁰² *Cohens v. Virginia*, 19 U.S. 264, 413 (1821).

¹⁰³ See, e.g., David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1265–70 (2007) (collecting sources); Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1010–17 (2007); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 498 (1928).

¹⁰⁴ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995).

¹⁰⁵ 28 U.S.C. § 1332(d)(2)(A) (2012).

only if they limited the class to consumers in one state. Both consumers and corporations would benefit: consumers would be able to consolidate their claims into a nationwide class action and would all receive the same levels of protection and compensation, and corporations would be protected from the idiosyncrasies of particular states and the potential for conflicting standards of liability.

* * *

By citing—but not directly relying on—*Erie* and its progeny in *Semtek*, the Court showed us the way to bring back together two ideas that have been separated for seventy-five years. Federal court power to shape substantive law is intertwined with and depends on the existence of federal interests sufficient to overcome the limits on federal lawmaking and the premise of residual state power. Those federal interests exist regardless of whether they have been codified by Congress. But *Erie* sheared off some of those federal interests and insisted that they could not be protected in the absence of congressional codification. The *Erie* doctrine and the development of enclaves of federal common law are, at one level, a history of attempts to figure out which federal interests require codification as a prerequisite to judicial protection and which do not. My proposal, inspired by *Semtek*, is to unify the two inquiries with a transparent standard that asks directly whether there exists a sufficient federal interest to demand the application of federal rather than state law.

CONCLUSION

The *Erie* doctrine is a mess. Every time the Court wades into it, it gets worse. The Court's failure to save *Erie* should not be surprising: The underlying problem is that the doctrine itself is internally incoherent. The only solution is to scrap *Erie* and replace it with a more coherent vision of the role of federal courts in a regime of dual sovereigns. And the role of federal courts should be the same as the role of the federal government in general: protecting national interests from individual state policy choices detrimental to the nation as a whole. Seventy-five years ago, when *Erie* limited the role of federal courts, the federal government was barely beginning to exercise its authority. Isn't it time that the federal courts catch up with the massive expansion of the rest of federal power?

FEDERALIZED AMERICA: REFLECTIONS ON *ERIE V. TOMPKINS*
AND STATE-BASED REGULATION

*Samuel Issacharoff**

The 75th anniversary of Erie v. Tompkins permits a critical reassessment of Justice Brandeis's landmark opinion. This article joins the growing body of critical academic literature, focusing on the implausibility of the claimed reasons for overturning Swift v. Tyson. Erie's claim to safeguard a constitutional place for state law rings hollow when viewed in historic perspective, especially if one looks at the underlying question of the role of common law tort claims to control railroad accidents. While the doctrinal claims of Erie may not hold up, the concern about the regulatory consequences of federal court prohibitory injunctions continues to resonate. The article tries to resuscitate this aspect of Erie, perhaps best understood as the Progressive response to the perceived excesses of the Lochner period. Read this way, the concerns of Erie continue to manifest themselves in current controversies over claims of implied preemption, despite the distance from the actual doctrinal claims of Erie.

INTRODUCTION: *ERIE V. TOMPKINS*¹ IN OUR TIME

Life's enduring mysteries present us with the unlikely, but nonetheless hypothetical, account of Harry Tompkins IV, an entirely upright and decent individual, notwithstanding his fictional status. On our account, Harry was leaving work on April 25, 2013 in Wilkes-Barre, Pennsylvania only to discover that his car was not working. A friend was finally able to give him a lift back to nearby Hughestown late that night—a dark night as it turns out. Tompkins was grateful for the ride and, in order not to impose further on his friend, said he could be dropped off and would walk the short distance across the field by the rail line on his own. Improbably enough, while walking on a path that he and others had used countless times, Tompkins was struck and injured.² A train had passed close by with something appar-

* Reiss Professor of Constitutional Law, New York University School of Law. Dan Hulsebosch, Cathy Sharkey, and Stephen Gardbaum gave me valuable comments, as did Michael Greve and the participants in the American Enterprise Institute roundtable on Erie. Maria Ponomarenko and Nikolaus Williams provided indispensable research assistance.

¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

² In the original *Erie* case, the plaintiff, Tompkins, was walking to his home in Hughestown, Pennsylvania, at 2:30 a.m. on July 27, 1934. *Tompkins v. Erie R. Co.*, 90 F.2d 603, 603 (2d. Cir. 1937), *rev'd & remanded*, *Erie*, 304 U.S. at 64.

ently projecting from one of the train's cars. Tompkins suffered serious injury, including a badly broken arm.

Tompkins was not only injured, but duly outraged. How could this happen in this day and age? The Tompkins family had lived in Hughestown for generations. Family lore had it that the first Tompkins in this proud family line of Harrys had moved heaven and earth to establish the principle that railroads had a duty of care to those traversing a "commonly used beaten footpath," the phrase that seemed to ring in Harry's head. That first Harry had gone to his grave with bitter resentment for the disabling injuries he had suffered and for which the Supreme Court decreed there would be no compensation to a mere trespasser.³ And how, wondered Harry, could this have happened to his family after all these years, a wound recurring as if ordained by some recessive familial genetic predisposition?

So, seventy-five years to the date on which his great-grandfather's claim for justice had been defeated by the arrogant Erie Railroad, Harry once again took up the good family fight to right the historic wrongs that the powerful railroad companies had visited on the ordinary people of this country. The family could never understand how the great progressive Justice Brandeis could have reached out for constitutional issues not presented in the case, and then ruled for the railroad on the basis of the inviolability of Pennsylvania state substantive law.⁴ Even worse, by the 1930s, the railroads crisscrossed America using interchangeable carriage stock and seamlessly transported goods. The invocation of state-by-state liability rules for the national railroad grid seemed anachronistic even then. But Brandeis used the Tompkins case to strike a blow for state autonomy, and the poor Hughestown family waited generations to revisit the issue.

We start with the Tompkins great-grandson for a reason. In *Erie*, Justice Brandeis sought to reaffirm a vision of scaled-down America, one that resisted the power of the trusts in the economic domain and the encroachments of the government in the domain of liberty.⁵ Even his early writing on the tort of invasion of privacy in his famous article with Charles Warren included an undisguised view of the institutionalized press as yet another threat to liberty.⁶

³ *Erie*, 304 U.S. at 90.

⁴ *Id.* at 78–80.

⁵ William Forbath makes this point forcefully in tying Brandeis's constitutional vision to the objective of "sustaining a politically and economically independent citizenry." William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L. J. 115, 1126 (2011); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 489–91 (1997) (describing New Deal jurisprudence of the *Erie* period as providing greater role for state regulation of large business combinations); see also Mark A. Graber, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 87–91 (1991) (tying free speech to issues of local political community in Progressive thought).

⁶ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

Brandeis famously invoked three alternative arguments for the insult created by the application of federal common law to a dispute between an innocent pedestrian and an apparently negligent railroad: reliance on the federally-derived general common law to define the railroad's tort liability would offend some long-forgotten original draft of the Rules Enabling Act,⁷ it would not promote any desired uniformity in the application of state laws,⁸ and it would offend the constitutional division of powers between the federal government and the reserved powers of the states.⁹ I will return to these arguments, particularly the latter two, to show their spotty jurisprudential grounding. But, we begin instead with a practical look at what would happen 75 years later if *Tompkins IV* had sought to reenact the battle of Hughestown and avenge the insults his family had long endured at the hands of the despised Erie Railroad.

Harry the latter would soon discover that the world of 2013 looks nothing like the state-centered world of small enterprise envisioned by Brandeis. To begin with, his adversary had itself long been transformed by a combination of market forces and regulatory overhaul. The Erie Railroad went out of business decades ago, first merging out of bankruptcy into the Erie-Lackawanna, then emerging from a second reorganization as part of Conrail, then spinning off from the formation of the Amtrak passenger rail system, and now primarily operating in remnants as a mere subsidiary of the giant CSX holding company.¹⁰ By 2013, the idea of a state-based freight railroad is not only a stretch as a matter of law, it could not even be presented as plausible factually—again, allowing for the selective invocation of facts in our fictional account.

But, just as significant is the transformed legal environment in the intervening seventy-five years. For all the Brandeisian concern over state authority, the brute fact is that the railroads are now a national operation under the aegis of national law. Even at the time of *Erie*, the Interstate Commerce Commission exercised jurisdiction over fare issues and had rudimentary authority over railroad safety as well, which it exercised on matters such as couplers and railroad gauges.¹¹ That was followed by the Federal Employers' Liability Act (FELA), enacted in 1908, which established a compensation system for employees injured as a result of railroad negligence.¹²

⁷ *Erie*, 304 U.S. at 71–73.

⁸ *Id.* at 76–77.

⁹ *Id.* at 78–79.

¹⁰ See *The Erie Railroad*, AMERICAN-RAILS.COM, <http://www.american-rails.com/erie-railroad.html> (last visited, Dec. 6, 2012), for a nutshell history of the Erie Railroad.

¹¹ The ICC was expressly established by the Interstate Commerce Act of 1887, Pub. L. 49-104, 24 Stat. 379 (current version at 49 U.S.C. § 10101 (2012)), to regulate railroads. Its powers were expanded steadily by a series of amendments in the late nineteenth and early twentieth centuries to reach all aspects of railroad rate setting and various safety issues.

¹² Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (2012).

Even at the time of *Erie*, the primacy of federal law in regulating railroads was well established. Consider, for example, *Napier v. Atlantic Coast Line Railroad*, a challenge to various safety features mandated by state law.¹³ In strikingly modern sounding terms, the question confronted by the Court was whether the Boiler Inspection Act (BIA)¹⁴ and its subsequent amendment “occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation.”¹⁵ According to the Court, in an opinion by none other than Justice Brandeis, the state requirements were presumed proper as an exercise of state police power unless “[t]he intention of Congress to exclude states from exerting their police power [was] clearly manifested,” in turn requiring that “Congress [must] manifest the intention to occupy the entire field of regulating locomotive equipment.”¹⁶ By the time of the 1915 amendments to the Act, the Court concluded that Congress had manifested such an intention by delegating to the ICC a “general” power to regulate “the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.”¹⁷

Indeed, in its most recent review of the BIA in 2012, under its current name of the Locomotive Inspection Act of 1915, the Supreme Court relied on *Napier* to preempt a state law claim for mesothelioma that resulted from a design defect that had exposed the plaintiff to asbestos.¹⁸ According to the Court, *Napier*’s holding that the LIA “occup[ie]d the entire field of regulating locomotive equipment”¹⁹ categorically “admit[ted] of no exception for state common-law duties and standards of care.”²⁰

More significant for our contemporary (if fictional) Tompkins claim is the general preemptive force of federal law in defining the background norms for all railroad negligence claims. Under the Federal Railroad Safety Act (FRSA), as most recently amended in 2007,²¹ the Secretary of Transportation is authorized to “prescribe regulations and issue orders for every area of railroad safety.”²² The Secretary has “exclusive authority” to impose civil liability for FRSA violations.²³ In order to ensure that laws and regulations regarding railroad safety are “nationally uniform to the extent practicable,” the FRSA includes a preemption clause that allows states to

¹³ 272 U.S. 605 *passim* (1926).

¹⁴ *Napier v. Atlantic Coast Line R.R.*, 36 Stat. 913 (1911), *amended by* 38 Stat. 1192 (1915).

¹⁵ *Napier*, 272 U.S. at 607.

¹⁶ *Id.* at 611.

¹⁷ *Id.*

¹⁸ *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1264 (2012).

¹⁹ *Id.* (quoting *Napier*, 272 U.S. at 611).

²⁰ *Id.*

²¹ Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (1970) (current version at 49 U.S.C. §§ 20201–20144; 21301–21304 (2012)).

²² 49 U.S.C. § 20103(a) (2012).

²³ 49 U.S.C. § 20111 (2012).

retain laws and regulations relating to railroad safety, but only until a federal regulation or order is issued “covering the subject matter of the State requirement.”²⁴ As it presently stands, the FRSA preemption language leaves narrow room for state law to operate:

Nothing in this section should be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party (A) has failed to comply with the Federal standard of care established by regulation or order . . . (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order . . . or (C) has failed to comply with a State law, regulation, or order.²⁵

The effect is to render state law interstitial. A state may impose an “additional or more stringent” requirement to remedy a “local safety or security hazard” as long as it does not conflict with federal law or “unreasonably burden interstate commerce.”²⁶ State law continues to supply the cause of action for a personal injury caused by a railroad, but federal law provides the substantive rights and duties that may be asserted through the state law cause of action.²⁷ Thus, federal law preserves for “railroad accident victims the right to seek recovery in state courts when they allege railroads violate safety standards imposed by a railroad's own rules, certain state laws, or federal regulations.”²⁸ However, federal law allows state law and its remedies to operate only when a regulated party has failed to conform to federal law. Thus, the federal legal regime makes “clear that when a party alleges a railway failed to comply with a federal standard of care established by regulation or with its own plan, rule, or standard created pursuant to a federal regulation, preemption will not apply.”²⁹

To make matters worse for our injured Harry Tompkins IV, current Pennsylvania law establishes—just as it did seventy-five years ago—that railroads only owe trespassers a duty, in the words of a 2003 statute, to avoid a “willful or wanton failure to guard or warn against a dangerous condition, use or activity.”³⁰ Even this limited articulation of state law treatment of trespassers is itself conditioned by the suffocating reach of federal power over the regulation of railroads. For example, if poor Harry argued that the train’s speed caused the accident, he would find that state law “excessive speed” claims are preempted by federal regulations estab-

²⁴ 49 U.S.C. § 20106(a)(1)–(2) (2012).

²⁵ 49 U.S.C. § 20106(b) (2012). The Supreme Court has addressed this preemption language, preserved from earlier forms of the statute, in two cases, holding in both that federal railroad regulation can preempt common law tort claims. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 670 (1993).

²⁶ 49 U.S.C. § 20106(a) (2012).

²⁷ 49 U.S.C. § 20106(c) (2012).

²⁸ *Lundeen v. Canadian Pac. R.R. Co.*, 532 F.3d 682, 690 (8th Cir. 2008).

²⁹ *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1215 (10th Cir. 2008).

³⁰ 42 PA. CONS. STAT. ANN. § 8339.1(b) (West 2003).

lishing maximum train speeds for certain classes of track preempted such a claim.³¹ Even a claim that the railroad failed to inspect the train sufficiently before leaving the prior station may be preempted by federal regulations that are “intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime.”³² And the list goes on to include negligent design claims against railroads.³³ There are even federal regulations relating to the structure and support of the track and the track roadbed,³⁴ and these too have been found to preempt state laws regarding walkways adjacent to tracks.³⁵

Whatever *Erie* stands for, or whatever it might have been thought to have stood for, one thing is clear: the operation of the railroads in the U.S. today is thoroughly federalized and that much of the legal architecture for the federalized regime was already in place in 1938. Except for the formality that a latter-day Tomkins would bring his claim as a state law tort, state regulation has been hollowed out in the name of the integrated administration of the national railway system, a goal that sounds much more like that of Justice Story than Justice Brandeis. As Story wrote in an 1834 treatise on conflicts:

To no part of the world is [the jurisprudence of the conflict of laws] of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states.³⁶

³¹ See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993). The regulation in question establishes maximum allowable operating speeds for both freight and passenger trains on five classes of track as well as excepted track. *Id.* (citing 49 C.F.R. § 213.9 (2013)). The different classes of track are defined in subsequent regulations by rail gage, alignment, curves, track structure, geometry, etc. *Id.* (citing 49 C.F.R. §§ 213.51–213.143 (2013)).

³² *In re Derailment Cases*, 416 F.3d 787, 793–94 (8th Cir. 2005) (“The [Federal Railroad Administration] FRA has adopted regulations that require inspections of freight cars at each location where they are placed in a train.”) (citing 49 C.F.R. § 215.13(a) (2013) (“At each location where a freight car is placed in a train, the freight car shall be inspected before the train departs.”)).

³³ See, e.g., *Toadvine v. Norfolk S. Ry. Co.*, Nos. 96-6221/6237, 1997 WL 720431 at *2 (6th Cir. Nov. 13, 1997) (holding that federal regulations preempted plaintiff’s claim that she fell from railroad car due to negligently designed car ladders and grab irons caused).

³⁴ 49 C.F.R. §§ 213.31–213.143 (2013).

³⁵ See, e.g., *Mo. Pac. R.R. Co. v. R.R. Comm’n of Tex.*, 823 F. Supp. 1360, 1367 (W.D. Tex. 1990), *aff’d*, 948 F.2d 179 (5th Cir. 1991) (holding that “the FRA has acted to completely occupy the field of railway safety specifically related to the roadbed, track structure, and walkways”).

³⁶ William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1532 (1984) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 9 (Boston 1834)).

In the remaining sections I will argue that not only has *Erie* failed in practice, but that its core logic fails on each of its stated bases. I will then conclude with a mild defense of *Erie* on grounds of the limited institutional competence of the courts to craft comprehensive regulatory systems through the happenstance of the cases that come before them, with particular attention to the risks associated with the doctrine of implied preemption.

I. IN SEARCH OF A PRINCIPLE

One of the enduring problems of *Erie* is that Brandeis offered three distinct arguments in support of overturning *Swift v. Tyson*.³⁷ First, Justice Story misinterpreted § 34 of the Federal Judiciary Act.³⁸ Second, Justice Story's interpretation of § 34 was unconstitutional.³⁹ And third, the practical effects of *Swift* were undesirable while the expected benefits did not materialize.⁴⁰ The opinion did not tie any of the three arguments to the other, nor did it address whether any of the three would have been sufficient by itself—though presumably the constitutional argument should have provided the ultimate grounding for the holding that federal common law could not displace state substantive law. Instead, the three appear unified by a more-or-less unspoken alternative vision of social and economic organization. To surface this alternative account, it is best to walk initially through *Erie*'s stated sources of infirmity of the inherited regime of *Swift v. Tyson*.

A. *Interpreting Aging Statutes*

Perhaps the most bizarre part of *Erie* was the statutory claim that 150 years of institutionalized practice should be overturned without any indication of congressional discontent with the Court's interpretation. Brandeis hinged the statutory argument on the recent discovery of legislative history of proposed statutory language, which was not only forgotten but most importantly was never enacted. In *Erie*, Brandeis claimed that the work of a "competent scholar" somehow should overturn a century of settled practice in order to bring the interpretation of the Rules of Decision Act with legislative objectives from 1789.⁴¹ I can do no better than Suzanna Sherry in trying to engage with the difficulty of this form of statutory interpretation. Even leaving aside Professor Sherry's less-than-subtle claim that *Erie* is the

³⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71–80 (1938); see generally *Swift v. Tyson*, 41 U.S. 1 (1842).

³⁸ *Erie*, 304 U.S. 71–74.

³⁹ *Id.* at 78–80.

⁴⁰ *Id.* at 73–78.

⁴¹ *Id.* at 72.

“worst decision of all time,”⁴² Professor Sherry properly identifies why this argument fails—and must fail—along a number of lines.

The doctrinal morass begins with Justice Joseph Story’s attempt to forge a common commercial legal regime for the new American Republic. The first Judiciary Act had created a federal court system most unlike our own, with the jurisdiction of the new federal lower courts limited to cases arising from diversity of citizenship.⁴³ The corresponding limitation from § 34 of the Judiciary Act, known as the Rules of Decision Act, restricted the law generating powers of the new federal courts by obligating them to apply state decisional law in the exercise of their new-found diversity powers. In *Swift v. Tyson*, Story finessed the statutory command of the Rules of Decision Act by distinguishing the sources of law as critical to state decisional law. For Story, legislative enactments had the force of decisional law in diversity cases, while common law did not.⁴⁴

For Brandeis, as for a generation of Progressive critics of the Supreme Court, the expansion of federal commonlaw power, together with the accompanying aggressive use of constitutional doctrines under the Due Process Clause, was a source of retrograde insult to the emerging role of social regulation. Story’s account of the Rules of Decision Act, as limited only to formal legislation, became the first target of *Erie*. Brandeis, relying on the work of Charles Warren, sought to undermine this statutory reading and restore the common law to co-equal status with legislative enactments as a source of state law meriting complete deference under the Rules of Decision Act.⁴⁵ For Brandeis, this new-found ambiguity in the original legislative intent called into question the entire legal edifice that had been constructed around *Swift v. Tyson*.

Such an extravagant claim for drafting notes for a version of a statute never enacted is surely a stretch as a matter of statutory interpretation. Professor Sherry goes even further and directly attacks Charles Warren’s specific statutory claim regarding the Rules of Decision Act, on which Brandeis relied. Warren argued that a newly discovered draft of § 34 of the Judiciary Act of 1789 (i.e., the RDA) conclusively showed that the enacted version was meant to include unwritten state law.⁴⁶ According to Professor Sherry, however, the legislative history was not as conclusive as Brandeis (and Warren) claimed. First, there is no support for Warren’s conclusion

⁴² Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie As the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 130 (2011).

⁴³ The first Judiciary Actempowered federal courts to hear “all suits of a civil nature at common law or in equity” between parties from different states. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (repealed 1948); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928).

⁴⁴ *Swift v. Tyson*, 41 U.S. 1, 7 (1842).

⁴⁵ *Erie*, 304 U.S. at 71–74.

⁴⁶ Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86 (1923).

that the changes were merely stylistic and that Congress did not intend to change the substantive meaning of the section between drafts. It is equally conceivable that the changes were meant to be substantive, reflecting Congress's intent to *exclude* common law from the RDA. Without further evidence, which neither Warren nor Brandeis had, it is impossible to determine the intent of the changes. Moreover, legislative history showing the placement of § 34 with sections dealing with federal suits, in general, and not with the sections on diversity suits, suggests that § 34 was intended as a general instruction to the courts and not one specific to diversity cases.⁴⁷

More intriguingly, Professor Sherry argues that *Swift* was closer to Congress's actual intent than *Erie*. The § 34 language mention of "laws of the several states" was probably contemporaneously understood to refer to the collective states. Reference to the states individually was often indicated by the term "respective states."⁴⁸ This proposition is supported by language in the Process Act, passed shortly after the Judiciary Act, which used the phrase "in each state respectively" to instruct federal courts to use state procedural law.⁴⁹ This understanding, according to recent work by Caleb Nelson, also corresponds to the practice in the states at that time, in which state supreme courts also looked to general law principles in coordinating a common legal enterprise.⁵⁰ Indeed, in that sense, *Erie* failed on its own terms as the common law enterprise was and remained one of finding a shared legal environment corresponding to a largely interchangeable national economy,⁵¹ with efforts like the Uniform Commercial Code as the resulting coordination point. While the UCC is the product of a codification movement, there is ample evidence that state courts saw the UCC as their common law undertaking in the nineteenth century. Thus, state courts prior to *Swift* commonly spoke of the "general commercial law," the "law merchant," and the "mercantile law"; and in addition, these courts would look broadly to other state courts, federal courts, and foreign courts to determine what that law should be.⁵² At the very least, there is strong reason to doubt the claim by Justice Holmes in dissent in the blockbuster case of

⁴⁷ Sherry, *supra* note 42, at 134.

⁴⁸ *Id.* at 134.

⁴⁹ Process Act of 1789, ch. 21, § 2, 1 Stat. 93 (1789); Sherry, *supra* note 42, at 135.

⁵⁰ Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 942 (2012).

⁵¹ Both "pre- and post-*Erie* federal diversity decisions have in fact been a force for bringing about a greater uniformity in the common law of the states." *Id.* at 949 n.77 (quoting Letter from Richard Posner to Henry Friendly (Jan. 3, 1983), in William Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982-86*, 51 AM. J. LEG. HIST. 395, 404 (2011)).

⁵² J. Benton Hurst, Note, *De Facto Supremacy: Supreme Court Control of State Commercial Law*, 98 VA. L. REV. 691, 697 (2012).

Black & White v. Brown & Yellow, that confusion rather than coordination was the ensuing norm in national law.⁵³

For example, after reviewing the merits of a rule in an 1854 case, the Supreme Court of Vermont stated that “[t]he more important question growing out of the case is, perhaps, what is the true commercial rule established upon this subject? And it is of vital importance in regard to commercial usages[] that they should, as far as practicable, be uniform throughout the world.”⁵⁴ Uniformity was the “ultimate desideratum,” and it was “always a question of time” as to achieving it.⁵⁵ Or, as the Ohio Supreme Court stated in 1842 in overruling its own precedent:

It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law[] is of much interest to the mercantile world.⁵⁶

There is an inherent risk in using contemporary understandings to update old statutes, let alone relying on musty notes of a version of a statute never enacted.⁵⁷ Surely in the century following *Swift*, Congress could have corrected the mistaken judicial view of the scope of federal common law authority, assuming that Brandeis (via Warren) had the better of the interpretive argument. But there is a paradox in Brandeis claiming the authority to disrupt expectations well settled through nearly a century of the *Swift* regime. One of the critiques of the *Swift* regime was that cases such as *Black & White v. Brown & Yellow*⁵⁸ revealed the disruption to the ordinary expectations of citizens leading their daily lives if the happenstance of judicial forum could alter their legal rights and responsibilities. It is hard to imagine that pivoting on the meaning of critical statutes is not less disruptive when the alteration of law is not the result of the deliberative political process but of the new research of a “competent scholar.”

⁵³ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting); see also Nelson, *supra* note 50, at 978–79.

⁵⁴ Hurst, *supra* note 52, at 711 (quoting *Atkinson v. Brooks*, 26 Vt. 569, 578 (1854)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 712 (quoting *Carlisle v. Wishart*, 11 Ohio 172, 191–92 (1842)).

⁵⁷ There is extensive literature on the justification for the “dynamic” school of statutory interpretation that takes us far beyond the scope of this inquiry. The debates take as a point of departure the claims made in William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496–97 (1987).

⁵⁸ *Black & White Taxicab*, 276 U.S. at 518.

B. *The National Enterprise and the Constitution*

For nearly a century, the doctrine that a national economic market required a coordinated national commercial law seemed unexceptional. As I have previously recounted with Catherine Sharkey,⁵⁹ Justice Story's vision of courts as important agents of national integration was uncontroversial, and seemed to correspond to the initial perceived need for diversity jurisdiction as a means of securing the recoverability of commercial debts across the developing national market.⁶⁰ Even prior to *Swift*, Justice Story had long espoused the need for commercial integration as a central tenet in developing the law of the new Republic. Writing in *Van Reimsdyk v. Kane*, Story explained that the difference in the application of local versus national law derived from the subject of the regulation. The more national the scale of the underlying legal engagement, the more the national courts must craft new national law:

In controversies between citizens of a state, as to rights derived under that statute, and in controversies respecting territorial interests, in which, by the laws of nations, the *lex rei sitae* governs, there can be little doubt that the regulations of the statute apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature; I think it can hardly be maintained, that the laws of the state, to which they have no reference, however, narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has provided a national court.⁶¹

Story later emphasized this point in *Williams v. Suffolk Insurance Co.*:

[U]pon commercial questions of a general nature, the courts of the United States possess the same general authority, which belongs to the state tribunals, and are not bound by local decisions. They are at liberty to consult their own opinions, guided, indeed, by the greatest defe-

⁵⁹ See generally Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353 (2006) (addressing the emergence of partial federalization of areas historically governed by state law); see also Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1188–92 (2011) (discussing the centralizing power of judicial review).

⁶⁰ According to Madison's notes of the Constitutional Convention, the concept of diversity jurisdiction was not much debated in the convention itself, while the wording was left to the Committee of Detail. See 1–2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 *passim* (Max Farrand, ed. 1911); see also, Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242–46 (1985) (tracing the language of diversity jurisdiction through the drafts of the Committee of Detail).

⁶¹ *Reimsdyk v. Kane*, 1 Gall. 371, 381 (1812), *remanded sub nom.* *Clark's Ex'rs v. Van Reimsdyk*, 9 Cranch 153, 153 (1815).

rence for the acknowledged learning and ability of the state tribunals, but still exercising their own judgment, as to the reasons, on which those decisions are founded.⁶²

Swift was an unexceptional application of the principles that Story had long articulated. Moreover, *Swift* largely followed contemporary practice, and leading state courts “seemed persuaded that it would lead to a desirable uniformity in commercial matters.”⁶³ As Judge William Fletcher notes, the decision seemed a clarification of the role of the “general common law” as it applied to commercial transactions unaffected by the particularized concerns of “local law.”⁶⁴

According to Brandeis, however, the doctrine of *Swift v. Tyson* was “an unconstitutional assumption of powers by courts of the United States.”⁶⁵ The Constitution itself does not address the range of substantive powers of the federal courts, except by requiring that they be created and empowered by affirmative acts of Congress. In order to find a limiting principle on what powers might be exercised by federal court, Brandeis pushed into the murky constitutional divides between state and federal powers in general. In order to cabin constitutionally—rather than as a matter of statutory interpretation—the power of the statutorily promulgated federal courts, Brandeis was forced to argue a corresponding limitation on all federal power, including that of Congress:

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. And no clause in the Constitution purports to confer such a power upon the federal courts.⁶⁶

Brandeis thereby rooted the constitutional infirmity of *Swift* in the limited federal power in all matters having to do with the administration of state commercial enterprise, not just in the particular fact of judicial declaration of the federal interest: “The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision *which Congress was confessedly without power to enact as statutes.*”⁶⁷

Generations of commentators have become enthralled with the bizarre constitutional underpinnings of *Erie*. If taken to its logical core, Brandeis’s

⁶² *Williams v. Suffolk Ins. Co.*, 29 F. Cas. 1402, 1405 (C.C.D. Mass. 1838).

⁶³ Alfred B. Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519, 524 n.36 (1940–41); *see also* *Stalker v. McDonald*, 6 Hill 93, 95 (N.Y. 1890); *Treon v. Brown*, 14 Ohio 482, 487–88 (1846); *Carlisle v. Wishart*, 11 Ohio 172, 192 (1842).

⁶⁴ Fletcher, *supra* note 36, at 1517. Fletcher points in particular to Blackstone as upholding commercial transactions governed by “a great universal law” that was “regularly and constantly adhered to.” *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES *67).

⁶⁵ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938).

⁶⁶ *Id.* at 78.

⁶⁷ *Id.* (emphasis added).

argument could be rooted in the reserve powers guaranteed to the states by the Tenth Amendment. On this theory, a federal judiciary could not vest the power to generate its own general common law as that power to create law would reach beyond the legislative powers specifically enumerated to the federal government, which would in turn necessarily encroach on states' rights.⁶⁸

But could this possibly be true? And could it be a conceivable claim of a constitutional limit on the economic reach of the federal government, at the very height of the New Deal? Brandeis's claim that Congress lacked the power to make "substantive rules of common law applicable in a state" was strikingly discordant with the contemporaneous, judicially-approved expansion of federal power during the New Deal. The same Court that decided *Erie* also upheld New Deal legislation that shifted the locus of economic and social regulatory power to the federal legislative and executive branches. Given Congress' broad power to regulate interstate commerce, subsequently recognized by the Court in decisions like *Wickard v. Filburn*,⁶⁹ it is difficult to believe that the federal government could not regulate large swaths of state common law. It is especially difficult to take Brandeis's argument at face value considering that the very claim in question was clearly subject to congressional regulation under the Commerce Clause. Indeed, as set forth only partially in the opening sections, the subject matter of *Erie* could hardly have involved a more paradigmatic case of expanding federal power. Railroads were one of the quintessential interstate commercial activities of the early twentieth century. In short, accepting Brandeis's argument at face value would pose a serious threat to Commerce Clause jurisprudence that has not seen a federal statute regulating economic activity struck down in seventy-five years, with only the Affordable Care Act decision of this past Term reviving any sort of constitutional limits under the Commerce Clause.⁷⁰

⁶⁸ See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702–03 (1974); Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 9 N.Y.U. L. REV. 383, 394–98 (1964). Article I, § 8 of the Constitution enumerates the specific powers granted to Congress. U.S. CONST. art.I, § 8. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST.amend. X; see also Gardbaum, *supra* note 5, at 490 ("Contrary to the nationalist account, most of these changes derived less from considerations of the proper roles of state versus national legislatures (that is, considerations of federalism) than from a fundamental change in thinking about the proper roles of legislatures (whether state or federal) and courts with respect to matters of public policy. In other words, the constitutional revolution as a whole had more to do with separation of powers than with federalism, ushering in a new understanding of the respective legislative and judicial functions.").

⁶⁹ *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (upholding regulation of wheat grown for home consumption under the Commerce Clause).

⁷⁰ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2587–88 (2012).

To give constitutional mooring to *Erie* requires a rejection of the ill-formulated federalism arguments in favor of a different constitutional divide. Many prior readers of *Erie* have cast doubt on the constitutional arguments questioning the scope of federal power.⁷¹ A number of subsequent commentators have gone further to articulate a separation-of-powers argument as the true basis for *Erie*'s constitutional holding.⁷² The constitutional limitation here turns not on the division of authority between the state and federal governments, but on the constitutional limits inherent in the exercise of the judicial function. Even if the broad federalism principles relied on by Brandeis no longer seem valid, there is still a version founded in what may be called "judicial federalism."⁷³ Under this argument, even if Congress has the power to regulate substantive rules of common law applicable in a state under the Commerce Clause, those legislative powers are limited to Congress under separation-of-powers principles. On this view, *Erie* should be understood not as a case about the limits of federal power, but as the resolution of the boundaries of federal *judicial* power,⁷⁴ a point to which I return in the concluding section.

C. *Settled Expectation and the Source of Law*

Perhaps the best rationale for *Erie* may be found in Brandeis's claim that "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue."⁷⁵ Here, Brandeis launches two related arguments against the market integration argument that Story so highly valued. In the first instance, this is essentially a functionalist critique about the capacity of courts to generate a body of commercial law that would harmonize a di-

⁷¹ See generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA 178–79* (2000) (rejecting as "oblique" and "reluctant" the state authority claims in *Erie*); Ely, *supra* note 68, at 702 (rejecting the federalism rationale for *Erie*).

⁷² See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13–19 (1985) (describing how federalism is only applicable when federal law interferes with state interests, where otherwise federal common law will apply).

⁷³ *Id.* at 16.

⁷⁴ By contrast to the ill-crafted federalism claim, as argued in Edward Purcell's definitive account of Brandeis's constitutional vision, Brandeis's longstanding hostility to far ranging judicial authority "was rooted firmly and purposely in his acute awareness of its tactical uses." PURCELL, JR., *supra* note 71, at 122.

⁷⁵ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938). Brandeis offered four specific criticisms: discrimination against citizens, uncertainties in drawing lines between categories of law, a lack of uniformity in the law within a state, and forum-shopping. *Id.* at 73–81. The discrimination point is not only unsubstantiated, but misreads the procedural posture of removal—only in-state defendants faced with a state court filing by an in-state plaintiff could not avail themselves of removal to federal court, an odd source of discrimination. See PURCELL, JR., *supra* note 71, at 162.

verse national market. To the extent that *Swift* and the nineteenth century vision of a seamlessly integrated national commercial market rested on a generally understood and applied legal framework, courts remained only one among many actors capable of creating or interpreting legal obligations. Second, even within the domain of courts, federal courts remained only one legal actor. Thus, even the judicial articulation of legal norms had to confront the two-courts problem in which state courts might not yield to the harmonizing federal vision.

For Brandeis, this critique led powerfully to the issue presented in cases like *Black & White v. Brown & Yellow*, which presented a rather extreme version of forum shopping. Under the facts presented, a party's citizenship was endogenous to the legal environment, meaning that a strategic player could decide which body of law would control its behavior. In that case, a taxicab company in Bowling Green, Kentucky could manipulate its citizenship by reincorporating across the border in Tennessee in order to claim federal court diversity jurisdiction. Had the company sued its local taxicab rival in state court to enforce its exclusive dealing arrangement at a local train station, it would have been barred by state law prohibitions on restraints of trade. Federal court offered not just a different forum, but a different body of substantive law.⁷⁶ Rather than promote uniformity, the "fact that federal courts were not bound to follow state courts on matters of general law meant that there were frequently two different rules of law in force inside a single state, either of which was available to a party able to get into federal court."⁷⁷

Uncertainty about the role of federal courts in governing any particular dispute compromised Story's functional account of market organization. For Brandeis, this was enough to proclaim *Swift's* failure, even without a richer account of the underlying mischief that the two-court problem could motivate. That argument was left to Justice Harlan, who later explained in *Hanna v. Plumer*, "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs."⁷⁸

Harlan thus offered the single compelling normative account for the *Erie* intuition of inconsistency in legal obligations, what in shorthand is known as the *Black & White v. Brown & Yellow* problem. One may readily

⁷⁶ The facts of the taxicab dispute are now a source of legal and casebook legend, as well recounted by Robert J. Condlin, "A Formstone of our Federalism": *The Erie/Hanna Doctrine and Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 483 (2005).

⁷⁷ Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie to Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 7 (2012).

⁷⁸ *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

question either how widespread the *Black & White* problem really was,⁷⁹ or whether it was really a matter of regulatory failure in corporate reorganization rather than forum selection rules.⁸⁰ But the claim was that uncertainty in controlling law created a distinct harm outside the litigation setting regardless of the constitutional or statutory allocation of specific powers to federal courts.

Once cast in these terms by Harlan's influential concurrence in *Hanna*, the potential mischief in *Erie* plays out at the level of law's obligation to the citizenry. The central insight is that the law's commitment to "private ordering" requires clarity in the legal commands confronting all individual actors as they go about their lives with expectations about what property rights entail, what contracts will be honored, and what duties of care they owe and should expect. When law provides the greatest certainty to such primary conduct, then individuals may pursue their happiness and welfare in ways that maximize their ambition and abilities. That legal clarity in turn requires that there be one source of authority for the decisions citizens make on a day to day basis. For Harlan, in giving meaning to Brandeis's critique, the importance of clarity in controlling law meant that the mischief created by the ability to seek conflicting legal authority as to the enforceability of an exclusive franchise agreement at a railroad terminal had to be resolved by allowing only one law-giving authority. And, the same principle meant that both the Erie Railroad and the poor Tompkins family would have to live by one controlling legal command as to the duties owed to those traversing the "commonly used beaten footpath."

The paradox of *Erie* is why one would expect greater uniformity to come from the states, particularly when the conduct in question is likely to be national in scope—as shown by the discussion of the evolution of railroad liability law in the opening section. Caleb Nelson well argues that the problems resulting from disuniformity (making *ex ante* planning more difficult and creating incentives for forum shopping *ex post*) might be greater under *Erie* than *Swift*.⁸¹ This is critical for any assessment of how successful Brandeis could be in critiquing Story on these grounds. A personal anecdote might elucidate this point.

Once when presenting this issue to an academic audience in Europe, I found the lecture going well and the legal arguments quite accessible to them given the ongoing European struggles with economic integration.

⁷⁹ See generally MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 221–242 (2012) (discussing the impact of *Erie* on the states' powers to regulate interstate commerce).

⁸⁰ Nelson notes that the attention on the leading *Erie*-era example of the forum shopping problem, *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), was arguably misplaced. See Nelson, *supra* note 50, at 964 n.132. The manipulative conduct of the taxicab company was as much due to the ease with which corporations could choose their state of incorporation as their ability to forum-shop. *Id.* However, the former was something that could have been readily changed through Congressional legislation if really viewed as a problem. *Id.*

⁸¹ Nelson, *supra* note 50, at 968.

When I came to the holding of *Erie*, however, the audience became visibly uncomfortable and finally someone interrupted me to explain that I must have misspoken: the audience assumed that I had mangled the holding of *Erie* and that any ruling seeking to promote uniformity of practice must therefore have resorted to the elevation of *federal law*. The European audience followed the logic thoroughly until they came to the conclusion. For Europeans—as for Story more than a century before—economic market integration required higher order law to apply, not localism. Indeed, it is hard to construct the logic whereby problems of competing and inconsistent authority are resolved by fractionating regulatory authority rather than concentrating it.

For the European audience, the question is presented as one of competence of the claimed legal authority actually to resolve the issue in question within its dominion. This is a longstanding source of debate in Europe going back to the rise of collectivism and Marxism. The fundamental European counterargument remains canonical:

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.⁸²

This principle of subsidiarity, enshrined in Catholic doctrine by Pope Leo XIII in 1891 in the famous encyclical *Rerum Novarum*, has emerged as the mainstay of European Community law, particularly as regards administrative regulation.⁸³ The basic principle of subsidiarity in EU law is intended to limit Brussels's reach by creating a presumption of local regulatory autonomy, or at the very least, a presumption in favor of national level regulation as opposed to EU commands. For its enthusiasts, "subsidiarity is celebrated as a check on the monopolistic tendencies of the modern state; it is a plea for localism and doing things at the lowest possible level."⁸⁴

⁸² UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CATECHISM OF THE CATHOLIC CHURCH 512–13 (1995), available at <http://www.usccb.org/catechism/text/pt3sect1chpt2.htm#7>; cf. Pius XI, *Quadragesimo anno* I, 184–86.

⁸³ The Maastricht Treaty's subsidiarity provision reads: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member-States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." Treaty Establishing the European Community, art.3b, Feb. 7, 1992, 1992 O.J. (C 224) 9.

⁸⁴ Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of Lasallians, Families, Schools—and the Poor*, 45 J. CATH. LEGAL STUD. 131, 133 (2006).

But subsidiarity operates only insofar as the issues remain local.⁸⁵ The European railroads began as the product of national consolidation under Bismarck and the Saint-Simonean ministers of Louis Napoleon. Indeed, some nations like Russia used different size railroad gauges to slow foreign armies, and the British colonial authorities used railbeds with different gauges within India to prevent economic integration and the potential of political unification.⁸⁶

Today, in furtherance of economic integration, European rail lines operate under the regulations of Brussels. Subsidiarity would have little to say about the coordinated regulation of common carriers designed to move across communities, not give expression to the local values of the way stations serviced by modern transport. Nor would the principle of subsidiarity be offended by the use of centralized laws of mercantile exchange in integrated national and multinational markets. In the language preferred by Europeans, Brandeis's invocation of state law authority failed to establish the competence of local law to govern the relevant unit of economic activity.

II. COURTS AND THE PROJECT OF ECONOMIC INTEGRATION

Many of these concerns are far from new. John Hart Ely probed at the broader claims of Brandeis and helpfully trimmed *Erie* down to a statutory case delineating the lines between the older Rules of Decision Act and the recently enacted Rules Enabling Act.⁸⁷ That argument both takes away the rhetorical excesses of the putative constitutional claim and gives a sense of the moment as one of creating a role of procedural innovation in the federal courts.

Much as Ely's argument is salutary, it does not go far enough in addressing Brandeis's extraordinarily obvious reach for strong principles of limitation, including constitutional principles that were not even addressed by the litigants in *Erie*.⁸⁸ Instead it is better to begin with Thomas Merrill's

⁸⁵ For a fuller account of Justice Brandeis deeply rooted commitment to small production and local endeavors, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 80–142 (1984) (describing Brandeis's lifelong crusade against the “curse of bigness”); see also Michael Lind, *LAND OF PROMISE: AN ECONOMIC HISTORY OF THE UNITED STATES* 229 (2012).

⁸⁶ Aaron K. Perzanowski, *Rethinking Anticircumvention's Interoperability Policy*, 42 U.C. DAVIS L. REV. 1549, 1560 (2009). For a discussion of the use of higher-level authorities to achieve the benefits of coordination, including of common railroad gauges, see Timothy S. Wu, Note, *Cyberspace Sovereignty? The Internet and the International System*, 10 HARV. J.L. & TECH. 647, 657–58 (1997).

⁸⁷ Ely, *supra* note 68, at 724 (tying *Erie* to the underlying procedural objectives of the Rules Enabling Act).

⁸⁸ PURCELL, JR., *supra* note 71, at 132–33 (contrasting the reach for unstated questions with Brandeis's opinion two years earlier setting forth the principle of constitutional avoidance in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)).

argument that *Erie* is a case not about federalism but about the institutional role of federal courts in the “displacement” function that necessarily follows from the exercise of federal supremacy and the ensuing subordination of state authority.⁸⁹ The argument here is not that federal power does not extend to conduct such as the liability rules governing railroads, an argument that was strained even as Brandeis wrote and that today would have no traction at all. Rather, the claim is that there is a softer form of constitutional constraint that applies when courts rather than the political branches undertake a realignment of power between the states and the federal government. This argument is anticipated by Michael Greve, who leads an effort to reexamine *Erie*, but acknowledges that the opinion might end up resting on “some combination of separation of powers and federalism arguments.”⁹⁰

The American system of “dual federalism” creates inherent conflict in regulatory authority but one in which the combined force of a national market and the Supremacy Clause push incessantly toward the centralization of federal power.⁹¹ Despite this pressure toward increased exercise of federal authority, the political process can realign regulatory authority toward the states, including through resistance to federal legislative initiatives. These “political safeguards of federalism”⁹² operate such that states can police against federal *legislative* encroachment on state prerogatives by virtue of the states’ representation in Congress.⁹³ Such state reassertions of authority are thwarted when the asserted federal power comes from the courts rather than Congress, and particularly when embroidered in the language of constitutional authority.

On this reading, *Erie* emerges as a caution on a particular exercise of federal power through federal courts, a specific discussion entirely absent in Brandeis’s opinion. *Erie* becomes a case not about the always elusive line between substance and procedure, or some curious notion of the reserve powers under the Tenth Amendment, but of the dangers inherent in the further reaches of federal judicial power. *Erie*’s otherwise inexplicable doctrinal overreach was the note of triumph of the Progressive vision against the hated ghost of *Lochner*⁹⁴ and its associated doctrines of federal constraint on regulation.⁹⁵ The evil of the federal common law was not that it constituted a reallocation of regulatory authority from state to federal power, but

⁸⁹ Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 744–46 (2008).

⁹⁰ MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 375 (2012).

⁹¹ See Issacharoff & Sharkey, *supra* note 59 (developing this argument).

⁹² See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 234 (2000).

⁹³ Merrill, *supra* note 89, at 742.

⁹⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹⁵ See PURCELL, JR., *supra* note 71, at 40–43 (describing the multiple doctrinal forms of the assertion of federal power during the late nineteenth and early twentieth centuries).

rather that its use by the judiciary was likely to be antagonistic to governmental authority to regulate.

It is always treacherous to read into an opinion a logic—or worse yet, a motivation—not apparent in the text itself. *Erie* is the anti-*Lochner* of a revitalized faith in the regulatory power of the state. This is not the anti-*Lochner* of Justice Holmes' famous dissent and its refusal to interpose any constitutional constraint on what a legislature might do.⁹⁶ Holmes not only saw no warrant for judicial intervention in the product of majoritarian processes, but anticipated that “people who no longer hope to control the legislatures . . . look to the courts as expounders of the Constitutions.”⁹⁷ Rather, the legislature envisioned by Brandeis was one capable of reasoned, orderly regulatory conduct, meriting the gracious margin of deferential review set out by Justice Harlan in his *Lochner* dissent.⁹⁸ When the *Lochner* Court elevated its liberty-based view of substantive due process, it acted not so much in furtherance of federal supremacy but against any regulatory authority whatsoever.

If indeed *Erie* does not stand for the primacy of state regulatory authority in contrast to federal power, then it is easier to reconcile with the massive expansion of federal authority during the New Deal period. If this is correct, the opinion should instead be read as a reaction to the use of federal *judicial* power to limit regulation of economic activity. This reading orders the apparent constitutional tension between Brandeis's bizarre invocation of the constitutional limits on federal power. Coming only one year after *NLRB v. Jones & Laughlin* and *West Coast Hotels v. Parrish*, and in the uninterrupted streak of New Deal cases culminating in *Wickard v. Filburn*, such a presumption of state autonomy fits poorly with constitutional doctrine of the day.⁹⁹

⁹⁶ *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting) (“I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).

⁹⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467–68 (1897). The more extreme forms of Holmes's skepticism toward any constitutional constraint on the legislature would come later, as expressed in one of his famous First Amendment dissents: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting). The most famous expression came in a letter to Harold Laski, claiming that, “if my fellow citizens want to go to Hell I will help them. It's my job.” Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe Howe ed., 1953).

⁹⁸ See *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting) (“No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives.” (quoting *Atkins v. Kansas*, 191 U.S. 207, 223 (1903))).

⁹⁹ See, e.g., *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

When courts, as opposed to Congress, interpose federal authority on regulatory initiatives, the question is not which regulatory scheme prevails, but whether there can be regulation, even of the common law sort. Courts are inherently limited in setting a regulatory agenda, a product of the constraints on the judicial power imposed by case or controversy requirements and limitations on agenda setting.¹⁰⁰ On this view, *Erie* allows courts to continue playing a role in allocating regulatory responsibility among distinct institutional players¹⁰¹ but not in foreclosing regulation under judicial mandate. The persistent injunctions of the *Lochner* period hollowed out the regulatory sphere in which progressive legislation might temper the harsh consequences of market-ordered mass society. The risk in the prohibitory intervention is that the absence of regulatory authority results in a legal void, one where injuries may necessarily go unremedied because the gap-filling role of the common law is not available.

In turn, this view of *Erie* resonates in the modern federalism preoccupation with preemption.¹⁰² Much of preemption law fits comfortably within a legal-process style inquiry into spheres of legal oversight over primary behavior. The preemption case law is dominated by the tension between federal regulatory authority and the residual force of state law usually expressed through common law liability rules. However, one distinct and relatively undeveloped area of preemption law concerns implied preemption. It is here that the *Erie* debate resurfaces most clearly.

Implied preemption turns not on the scope and force of congressional action, but on the inherent domain of federal exclusivity. When acting to strike down state law as violative of implied preemptive domain of federal interests, the Court is pronouncing a non-statutory basis for substituting uncodified federal law for the enforcement of state law—either statutory or common law, though much more likely in the common law setting.¹⁰³ Implied preemption challenges the Court to identify a controlling body of law in a fashion broadly analogous to the way that the *Lochner* era cases forced

¹⁰⁰ Henry Monaghan interestingly argues that the Court has developed greater agenda-setting mechanisms, but even so, they do not approach the capacity of agencies or the incrementalism of repeated common law cases. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669 (2012) (placing this argument in the context of “a powerful drive to ensure that . . . the Court possess wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants”).

¹⁰¹ See generally HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2001) (leading from *Erie* to the legal process approach to judicial review that dominated post-WW II legal thinking under the tutelage of the authors).

¹⁰² Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 131 (2004) (“Doctrines limiting federal preemption of state law thus go straight to the heart of the reasons why we care about federalism in the first place.”); see generally Roderick H. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007) (arguing that anti-preemption rules of statutory construction enhance national lawmaking).

¹⁰³ Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

the Court to articulate a broad constitutional vision as the basis for curbing state law.

In some settings, implied preemption may result from a concern for conflict that would be created with an existing body of federal law, what is termed conflict preemption: “[e]ven where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.”¹⁰⁴ But, the Court has developed a doctrine of implied preemption that reaches further and is triggered by a determination that federal law must occupy the entire field, regardless of whether there is a conflict with an actual statute or regulation. In this broader domain of field preemption, state law must be displaced where the Court deems that state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁵ The challenge becomes determining how the federal interest is expressed. The question of the source of law in turn galvanizes the dissents in implied preemption cases. Dissenting Justices have sought to rein in the scope of judicially-mandated federal supremacy by expressly invoking the role of Congress, and not the courts, as the source of federal supremacy.¹⁰⁶

As a formal matter, implied preemption is defined by the regulatory orbit of federal statutes,¹⁰⁷ and hence exists at a significant removal from the general federal common law of the pre-*Erie* period. The Court does not rely on broad constitutional principles enshrined in the liberty provisions of the Constitution. Such judicial common law reasoning applied in the preemption domain “would undercut the principle that it is Congress rather than the courts that preempts state law.”¹⁰⁸ In practice, however, implied preemption exists in areas the Court defines as corresponding to a broader federal ambition than that defined by any statute, and is triggered by a judicial determination that “the requisite congressional intent is implied from substantive statutes outside of any jurisdictional preemption provision.”¹⁰⁹ Regardless of whether Congress could have occupied the field pursuant to the Commerce Clause, the doctrine only emerges where Congress has not exercised its regulatory authority. As a result, “the Court is discerning con-

¹⁰⁴ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

¹⁰⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁰⁶ *See, e.g., Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 531 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Our precedents do not allow us to infer a scope of preemption beyond that which clearly is mandated by Congress’ language.”).

¹⁰⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (defining the scope of implied preemption by “the depth and breadth of a congressional scheme that occupies the legislative field”).

¹⁰⁸ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

¹⁰⁹ David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1137 (2012).

gressional intent from the broader structure of statutes” rather than from congressional action itself.¹¹⁰

The rise of implied preemption creates further judicial pressure to the expansion of federal power, as Thomas Merrill’s more recent work on the subject recognizes.¹¹¹ The danger presented here is that the Court is interposing a federal vision of the importance of the area of specific law in the absence of a comprehensive regulatory structure. In the implied preemption context, the question is not federal versus state regulatory authority, but oftentimes a regulatory void in which the absence of the common law baseline may result in a lack of an enforcement or remedial regime. As characterized by Ernest Young, the critical question becomes the perceived broad federal statutory mandate and the Court’s perception of the “acceptable degree of conflict between those purposes and state regulatory measures.”¹¹² Put another way, absent a declaration from Congress as to its intended statutory goals, implied preemption represents an unmoored claim of federal intent to occupy a field.¹¹³

Unlike forms of preemption that at least purport to rely on the “bro-mide”¹¹⁴ of congressional intent, implied preemption is an invitation to a regulatory void that resonates in the field-clearing domain of *Lochner*. The source of authority is not the text of a congressional statute but the Supremacy Clause of the Constitution directly.¹¹⁵ Displaced is state regulatory authority developed through the right to sue, which in turn means that “[t]ort law in America is built on the bedrock of state common law.”¹¹⁶ By contrast, implied preemption once again removes the gap-filling function of the state common law, but enables no federal common law substitute, except in the domain of preemption law itself. This void has prompted strong voices on the Court seeking to resurrect the putative “presumption against preemption” doctrine in the case of implied preemption:

¹¹⁰ Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 200 (2009).

¹¹¹ Merrill, *supra* note 89, at 741 (“The Court’s preemption doctrine . . . systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area.”).

¹¹² Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 132 (2004).

¹¹³ See Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39, 53–54 (2005) (“[T]here should be a constitutional requirement that Congress can only exercise this power [of preemption] expressly. There must be some statutory text in which Congress specifies that it is altering the default constitutional position of concurrency plus supremacy. In the context of preemption, a purely implied exercise of an implied power—in which the courts fill in the nuances of congressional silence— . . . violates the duty that Congress has to exercise its best judgment on the necessity of preemption.”).

¹¹⁴ Merrill, *supra* note 89, at 740.

¹¹⁵ See Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist*, 5 N. Y.U. J.L. & LIBERTY 63, 84 (2010) (“Implied preemption derives its constitutional authority from the Supremacy Clause.”).

¹¹⁶ Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2 (1997).

Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States’ historic police powers—are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so.¹¹⁷

The distinction between implied preemption and the congressional assertion of federal supremacy is found most directly in the opinions of Justice Thomas, a persistent critic of implied preemption. Thomas, often writing in dissent, directly ties the dangers of implied preemption to the absence of an elaborated regulatory alternative. This concern comes to the fore in the Court’s divided opinions in *Wyeth v. Levine*,¹¹⁸ a challenge to an adverse reaction to the administration—as opposed to the design or testing—of a drug approved by the Federal Drug Administration, which had also approved the manufacturer’s drug warning label. The Court found the state law liability action not preempted on a showing that the warnings did not sufficiently address risks of which the manufacturer was aware. Concurring in the judgment, Justice Thomas criticized implied preemption as permitting “this Court to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from the constitutionally enacted federal law authorizing the federal regulatory standard that was before the Court.”¹¹⁹ For Thomas, implied preemption gives rise to impressionistic, ad hoc regulatory interventions by the Court based on “freewheeling” reliance on “broad federal policy objectives, legislative history, or generalized notions of congressional purposes” that push “beyond the scope of proper judicial review.”¹²⁰

III. CONCLUSION

The implied preemption discussion leads us back to a revisionist account of *Erie* as a caution on judicial creation of incomplete and conflicting regulatory schemes. It is possible to recast Justice Story’s vision of an integrated national market as a necessary stage in the forging of a national un-

¹¹⁷ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting). The extent to which this presumption holds is a matter of some conjecture. See Merrill, *supra* note 89, at 738 (“[the] preemption doctrine is highly formulaic, although no one seems to believe that the formal categories provide significant guidance to courts and litigants in resolving particular cases”); see also Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) (claiming that the Court has abandoned the presumption altogether); Susan Raeker-Jordan, *The Preemption Presumption that Never Was: Preemption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1380 (1998) (“The retreat from *Cipollone* restored the Court’s earlier doctrine, which poses significant threats to federalism, state sovereignty, and, in particular, state common-law actions for damages.”).

¹¹⁸ See generally *Wyeth v. Levine*, 555 U.S. 555 (2009).

¹¹⁹ *Id.* at 601 (Thomas, J., concurring).

¹²⁰ *Id.* at 583, 602, 604.

ion. Perhaps the initial stages of national consolidation offer a role that courts are well suited to play as agents that break down regionalism, particularism, and the overriding temptation of local officials to offer forms of protectionism. This is not just the history of American judicial constitutionalism as a strong force of national integration¹²¹, but one that has unfolded more contemporaneously in the strong judgments of the European Court of Justice.¹²²

One consequence, however, is that courts prove better at striking down barriers than at recreating a comprehensive and sensible regulatory regime. *Erie* emerges from this recasting as an awkward accompaniment to the Court's unleashing of the regulatory state during the New Deal period. The substantive doctrines that emerged in cases like *Wickard* put economic regulation basically beyond the reach of constitutional constraint. *Erie* denied to federal courts the ability to craft common law doctrines that might backhandedly restore the judiciary's anti-regulatory zeal associated with the *Lochner* period and the Court's repudiation of the early New Deal initiatives. The New Deal showed Congress and the emerging administrative state forging a transformation between the federal government and the economy. *Erie* was a shot across the bow of the remaining potential source of federal *prohibitory* power. That, rather than any of Justice Brandeis's unsatisfying claims in *Erie*, may be the lasting contribution of the case.

Erie then becomes an object lesson in the institutional role of courts in the grand project of national economic integration. Courts can mediate conflict among states, and can root out retrograde barriers to market expansion born of sectionalism or special interest protectionism. But that negative projection of integrative power only goes so far in the modern era. At some point, the political branches must assume responsibility for that project. *Erie* cautions that when the political branches take up the mantle, the judiciary should cautiously cede ground.

¹²¹ Friedman & Delaney, *supra* note 59, at 1159 ("The rise of horizontal supremacy was facilitated by a powerful constituency that needed the Supreme Court to ensure vertical authority over the states: business.").

¹²² Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT'L L.J. 243, 255–56 (2006).

IN PRAISE OF *ERIE*—AND ITS EVENTUAL DEMISE

*Robert R. Gasaway and Ashley C. Parrish**

INTRODUCTION

We come to praise *Erie* and then help bury it.

Seventy-five years after its spontaneous begetting, *Erie Railroad Co. v. Tompkins*¹ remains paradoxical. It is jurisprudentially the most consequential decision in history—a hidden engine driving a train of landmark decisions that now includes *New York Times Co. v. Sullivan*,² *Bivens v. Six Unknown Narcotics Agents*,³ *Motor Vehicle Manufacturers Association of America v. State Farm Mutual Automobile Insurance Co.*,⁴ *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁵ and perhaps even *Roe v. Wade*.⁶ Nonetheless, *Erie* remains one of the most criticized and, some would say, discredited decisions of all time.⁷ As others have explained at length, the decision has inarguably “failed in practice.”⁸ And although its holding has been readily accepted, its rationale—at least as regards the grounds originally set forth in the Court’s opinion—has been widely questioned and sometimes harshly criticized.⁹ The decision has spawned (unsurprisingly) a succession of precedents that have tried (unsuccessfully) to resolve the inevitable conflicts between federal courts’ authority to apply the Federal Rules of Civil Procedure and *Erie*’s command that “federal

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¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

² *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

³ *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

⁴ *Motor Vehicle Mfr.’s Ass’n of Am. v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29 (1983).

⁵ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1983).

⁶ *Roe v. Wade*, 410 U.S. 113 (1984).

⁷ *Erie*, 304 U.S. 64 (1973). For commentary discussing discrediting *Erie*, see, e.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 372–73 (2012); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 922 (2013); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 129–30 (2011).

⁸ Samuel Issacharoff, *Federalized America: Reflections on Erie and State-Based Regulation*, 10 J. L. ECON. & POL’Y. 199, 205 (2013); see also Nelson, *supra* note 7, at 950–84.

⁹ GREVE, *supra* note 7, at 373 (it is “difficult to think of any comparably important case so bereft of serious intellectual or constitutional support”). For a summary of the problems with *Erie*’s stated constitutional justifications, see Aaron Nielsen, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 258 (2011).

courts in diversity cases must respect the definition of state-created rights and obligations.”¹⁰ Yet, despite *Erie*’s acknowledged flaws, there is no indication the Supreme Court is likely to revisit it anytime soon. The decision by all appearances remains “unassailable.”¹¹

Why this paradox? In our view, the essential point is that *Erie* is today—and has been from the outset—a conflicts-of-law decision.¹² *Erie*’s conflicts-of-law ideas are, to be sure, dauntingly and beguilingly large. They must be understood in the broadest sense to encompass speculations about the nature of all “law” and of all “laws” that can potentially come in conflict. *Erie* has itself become a brooding jurisprudential omnipresence—one that seems to require a well-formed philosophy of law before it can be critically approached.

Another part of *Erie*’s elusiveness comes from the difficulty of grasping its practical conflicts-of-law implications, in part because it was brought forth separately and by all appearances independently from its Siamese sibling, *Klaxon Co. v. Stentor Electric Manufacturing Co.*¹³ *Erie* tells us that there are no “general federal common law” doctrines; hence, federal courts must apply state rules of decision in common law cases. *Klaxon* tells us, effectively, that there are no federal conflicts-of-law doctrines—hence, federal courts must follow state conflicts rules in practically *all* cases. Professor Hart, the great federal courts scholar of the generation following *Erie*, famously embraced *Erie* while questioning *Klaxon*;¹⁴ so too does the excellent, more recent conflicts-of-law scholarship of Professor Laycock.¹⁵

¹⁰ *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)); see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 416 (1996); see generally Suzanna Sherry, *A Pox on Both Your Houses: Why The Court Can’t Fix The Erie Doctrine*, 10 J. L. ECON. & POL’Y 173 (2013) (explaining the problem created by *Erie* between the Rules of Decision Act and the Rules Enabling Act); Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131 (2011) (examining the evolution of problems created by *Erie* through more recent cases); Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988) (explaining the union between state common law and the Federal Rules of Civil Procedure).

¹¹ GREVE, *supra* note 7, at 373.

¹² See ROBERT R. GASAWAY & ASHLEY C. PARRISH, *The Problem of Federal Preemption: Toward a Formal Solution*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 219, 239–41 (Richard S. Epstein & Michael S. Greve, eds. 2007); see also Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813, 816 (2013); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 17 (2012); Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1239 (1999).

¹³ *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

¹⁴ See, e.g., Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514–15, 541–42 (1954).

¹⁵ See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 282 (1992).

Our view is that *Klaxon*'s flaws are all inherent in *Erie*—and *Erie* and *Klaxon* are no more independent than *Brown v. Board of Education*¹⁶ and *Bolling v. Sharpe*.¹⁷ One sibling pair, to be sure, was born the same day and the other three years apart. But the idea that *Klaxon* could have come out differently after *Erie* is as much a lawyer's mirage as the idea that a Supreme Court ready for *Brown* might have stopped short of *Bolling*.

Of course, to say *Erie* is a conflicts decision is not to deny that *Erie* raises important issues concerning the structure of our constitutional republic and its allocation of governing authority. After all, "choice of law within the United States is inherently constitutional law."¹⁸ The *Erie* doctrine implicates both federalism and separation of powers, as has been widely recognized. What has been less widely recognized is that both sets of implications arise principally from limitations placed by *Erie* (as later became clear in *Klaxon*) on the federal courts' traditional adjudicatory responsibilities. We acknowledge our analysis in this regard is at odds with the growing body of scholarship that defends *Erie* as a necessary check on federal judicial policymaking.¹⁹ But while we are sympathetic to those goals, we hasten to add that such arguments find only submerged support in the *Erie* opinion itself; put little faith in core aspects of the judicial function as traditionally carried out; overlook the salutary role general common law can play in a compound republic such as ours; and above all, ignore the doctrinal opportunities enabled by jurisprudential advances over the past seventy-five years.

By the same token, we are aware of, and also quite sympathetic to, arguments that *Erie* unnecessarily disrupted the fabric of our constitutional order—a position articulated most forcefully by Professor Greve.²⁰ But it is hard to see how the *Erie* doctrine could have failed to come to life at some point very close in time to *Erie*'s actual birthday. If the *Erie* doctrine is conflicts-of-law doctrine, then surely it is important that the conflicts-of-law alternatives on offer back in 1938 were some combination of a series of ad hoc judicial improvisations or the then-existing territorial conflicts-of-law rules that even Professor Laycock—territorialism's great contemporary advocate—would unhesitatingly reject. Simply put, an article like this one could not have been written seventy-five or even fifty years ago. Back when Justice Brandeis was penning *Erie*, and even when Judge Henry

¹⁶ *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954).

¹⁷ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁸ Laycock, *supra* note 15, at 250 (citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2, 6–7 (1945)).

¹⁹ See, e.g., Ernest A. Young, *A General Defense of Erie Railroad v. Tompkins*, 10 J. L. ECON. & POL'Y 17 (2013); Bradford R. Clark, *Erie's Constitutional Source*, 95 CAL. L. REV. 1289, 1297–1300 (2007); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 12–13 (1985); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974).

²⁰ GREVE, *supra* note 7, at 372–79.

Friendly took the occasion of *Erie*'s silver anniversary to attempt to preserve, protect, defend—and strictly limit—the *Erie* decision, jurisprudential assumptions and understandings were much different than they are now. Although the *Erie* doctrine may have been salutary, or at least inevitable, in its day, that day ought to be waning. Hopefully, *Erie* is approaching the beginning of its end.

This article has three parts. Part I discusses Judge Friendly's constitutional defense of *Erie* and explains why his article, though widely cited and even embraced by the Supreme Court, remains underestimated. Part II identifies several often overlooked elements of the pre-*Erie* regime of *Swift v. Tyson*²¹ that, we believe, are central to understanding the latent virtues of *Swift*, the problems with *Erie*, and the possibilities for a conflicts-of-law resolution of the disorders *Erie* has caused. Part III concludes with an attempt to synthesize the lessons of *Erie* and *Swift*, and a proffer of suggestions for fixing our broken conflicts-of-law system. Through this article, we hope to contribute to the already expansive scholarship on *Erie*—in the interest of eventually laying it peacefully to rest.

I. IN PRAISE OF *ERIE*

We begin with Judge Friendly's scholarly essay, *In Praise of Erie—And of the New Federal Common Law*.²² The essay remains, fifty years after publication, impressive for legal erudition, stylistic grace, and frank, sensible judgments. More importantly, it is not idle speculation; the Supreme Court recently treated the article as a canonical expression of the justification for and limits of the *Erie* doctrine.²³

Judge Friendly's article is the only suitable starting point because his acknowledged task was to defend *Erie* on its own terms. Judge Friendly's prefatory remarks situate him (convincingly and without immodesty) as perhaps the last in a line of Harvard jurists—preceded by Gray, Holmes, Brandeis, and Frankfurter—who had made the *Erie* doctrine, broadly understood, a core jurisprudential commitment. Judge Friendly was spurred to write by a former high school classmate's article, published in the *Journal of Air Law and Commerce*, attacking *Erie* with the stinging quip that *Erie* was “a triumph of the Harvard Law School, acting through the not undistinguished quartet of Gray, Holmes, Brandeis, and Frankfurter, over

²¹ *Swift v. Tyson*, 41 U.S. 1 (1842).

²² Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

²³ *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527, 2535–36 (2011).

the prostrate body of the Constitution.”²⁴ As Justice Brandeis’s former law clerk, and a student of Justice Frankfurter’s, the article is Judge Friendly’s heartfelt advocate’s brief defending his mentors against a schoolmate’s attack. As true heir to *Erie*, Judge Friendly ought not be lightly dismissed.

Judge Friendly’s spirited *Erie* defense is fought on narrow ground. He quickly concedes the statutory interpretation territory, acknowledging that *Erie* cannot be defended based on an interpretation of the Rules of Decision Act.²⁵ Justice Brandeis’s opinion had cited legislative history, uncovered by professor Charles Warren, to delicately suggest that *Swift* had misinterpreted the Rules of Decision Act, § 34 of the Judiciary Act of 1789.²⁶ But, as Judge Friendly explains, Brandeis “[t]oo quickly accept[ed] Warren’s thesis.”²⁷ Moreover, according to Judge Friendly, the “doctrine of *Swift v. Tyson* was notorious,”²⁸ and would not have been overruled on grounds involving mere statutory interpretation:

[f]or the Court to have abrogated a construction so long accepted by Congress, on the basis of an ‘archeological discovery’ or any other basis going only to statutory interpretation, would have been a naked exercise of power—far more fairly subject to the criticism it would deservedly have attracted than the constitutional ground on which the decision was placed.²⁹

Judge Friendly’s defense of *Erie* is thus mounted on constitutional ground and especially on this passage in the opinion:

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. And no clause in the Constitution purports to confer such a power upon the federal courts We merely declare that in applying [*Swift*,] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.³⁰

According to Judge Friendly, wielding cudgels inherited from Justice Brandeis, “the constitutional ground taken in *Erie* was precisely the right ground—indeed, the only tenable one.”³¹

²⁴ Friendly, *supra* note 22, at 384 (citing Arthur John Keeffe, *Piercing Pearson*, 29 J. AIR L. & COM. 95, 109–11 (1963)); *see also* Arthur John Keeffe, *In Praise of Joseph Story, Swift v. Tyson and “The” True National Common Law*, 18 AM. U. L. REV. 316, 316 (1969).

²⁵ Friendly, *supra* note 22, at 389.

²⁶ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71–74 (1938) (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)).

²⁷ Friendly, *supra* note 22, at 390.

²⁸ *Id.*

²⁹ *Id.* at 390–91 (internal footnotes omitted); *see also* Greve, *supra* note 7, at 456 n.14 (“Warren’s purported evidence has been proven wrong to a point of certainty.”).

³⁰ *Erie*, 304 U.S. at 78, 80.

³¹ Friendly, *supra* note 22, at 386.

Judge Friendly's constitutional defense of *Erie* has since been questioned. As others have noted, *Erie*'s constitutional federalism rationale can appear dated, even as of 1938 when *Erie* was decided.³² By 1938, the Supreme Court had already greatly relaxed the judicially enforceable limits on Congress's authority under the Commerce Clause, making clear Congress's extensive power to regulate commerce.³³ Today, of course, it is "well established" that Congress "has broad authority" to regulate under the Commerce Clause,³⁴ and there is no basis for believing the *Swift* doctrine raises serious federalism concerns because it "commandeers" state officials.³⁵

In light of the above, a conclusion too often reached is that Judge Friendly's *Erie* defense is unconvincing, and we must search elsewhere for *Erie*'s continuing justification.³⁶ But that fails to give due credit to Judge Friendly. Unlike what appears in the *Erie* opinion, Judge Friendly's elaboration of the opinion is keenly attuned to fundamental characteristics of the general common law. Judge Friendly does not so much deny the possibility of declaring common law doctrine based on general principles as he denies that authority for doing so can be found in Article III, § 2's extension of the judicial power to "all [c]ases in [l]aw and [e]quity" together with the same section's Diversity Clause and the implementing statutory grants of federal diversity jurisdiction.

The "constitutional argument for *Erie*," according to Judge Friendly, is "of rather stark simplicity" and hence capable of being "summed up in a few sentences."³⁷ The argument's pivot is "hypothesizing an act of Congress depriving charities of immunity in tort." It will be generally agreed, says Judge Friendly, that "such a statute is neither within any power enumerated in § 8 of Article I nor within the 'necessary and proper' clause insofar as that relates to implementing Congress' enumerated powers." Judge Friendly then springs his subtle trap, contending that it would be "unreasonable to suppose that the federal courts have a lawmaking power which the federal legislature does not." He continues, "Power to deal with the

³² See, e.g., Sherry, *supra* note 7, at 143 ("It is doubtful that *Erie*'s federalism limitation on congressional power was correct when it was decided, and doctrinal developments have made it even less valid.").

³³ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); see also *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 389–90, 397–400 (1937); *Nebbia v. New York*, 291 U.S. 502, 524–25, 537–39 (1934).

³⁴ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2012).

³⁵ See, e.g., *Printz v. United States*, 521 U.S. 898, 928–29 (1997) (prohibiting commandeering); see also Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595, 596 (2008).

³⁶ See, e.g., Green, *supra* note 35, at 596; Nielsen, *supra* note 9, at 258 ("Judge Friendly's constitutional reasoning is elegant" but "there is a fatal flaw"); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1657–59 (2008).

³⁷ Friendly, *supra* note 22, at 394.

hypothesized subject *and others like it*” is “reserved by the Tenth Amendment, ‘to the States respectively, or to the people.’”³⁸

It is important to appreciate both the persuasive force and historical importance of this argument. As to historical importance, Judge Friendly’s analysis contributed magnificently to protecting much of federal law from being swallowed up by *Erie*’s apparent skepticism about traditional modes of common law and quasi-common law adjudication. If today we enjoy reasonably secure bodies of common law or quasi-common law in legal areas as diverse as labor, antitrust, admiralty, government contracts, sovereign tort claims, and others, it is in no small measure due to Judge Friendly’s praise of the “new federal common law.”

But if few would question Judge Friendly’s historical importance, many do question his essay’s persuasive force.³⁹ For some, an easy answer to Judge Friendly appears to be that payments of economic damages in accordance with the common law from a citizen of one state to a citizen of another state is, necessarily, an instance of regulation of interstate commerce—or something so closely akin to interstate commerce that it falls within congressional authority. Another complementary answer appears to be that, to the extent Congress may lack power to revise by statute Judge Friendly’s hypothesized common law tort immunity as applied by federal courts, that failure of congressional power shows only and at most that, in one isolated instance (or maybe in a few oddball instances) the general common law lies beyond Congress’s power to correct and hence possibly also beyond the federal courts’ power to declare. But surely the common law does not exist principally for governing good samaritans and charities. And surely outlier instances ought not destroy our federal courts’ ability to apply the full entirety of a *corpus juris* that had been built over the ages.

While these rejoinders do not lack force, neither does Judge Friendly’s argument. Judge Friendly importantly shifts the federalism argument he inherited from Justice Brandeis. Whereas Justice Brandeis said the constitutional problem lies with declaring “substantive rules of common law applicable *in a State*,”⁴⁰ Judge Friendly’s charitable-immunity hypothetical emphasizes what later jurisprudence came to call the economic or noneconomic character of a transaction. Indeed, Judge Friendly anticipates modern Commerce Clause jurisprudence and, interestingly, embraces a position parallel to and even aligned with Professor Greve’s suggestion that the Supreme Court’s *Lopez* and *Morrison* decisions indicate that the commerce power “does not extend to transactions that are *neither* interstate *nor* ‘economic.’”⁴¹ Whereas Justice Brandeis had focused on the interstate half of this test, Judge Friendly focuses on the economic half. Judge Friendly, like

³⁸ *Id.* at 394–95 (emphasis added).

³⁹ See, e.g., Green, *supra* note 35.

⁴⁰ See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

⁴¹ GREVE, *supra* note 7, at 315.

Professor Greve, thus accepts the New Deal's expansion of federal commerce powers, but, also like Professor Greve, insists on imposing judicially enforceable limits on the expansion⁴²—including, most importantly, limiting the federal government's regulatory authority over noneconomic transactions.

Judge Friendly's anticipation of modern Commerce Clause jurisprudence is one main virtue of his *Erie* defense. The other is his use of the weight of his opponents' arguments against their position. Think of it this way: If the Founders and Justice Story were right about common law, and Justices Holmes and Brandeis were wrong, it likely has something to do with the fact that the common law is and must be, as we contend at length below, an integrated and comprehensive, albeit subsidiary, body of legal principles—a true *corpus juris* for determining prima facie the whole legal relationship between person and person. The power of Judge Friendly's one-paragraph symphony is that it appears to force adherents to traditional understandings of common law to sacrifice at least one strand in the bundle of common law attributes they likely regard as essential.

Say, for example, that the general common law as applied in federal courts simply need not encompass good samaritan doctrines, charitable immunity doctrine, or the like. But then the general common law becomes less than general in the sense of being less than comprehensive. Say instead the general common law can be truncated in application by constitutional concerns. But then, the integrated common law doctrines become, to that extent, disjointed, as well as restricted. Or else, say the general common law as applied by federal courts can be immune from congressional revision. But it then threatens to become superior, not subsidiary, to political law.

Judge Friendly's argument may indeed be one of stark simplicity, but that does not mean it lacks force. Judge Friendly concludes his constitutional discussion by graciously acknowledging that, while *Erie*'s critics may well have their points, *Erie* in his view provides “a far better fit with the scheme of the Constitution” than its critics would acknowledge.⁴³ The same could be said of Judge Friendly's analysis. It provides a far better defense of *Erie* than many critics appreciate, raising legitimate concerns about the authority of federal courts to apply a true and comprehensive body of general common law.

Nonetheless, even in this nuanced defense of his mentors' handiwork, it is fair to say that Judge Friendly overestimated the virtues of *Erie*. The problem lies not so much with Judge Friendly's understanding of the scope

⁴² See Robert R. Gasaway, *The Upside-Down Constitution* by Michael S. Greve, ENGAGE, May 17, 2012, at 1 (book review), available at www.fed-soc.org/publications/detail/print/the-upside-down-constitution-by-michael-s-greve (noting that Professor Greve “defends the New Deal's most essential achievements” while criticizing the New Deal for inverting the Constitution's logic).

⁴³ Friendly, *supra* note 22, at 298.

of Congress's authority under the Commerce Clause, but rather with Judge Friendly's failure, together with generations of jurists, to appreciate the latent wisdom of *Swift v. Tyson*.

II. THE LATENT WISDOM OF *SWIFT*

The essential operations of the *Swift* regime of general common law are familiar to all and easy to summarize. From the early 1800s until 1938, in cases in federal court involving diversity jurisdiction, and in the absence of a governing statutory command to the contrary, federal courts decided cases based on "general common law." The law was "common law" in the sense that it was "fashion[ed]" by courts themselves using common law reasoning and common law decisional techniques.⁴⁴ The law was "general law" in the sense that it was not rooted in the preferences or policies of any particular sovereign.⁴⁵ The key features were *first*, that the judicial institution pronouncing common law principles be impartial, in the sense of not overtly prone to favor one or the other party, either as individuals or as representatives of broader interests; *second*, that the pronouncing institution be competent, in the sense of knowing the common law tradition and the techniques employed in upholding and extending it; and *third*, that it be immediately as well as regularly engaged in rendering binding resolutions for real-world disputes. So long as these loose but recognizable criteria were met, decisions from far-flung ends of the globe could be—and often were—accepted as relevant (if not decisive) indicia of true principles of law governing disputes in American courts between American citizens involving facts arising wholly on American soil.

This familiar encapsulation, while all true, understates the importance of several latent elements of the *Swift* regime that are critical to assessing its continuing plausibility as a competitor to *Erie*. The most important of these elements are as follows.

First, important textual evidence supporting Justice Story's interpretation of the Federal Rules of Decision Act in *Swift* is to be found hidden in the *Erie* opinion itself. Although this textual evidence further confirms that *Erie*'s statutory ground was untenable, it serves more importantly as evidence of the Founders' understanding of the nature of common law and its role in the constitutional structure.

Second, notwithstanding *Erie*'s advocates' withering criticisms of *Swift* as enabling forum shopping, one of *Swift*'s foremost attractions is its

⁴⁴ See *Am. Elec. Power Co. v. Conn.* 131 S. Ct. 2527, 2535 (2011) (quoting Friendly, *supra* note 22, at 421–22 (noting that federal courts "may fill in 'statutory interstices' and, if necessary, even 'fashion federal law'").

⁴⁵ For a more detailed description, see Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013).

elegant deployment of a second-mover counteradvantage offsetting the first mover's usual forum-selection advantage in litigation. Given the forum-selection advantages inherent in any legal system that simultaneously includes dual sovereigns, a right to trial by jury, and a presumption in favor of a plaintiff's initial choice of forum, overlooking *Swift*'s offsetting advantages for the second mover was a serious error on the part of *Swift*'s critics.

Third, together with all jurists of the era, *Erie*'s advocates overlooked or misunderstood *Swift*'s latent structural assumptions regarding the sources and potency of state law, general common law, and federal statutory law. As we hope to show, those assumptions have since proven both more congruent with the Constitution and more workable in practice than the *Erie* regime that displaced them.

A. *Erie*'s Textual Evidence Supporting *Swift*

Interpreting the Federal Rules of Decision Act in *Swift*, Justice Story relied on the statute's plain meaning, emphasizing that its reference to the "laws of the several states" in the plural was meant to refer to the "positive statutes of the state, and the construction thereof adopted by local tribunals."⁴⁶ According to *Swift*, the Rules of Decision Act did not apply to "questions of a more general nature, . . . especially to questions of general commercial law."⁴⁷ Significantly, Justice Brandeis's *Erie* decision offers no response to *Swift*'s textual analysis. And, as noted above, Justice Friendly abandons any defense of *Erie* on statutory grounds.

Part of the reason Justice Brandeis failed to engage in meaningful textual analysis of the Rules of Decision Act lies hidden in the *Erie* opinion itself. In a portion of the opinion criticizing *Swift*, Justice Brandeis cites John Chipman Gray's classic, *The Nature and Sources of Law*.⁴⁸ But Gray's book provides a fascinating kernel of support for *Swift*'s statutory interpretation as against *Erie*'s. Gray recognized that the "meaning of 'Law,' when preceded by the indefinite, is to be distinguished from that which it bears when preceded by the definite, article." As Gray explained, "A law ordinarily means a statute passed by the legislature of a State." In contrast, "'The Law' is the whole system of rules applied by the courts."⁴⁹ This same distinction was recognized in a slightly different form by the Supreme Court in *Sprietsma v. Mercury Marine*.⁵⁰ There, the Court interpreted the express preemption provision in the Federal Boat Safety Act of

⁴⁶ *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

⁴⁷ *Id.* at 18–19.

⁴⁸ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 18–19, 85–86 (1909).

⁴⁹ *Id.* at 85–86, 107 ("A law is a formal general command of the State or other organized body; the Law is the body of rules which the courts of that body apply in deciding cases.")

⁵⁰ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002).

1971, which applied to “a [state or local] law or regulation.”⁵¹ The Court held that the provision did not encompass common law claims because “the article ‘a’ before ‘law or regulation’ implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law.”⁵²

These principles are also relevant to interpreting the Constitution’s Supremacy Clause, which refers, in the plural, to “the *Laws* of the United States.”⁵³ By referring to “laws” (plural), the Supremacy Clause refers to the group of positive Congressional enactments, not to the singular and integrated body of general common law. As scholars have recognized, before *Erie*, the common law applied by federal courts sitting in diversity under the *Swift* regime did not preempt state law because a federal judicial decision was not a “federal law”; it was “merely the federal judge’s interpretation of the principles constituting the distinct field of common law.”⁵⁴ In other words, before *Erie*, the general common law was subordinate to state statutory law,⁵⁵ a result grounded ultimately in the plural usage (“the *Laws* of the United States”) found in the Supremacy Clause.

Justice Brandeis’s *Erie* decision overlooks this interpretive evidence drawn from *Swift*, Gray, and the Constitution. But even more significantly, Justice Brandeis’s opinion is forced by the logic of its argument to recast—slightly but tellingly—the language of the Rules of Decision Act. The Rules of Decision Act states as follows:

The laws of the several States, except where the Constitution, treaties, or statute of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.⁵⁶

⁵¹ *Id.* (alteration in original).

⁵² *Id.*

⁵³ U.S. CONST. art. VI, cl. 2 (emphasis added).

⁵⁴ Larry Kramer, *The Lawmaking Power of Federal Courts*, 12 PACE L. REV. 263, 283 (1992); see also William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 (1984) (demonstrating that state courts were not obligated to follow federal decisions construing the “general common law” under the *Swift* regime).

⁵⁵ In *Erie*’s wake, that has changed. See Friendly, *supra* note 22, at 405 (“*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum . . .”). As Larry Kramer has explained, “*Erie*’s real significance is that it represents the Supreme Court’s formal declaration that” the traditional “view of the common law (with all its implications for our understanding of law in general) is dead, a victim of positivism and realism.” Kramer, *supra* note 54, at 283; see also *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 314 (1955) (“States can no more override such judicial rules . . . than they can override Acts of Congress.”).

⁵⁶ Federal Judiciary Act of 1789 § 34, 28 U.S.C. § 725 (2013) (emphasis added).

As recast by Justice Brandeis, however, this statutory text becomes the following:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.⁵⁷

Almost through an absence of mind (or perhaps a sleight of hand), Justice Brandeis's formulation importantly alters the meaning of the statutory text it paraphrases. First, the Brandeis formulation transmutes the word "laws" (plural) of the statute into "law" (singular) for purposes of the opinion. But as Justice Brandeis ought to have recognized, whereas the plural statutory language—"laws of the several states"—is most naturally read to refer to the collective group of each state's positive laws, it is awkward and unnatural to read the statutory term "laws" as referring to and encompassing a unitary body of "common law."⁵⁸ To be sure, the general common law was typically received into state law via a statute or constitutional provision. But such positive enactments, while they might provide rules of decision for state courts, could not be read constitutionally or by their terms to apply to cases in federal court. Put in terms of the Rules of Decision Act, federal court cases would not have been "cases where" such state incorporation statutes would properly "apply." It is difficult to see how, especially after *Swift*, *Gray*, and the Supremacy Clause, Justice Brandeis could have overlooked this important interpretive evidence.

Second, Justice Brandeis's recasting omits the statute's reference to treaties. This omission, while perhaps an oversight, is nonetheless of interest because the international law of both the Founding era and Justice Brandeis's day is akin to common law in that it was largely declared by judges.

Third, in using one and the same verb "declare" to encompass both the legislative act of framing and enacting a statute and the judicial act of fashioning common law doctrine, Justice Brandeis's recasting implicitly equates the legislative and judicial functions. But surely this is—if not an outright solecism—then at least a point to be proved rather than a postulate to be assumed. Legislatures (unlike courts) do not "declare" law—they frame it as they please within constitutional limitations and enact it. In contrast, common law courts can declare an extension of, or even a reformation

⁵⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

⁵⁸ Nelson, *supra* note 7, at 957 (discussing theory advanced in WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, 131 (Wythe Holt & L.H. LaRue eds., 1990)). This interpretation is more persuasive, in our view, than the suggestion that § 34's use of the phrase "the laws of the several states" referred to "American law generally" rather than "the law of a particular state."

of, preexisting doctrine. But they cannot, as Judge Posner reminds us, endow specific verbal formulations with the force of law.⁵⁹

B. *Swift's Second-Mover Counteradvantage*

Swift made a virtue out of the necessity created by the Framers' decision to split the atom of sovereignty. In any dual-sovereign system with concurrent and overlapping legislative jurisdiction, there is bound to be some lack of uniformity and opportunities for forum shopping. Moreover, these opportunities are especially inevitable in a system, like our system, that guarantees a right to trial by jury and presumptively accepts a plaintiff's choice of forum.⁶⁰ Under *Swift*, however, there were in fact *diminished* opportunities for forum shopping as compared to a regime, like England's, having multiple forums under a single sovereign. *Swift* accomplished this miracle by creating a second-mover counteradvantage to offset the first-mover advantages inherent in any dual-sovereign, jury-based, plaintiff-initiated system.

To see the advantage of being a second mover under *Swift*, it is important to see how the *Swift* regime functioned, together with rules governing diversity jurisdiction and removal to federal court, as a system for handling choice-of-law disputes between citizens of different states.⁶¹ If, under *Swift*, a plaintiff sued in its home state's courts and the defendant declined to remove, the common law of the plaintiff's home state would govern by acquiescence of both parties. If, on the other hand, a plaintiff sued in the defendant's home state's courts, the defendant could not remove; hence, the common law of the defendant's home state could be said to govern by acquiescence of both parties. Finally, if the parties could not agree in this fashion that their case ought to be tried either in one or the other state's court system, the dispute would wind up in federal court (either by original filing or removal) and be governed by general common law.

This implied bargaining over the version of common law to apply—that of the plaintiff's state, the defendant's state, or the federal courts—served in the *Swift* regime to counteract the inherent first-mover advantages that necessarily accrue to a plaintiff that gets to choose where to litigate. Absent the defendant's acquiescence, a plaintiff in the days of *Swift* was entitled to select *either* the location (and hence the jury pool) for his trial *or* the substantive common law deviations from the federal baseline that would apply to his case—but not both. If a plaintiff chose the locational and jury-pool advantages of suing in the courts of its home state, the defendant

⁵⁹ Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187 (1986-1987).

⁶⁰ See Nelson, *supra* note 7, at 926.

⁶¹ For a more extended discussion, see Gasaway & Parrish, *supra* note 12, at 236-41.

would then be entitled to the doctrinal advantages of choosing whether to apply state common law (by remaining in state court) or general common law (by removing to federal court). Alternatively, if a plaintiff were willing to eschew locational and jury pool advantages and file in the defendant's state, the plaintiff could then choose between either general common law (by filing in federal court) or the defendant's state common law (by filing in the defendant's state courts and thus precluding removal). Either way, the plaintiff could deploy its first-mover advantage to choose either the jury pool or the substantive departures from the general common law baseline, but not both. A plaintiff could buy locational advantages but only at the price of influence over which body of common law would apply.

In short, under *Swift*, general common law provided a baseline of substantive law.⁶² Absent the parties' consent, the only law that could apply between citizens of different states was general common law as declared by the federal courts. Moreover, even with the parties' consent, departures from general common law tending to favor one side would—through litigation move and countermove—be offset by locational and jury pool advantages favoring the other side.

This careful balance is consistent with and reinforces the Constitution's commitments to an integrated national economy and the protection of individual citizens from state-law-based discrimination. Indeed, a principal purpose of federal diversity jurisdiction was to ensure that citizens receive equal justice by ensuring that *federal* courts would either choose or develop the law to govern interstate disputes.⁶³ As Hamilton explained in *Federalist No. 80*, diversity jurisdiction was thought to be necessary to achieve "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled."⁶⁴ Cases between citizens from different states were thus expected to land in the federal courts "[t]o secure the full effect" of the Privileges and Immunities Clause "against all evasion and subterfuge."⁶⁵ The *Swift* regime implemented these constitutional commitments.

Among *Erie*'s most fundamental problems is that it disregards these commitments, eliminates *Swift*'s calibrated balance, and gives all advantages to plaintiffs. Far from disciplining would-be forum shoppers, as Justice Brandeis had hoped it would, *Erie* opened the forum-shopping floodgates.⁶⁶ Of course, part of the reason has nothing to do with *Erie*. Since *Erie*, and even since Judge Friendly's essay, the ethical regulations governing law-

⁶² *Swift v. Tyson*, 41 U.S. 1 *passim* (1842).

⁶³ See Henry Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 498–99 (1928); Laycock, *supra* note 15, at 266; see also William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 *passim* (1963).

⁶⁴ THE FEDERALIST NO. 80 (Alexander Hamilton).

⁶⁵ *Id.*

⁶⁶ GREVE, *supra* note 7, at 372–73.

yers' compensation and the ability of lawyers to advertise for clients have both dramatically changed.⁶⁷ More than ever, skilled lawyers are able to seek out clients, contract for large fees, and file anywhere in the country at the press of a button. But with all that said, *Erie*'s conflicts-of-law doctrine has greatly expanded the opportunities for forum shopping.

Some scholars have attempted to defend *Erie* on a theory that the decision merely replaced "vertical" forum shopping with "horizontal" forum shopping, and that such horizontal forum shopping is arguably preferable because "[t]o some extent, horizontal disuniformity is inevitable in a federal system—indeed, it is the *essence* of a federal system."⁶⁸ But this line of argument is hard to follow. When it comes to discouraging opportunistic forum shopping, limiting shoppers' choices to two forums is much better than offering up fifty.⁶⁹ Under *Swift*, plaintiffs had an opportunity to "shop" for the benefits of either federal or state law, which meant that citizens were potentially subject to dual systems of substantive law.⁷⁰ Under *Erie*, the problem is far worse. Litigants often choose freely among courts located in fifty states in a hunt to obtain particularly favorable governing law. Although some amount of vertical disuniformity is inherent in our constitutional structure, reflecting the Framers' decision to "split the atom of sovereignty,"⁷¹ nothing in the constitutional scheme requires that a resident of one state face the uncertainty of being potentially subject to the laws of every other state.

Under *Swift*, then, the problem of forum shopping was not as significant as is often supposed.⁷² And to the extent problems did exist, Congress might easily have addressed the most obvious manipulations of federal diversity jurisdiction⁷³ by overriding the then-existing doctrine for determining citizenship of corporations, as it later did when it amended the diversity statute to make corporate citizenship depend on a corporation's principal place of business.⁷⁴

⁶⁷ Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 HARV. J.L. & PUB. POL'Y 953, 961 (2002).

⁶⁸ Young, *supra* note 19, at 45 (emphasis in original).

⁶⁹ See Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 980 n.60 (1996) ("*Erie* sacrificed horizontal uniformity among different courts in the federal system in favor of vertical uniformity between federal and state courts in the same state.").

⁷⁰ Nelson, *supra* note 7, at 966 (quoting Hart, *supra* note 14, at 505).

⁷¹ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

⁷² GREVE, *supra* note 7, at 229; see also Sherry, *supra* note 7, at 138 ("Despite a perception that federal law was more favorable to corporate interests, there were many cases (including *Erie* itself) in which the opposite was true.").

⁷³ The most noted pre-*Erie* example is *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 529–30 (1928).

⁷⁴ Nelson, *supra* note 7, at 961 n.122 (explaining this point in more detail); see also Hertz Corp. v. Friend, 559 U.S. 77, 97 (2010) ("a major reason for the insertion of the 'principal place of business' language in the diversity statute" was to address "jurisdictional manipulation").

Indeed, as Professor Greve rightly points out, *Erie* itself is a good example of how forum shopping under the *Swift* regime parceled out advantages to both sides of a lawsuit.⁷⁵ The plaintiff in the *Erie* case, Harry Tompkins, left his hometown in Hughestown, Pennsylvania and traveled to the big city of New York to file his suit in federal court. He thus gave up a hometown jury and other locational advantages in order to avail himself of favorable substantive law—both the general common law and the interpretive gloss to be obtained in the Court of Appeals for the Second Circuit. Under *Swift*, Erie Railroad, as a corporation of New York, was defending on home turf and had no basis to object to litigating in New York or to being subject to the requirements of general common law. Viewed seventy-five years hence, nothing is more remarkable than the talk among *Erie*'s proponents—apparently sincere and certainly widely indulged in—that *Erie* would provide an antidote for forum shopping.

C. *Swift's Latent Structural Assumptions*

As we have explained at greater length in *The Problem of Federal Preemption: Toward a Formal Solution*,⁷⁶ there is an important, often underappreciated, logical and formal distinction between legal rules and legal standards.⁷⁷ Legal rules govern conduct, pure and simple. They are thus forward looking and appropriate for territorial-based regulation. Rules seek to prescribe or proscribe the metes and bounds of future conduct that has yet to occur. In contrast, legal standards govern conduct defined in terms of a *relationship*. Standards can therefore apply to a past or completed transaction as well as to future action.

This logical distinction between rules and standards is important for present purposes because while statutory commands may be framed either as rules or standards, *every* common law doctrine must be stated in the form of a legal standard. Applying the common law means first identifying a standard of conduct that two people would choose to govern their relationship behind a veil of ignorance, without knowledge of any particulars as to the actual persons, time, place, or even specific conduct involved.⁷⁸ Fashioning common law doctrine therefore means identifying legal principles that are neutral and apolitical, but nevertheless definite and non-arbitrary, for purposes of resolving real-world disputes.

⁷⁵ GREVE, *supra* note 7, at 223–24, 229–30.

⁷⁶ See Gasaway & Parrish, *supra* note 12, at 225–34.

⁷⁷ See generally St. Thomas Aquinas, *Question 96, Article 2*, in TREATISE ON LAW 131 (R.J. Henle, S.J. trans., University of Notre Dame Press 1993) (noting that law must be “framed as a rule or measure of human acts”).

⁷⁸ See generally GREVE, *supra* note 7, at 25–26 (describing how institutional rules are formed behind a veil of ignorance, using the example of a hypothetical squash, golf, and bridge club).

The common law is different in kind, not merely in origin, as compared to political law. First, because the corpus of common law standards must be adequate to define a legal relationship between any two people for all past time, all future time, and every conceivable course of conduct, the common law must be *comprehensive*. Second, because the common law is by nature neutral, it must form an *integrated* corpus of legal principles derived logically or by analogy from unifying assumptions (either express or implied) that are themselves neutral; it may not simply anthologize discrete pronouncements for varying occasions. Finally, because the common law is by nature a law of legal relations (not of lawful conduct), it draws its binding character from only one-half of a sovereign's authority—the authority over persons as opposed to territories. The common law has thus always been understood as *subsidiary* to political law, which draws authority from the full power of the sovereign.⁷⁹

The critical, often overlooked, point is that differences between common law and political law are not fundamentally about institutional origins. The almost obsessive focus on institutional sources in the *Erie* scholarship—on whether a legal pronouncement comes from a court of law, a legislature, a constitutional convention—is largely attributable to our American-centric point of view. We forget too often that the House of Lords in England was historically both the upper chamber of the parliament and an ultimate oracle of the English common law.⁸⁰ But there is no contradiction in one and the same body deliberating—at different times and in different modes—over both the political question of whether to enact a statute and the adjudicatory question of how to fashion a common law doctrine.

Before *Erie*, these fundamental distinctions between general common law and positive statutory and customary laws formed an essential (if often implicit) backdrop to the federal courts' unending task of integrating general common law standards with the states' authority over economic regulation. In *Swift*, the Supreme Court interpreted the Federal Rules of Decision Act⁸¹ to require federal courts to apply the statutory and customary laws of the appropriate state in diversity cases but to disregard state court judgments in matters of "general common law." As noted above, Justice Story

⁷⁹ See Fletcher, *supra* note 54, at 1517–18 (quoting P. Du Ponceau, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 88 (Philadelphia 1824)) ("[The common law] was a general system of jurisprudence, constantly hovering over the local legislation and filling up its interstices. It was ready to pour in at every opening that it could find. Like the sun under a cloud, it was overshadowed, not extinguished, by the local laws It burst in at the moment of the adoption of the Constitution of the United States, and filled up every space which the State laws ceased to occupy.")

⁸⁰ See Constitutional Reform Act, 2005, c. 4, pt. 3, available at <http://www.statutelaw.gov.uk/documents/2005/4/ukpga/c4/part3> (establishing the Supreme Court of the United Kingdom); Constitutional Reform Act, 2005, S.I. 2009/1604 (bringing into force the provisions of the Constitutional Reform Act of 2005).

⁸¹ Codified at 28 U.S.C. § 1652 (2012).

cogently reasoned that the Rules of Decision Act's reference in the plural to "laws of a state" referred only to "the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws."⁸² Justice Story recognized—knew in his bones—that a *corpus juris* of the common law was of necessity an integrated whole. Justice Story thus read the 1789 Rules of Decision Act's usage of "laws" (plural) to refer only to discrete positive enactments and customary practices, not to the unitary common law. Both then and now, lawyers and judges would reflexively refer to the common law, not in the plural, but as a singular⁸³—"under *the* common law," not "under the common laws."⁸⁴

A second touchstone for conflicts-of-law analysis is recognizing that the doctrines of the general common law are subsidiary to enactments of political law, even where it is the common law of the United States and the political law of a constituent state that are in issue. The conventional wisdom holds that common law yields to statutory law because common law is declared by judges, and statutes are enacted by legislators. But this wisdom, such as it is, fails to account for the fact that federal administrative pronouncements can preempt state legislative enactments, but federal common law rulings under the *Swift* regime did not.⁸⁵ Under *Swift*'s legal hierarchy, state statutes rightly ranked above general common law doctrines.⁸⁶

We regard this hierarchy as not only enjoined by the Supremacy Clause but also logically entailed by the fact that, at both the state and federal levels, the full sovereign authority includes authority over both persons and territory,⁸⁷ while common law doctrines are grounded in only the personal aspect of sovereignty.⁸⁸ Indeed, modern social scientists have come to believe that primitive forms of common law may have been rooted in

⁸² *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

⁸³ See also Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process Of Law,"* 77 MISS. L.J. 1, 105 (2007) (stating that "in framing-era usage 'laws' typically denoted statutes, while common law was denoted as 'law'").

⁸⁴ David Perry, *How Did Lawyers Become Doctors?*, N.Y. ST. B. ASS'N J., June 2012, at 20, 24 (noting that "B.L." degree, initiated at William and Mary in 1792, used the singular "of law" (*legis*) rather than the plural "of laws" (*legum*, as in LL.B.) to emphasize that the common law, and no civil law, was taught).

⁸⁵ See, e.g., *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152–54 (1982).

⁸⁶ See Fletcher, *supra* note 54, at 1513, 1533–34. But see *Watson v. Tarpley*, 59 U.S. (18 How.) 517, 521 (1855).

⁸⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) ("[A] state is an entity that has a defined territory and a permanent population . . .").

⁸⁸ This is not to say, of course, that territorial considerations play no important role in the application of the common law. A foreigner traveling in England may subject himself to the English common law *as if* he were an Englishman. Similarly, Professor Laycock has forcefully argued that the Privileges and Immunities Clause of the American Constitution requires that an out-of-state traveler have adjudicatory rights *as if* he were a citizen of the state he visits. See Laycock, *supra* note 15, at 327.

group customs not linked to particular territories.⁸⁹ A common law decision thus draws force from half of the federal government's authority, while a state statute draws from the full authority of the state.

Understood from this perspective, the *Swift* regime worked to ensure that the conduct of interstate commercial enterprises could be regulated through the multiple rules that might from time to time be enacted by the states in which such conduct occurs, while the enterprise's legal relationships would be governed exclusively by the general common law as fashioned exclusively by the federal courts and courts in the enterprise's home state. Although the federal courts sitting in diversity were required to apply state statutory law, they had no obligation to defer to state understandings of the common law as declared by the state courts, especially in cases raising "questions of general commercial law." A state wishing to regulate the commerce conducted by interstate enterprises could therefore do so, but only by enacting prospectively applicable statutory law—in the form of either a rule or standard—that would operate solely within the state's own territory. On the other hand, interstate enterprises would still have to confront the possibility of being found liable under retroactively applicable legal standards, but only those applied in the federal courts and the courts of its home state. Unlike today, when any state's common law may subject an interstate business to retroactive liability anywhere and at anytime, the *Swift* regime ensured interstate enterprises could at least count on being subject to at most two sets of potentially retroactive legal standards. One wonders how the latent wisdom of such arrangements could be overlooked.

III. FIRST STEPS TOWARD *ERIE*'S DEMISE

Like Judge Friendly's defense of *Erie*, our case for curtailing *Erie* is of rather stark simplicity. It consists of two propositions.

First, there can be no rule of law for interstate businesses until *Erie* is thoughtfully reassessed and significantly curtailed. So long as *Erie* is in ruddy good health, forum shopping by plaintiffs for lawsuit-friendly venues will remain a problem. We further discuss this point below.⁹⁰

Second, *Erie* was based on a mistake, and we now know better. Those tempted to doubt whether the *Erie* generation really did have a crisis of confidence in the reality of the general common law should reread Profes-

⁸⁹ VERNON L. SMITH, RATIONALITY IN ECONOMICS: CONSTRUCTIVIST AND ECOLOGICAL FORMS 193 (2009); see generally Vernon L. Smith, *Exchange, Specialization, and Property as a Discovery Process*, 43 HISTORY OF POL. ECON. 317 (2011) (describing how legal norms are formed by groups, even absent external enforcement of property rights, to allow wealth creation through production, specialization, and exchange).

⁹⁰ See *infra* Part III.B.

sor Gray's *The Nature and Sources of Law*. Still illuminating 100 years after publication, the book is suffused with a fallacy of the false dilemma—the idea that all human law (and most importantly the common law) must either be positively laid down by a lawmaker or else normatively binding from some point in the wide beyond. But we know today that neither is true. The doctrines of the general common law are neither confinable to courts' articulations of them nor assignable to a branch of deontology.⁹¹ The general common law is neither positive nor normative but presumptive. It is, in a word, a benevolent omnipresence on the ground.

A. *Our Divided Federal Courts*

Although the *Erie* opinion may no longer be convincing, and although the *Swift* regime has much to commend it, neither an immediate nor a complete embrace of *Swift* is in the cards. In the wake of *Erie*, and in light of continuing distress over judicial policymaking, a turn in the direction of a general common law for interstate commerce could occur only by careful degrees and within strict limits—and with eyes wide open as to how *Erie* has and has not affected our federal court system.

As an initial matter, by heralding and thus legitimizing the “new federal common law,” Judge Friendly effectively cabined *Erie* and preserved federal decisional law in multiple “areas of national concern,” including, for example, cases involving federal admiralty jurisdiction, disputes between states, tort claims against the United States, disputes over labor contracts affecting commerce, unfair competition law with respect to trademarks, the activities of interstate carriers, and defamation by multistate media.⁹² Judge Friendly thus definitively rejected the notion that federal courts are unequipped or constitutionally disabled from fashioning decisional doctrines. He heroically ensured that a problem identified by Professor Greve with the so-called judicial federalism rationale for *Erie*—namely, that it proves too much and would devastate large swaths of settled doctrine⁹³—is largely of academic as opposed to practical concern.

Even in its heartland, however, *Erie* has curtailed courts' discretion much less than one might suppose. Under *Erie*, just as much as under *Swift*, courts' inherent authority operates with decisive importance across multiple dimensions in practically every adjudicated case. American courts, taken collectively, continue to enjoy an inherent power to identify substantive standards of common law (subject to legislative override); an inherent power to resolve conflicts of law (subject to legislative override); and an inherent power to manage the proceedings in their own courtrooms

⁹¹ Posner, *supra* note 59, at 179.

⁹² See generally Friendly, *supra* note 22.

⁹³ GREVE, *supra* note 7, at 375.

(subject to legislative override). Further, because legislative commands regarding substantive law, conflicts of law, and procedural law must themselves be reconciled, courts retain an ultimate responsibility for bringing together court-fashioned and legislative rules to produce real-world outcomes in contested cases. The *Erie* revolution neither did nor could eliminate federal courts' common law powers, because unwritten patterns of judicial practice (whatever one calls them) must of necessity provide a foundation for supporting and a superstructure for integrating whatever rules a legislature provides for adjudicatory processes. None of this can or will change, at least so long as we enjoy a recognizably Anglo-American system of courts and a politically insulated judiciary.

What the *Erie* revolution could and did accomplish was to diminish federal courts' supervision of the national economy. We are tempted to say that, for all the concerns about *Erie* undermining constitutional structure, *Erie* limited the judiciary's power over interstate commerce by using the very strategy the Constitution itself uses to limit congressional power over interstate commerce—divide and hobble. Today, as in 1938, federal courts are obliged to make common law and conflicts-of-law rulings; it is just that today those rulings must respect a division of authority with the courts of the fifty states. That division has had an (intended) effect of draining the federal judiciary of doctrinal aspirations in areas of law of vital concern to businesses, and it has had an ancillary, if not unforeseeable, effect of draining the same fields of some substantial doctrinal coherence. The federal courts today exert less influence over the national economy than previously, and one seldom finds modern-day Judge Friendlies writing off the bench about topics of general law as they concern interstate businesses.⁹⁴

If this is success, it has been bought at a dear price in the coin of turbocharged forum shopping. To be sure—and as noted earlier⁹⁵—neither Justice Brandeis nor even Judge Friendly could have foreseen later developments like changes in ethical rules governing lawyers' client solicitations or the multiplication of contingency fees.⁹⁶ Although it was *Swift's* demise that provided opportunities for forum shopping, it was these subsequent developments (not wholly bad) that supplied means and motives. But the fact remains that we live in a world in which Judge Friendly's success in

⁹⁴ See, e.g., Henry J. Friendly, *Air Law*, 77 HARV. L. REV. 582, 582–86 (1964); Henry J. Friendly, *The Federal Administrative Agencies: The Need For Better Definition Of Standards*, 75 HARV. L. REV. 1055, 1055–97 (1962); Henry J. Friendly, *The Common Law Tradition—Deciding Appeals*, 109 U. PA. L. REV. 1040, 1040–56 (1961). Notable exceptions are several of the judges on the U.S. Court of Appeals for the Seventh Circuit.

⁹⁵ See *supra* Part III.

⁹⁶ See generally Gasaway, *supra* note 67.

cabining *Erie* is no longer enough. Under the current litigation system, it can seem as if almost anything goes.⁹⁷

The only possible solution given this backdrop is a gradual approach to a neo-*Swift* regime. Such a rapprochement, as we envision it, would retain the structure that justified and upheld the original *Swift* doctrine—while purging the original of the ignorance, excesses, and politicization that brought it down. Some key elements of this proposed reform are described in the remainder of this article.

B. *Reinvigorated Common Law Baselines*

Reformist conflicts-of-law scholars, like Professor Laycock, have proposed territorial-based rules as a solution to the conflicts-of-law confusion found in federal and state courts alike under the *Erie* regime. Professor Laycock's proposal, if we understand it correctly, advocates a new set of mutually exclusive territorial rules that would settle conflicts-of-law problems.⁹⁸ The proposal has much to commend it, but without more, we do not see how it can work.

Under *Swift*, courts could readily identify a common law standard to apply to a dispute before proceeding to consider the potentially governing, territorially based, positive laws and deciding which, if any, should displace that standard. But under *Erie*, the possibility of such a simple first step is foreclosed. Or rather, *Erie* ensures that choosing a common law baseline is *itself* a complex problem in conflicts of law, with multiple states' common law jurisprudence as eligible alternatives. This situation is untenable precisely because there is no way to specify in advance a conflicts-of-law rule for identifying which state's common law will form the adjudicatory baseline in all possible circumstances. Professor Laycock, to his credit, identifies difficult cases for choosing territorial conflicts-of-law rules and admits their difficulty. But this problem of the unprovided-for case, which is otherwise unsolvable, disappears so long as there is a tolerably just set of legal standards serving as an all-purpose net for catching cases no legislature considered in advance.

This is precisely what the general common law used to do. A signal advantage of *Swift* was its allowance for the fact that, in certain cases, no territorial rule will sensibly apply; hence, there will always be need for neutral common law standards defining a tolerably just substantive relationship between plaintiff and defendant in the cases that no legislature has provided for. With such a baseline readily at hand, courts under *Swift* were able to

⁹⁷ Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 131 (1993) (explaining that “*Erie* and *Klaxon* create grotesque problems in multiparty actions such as mass-tort cases”).

⁹⁸ Laycock, *supra* note 15, at 337.

adjudicate according to a two-step process. As a first step, a court could consider the relationship involved in a dispute and apply a presumptive common law standard. As a second step, because conduct between people occurs within some territory, the court could consider whether a territorial rule should trump the presumption and apply the appropriate rule (if any) to determine the outcome of the case.

Critically, under *Swift*, but not *Erie*, the body of conflicts-of-law rules did not have to arrive at a unique and exhaustive set of conflicts-of-law solutions. Under *Swift*, but not *Erie*, a fully permissible answer in any case was that no positive law rule applied. Only under *Swift*, not *Erie*, does arriving at such an answer mean that justice will be served through application of a presumptively just common law standard—not left to perish in a legal void.

C. *Congruence with Constitutional Doctrine*

Professor Laycock has suggested that developments in the law “render[ed] the *Swift v. Tyson* solution inconsistent with the rest of the constitutional structure.”⁹⁹ In fact, however, the problems with the *Swift* regime were not at all structural, but practical, doctrinal, and jurisprudential.

On a practical level, the *Swift* regime was subject to increasing criticism because Congress failed to address the most obvious manipulations of federal diversity jurisdiction. But on a larger doctrinal and jurisprudential level, the jurists of the day were simply incapable of keeping pace with social and economic change, as the Supreme Court “extended the principle of *Swift* to an ever-widening range of state common law.”¹⁰⁰ As Professor Greve emphasizes, *Swift*’s reach became problematic in light of “progressive economic integration, industrialization, and sectional divisions among states.”¹⁰¹ Professor Laycock rightly describes these same developments as involving an “increasing diversity of state law, the erosion of the line between local and general law in an integrated economy, and disagreement between state and federal courts about the location of that line.”¹⁰²

These problems were indeed enormous, but overthrowing the constitutional structure was bound to create problems of its own. The true solution for such problems is to recognize and work around the fact that territorial-based formalisms will always eventually break down in the crucible of experience. Rather than maintaining *Erie* undiminished or effecting a jot-and-tittle restoration of *Swift*, what is needed today is a new jurispru-

⁹⁹ *Id.* at 281.

¹⁰⁰ GREVE, *supra* note 7, at 145.

¹⁰¹ *Id.*

¹⁰² Laycock, *supra* note 15, at 281.

dence that takes advantage of the post-1938 advances in doctrinal and jurisprudential understandings.

Consider, for example, the post-1938 advances in constitutional understandings as reflected in the *form* taken by constitutional doctrines. Under the Commerce Clause, the late 1930s and early 1940s saw the Supreme Court's definitive renunciation of old doctrinal formalisms in favor of a functionalist jurisprudence focusing on practical effects.¹⁰³ And in more recent decades the era has again turned, as Commerce Clause and other constitutional jurisprudence has moved beyond functionalism (doctrine stated as balancing-of-interests tests or purpose-and-effects tests) to new standards-based tests—a shift most evident perhaps under the Commerce, Free Exercise, and Establishment Clauses. The common feature in this modern doctrinal trend is that doctrine takes a form that avoids both formalism (is this activity manufacturing or commerce?) and functionalism (does the activity substantially affect commerce?) and embraces instead what might be called “foundationalism”—conceptual distinctions of real-world importance rooted in the constitutional structure (does this law regulate a preexisting voluntary transaction for value?).¹⁰⁴ In this fashion, the forms of the new constitutional law mimic those of the old general common law.

D. *A Final Caution and Riddle Solved*

A significant challenge in seeking to recover the latent virtues of *Swift* is that even *Erie* and *Klaxon* together are only part of a larger set of fundamental, contemporaneous legal reforms. Any effort at further reform must therefore account for a broad array of interconnecting elements in today's legal system.

To summarize what is obvious and well known, *Erie* revoked federal courts' licenses to fashion and apply general common law doctrines under the Diversity Clause only shortly before *Klaxon* largely renounced federal courts' authority to fashion and apply choice-of-law rules under the Full Faith and Credit Clause, which occurred at about the same time choice-of-law scholars (and then states) began abandoning the territorial formalisms of the Restatement (First) of Conflict of Laws, which in turn gathered steam only shortly after the first Federal Rules Committee merged law and equity

¹⁰³ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (distinguishing manufacturing that precedes commerce from interstate commerce itself); see generally *Wickard v. Filburn*, 317 U.S. 111 (1942) (allowing Congress to regulate entities that do not participate in interstate commerce if their activities affect interstate commerce).

¹⁰⁴ See generally Robert R. Gasaway & Ashley C. Parrish, *Structural Constitutional Principles and Rights Reconciliation*, in *CITIZENSHIP IN AMERICA AND EUROPE: BEYOND THE NATION-STATE?* 206, 219 (Michael S. Greve & Michael Zöller, eds. 2009) (discussing the “Supreme Court's tendency in a variety of doctrinal contexts to assume the presumptive legitimacy of government attempts to regulate future, private conduct”).

and otherwise streamlined rules of civil procedure. The upshot is multiple dimensions of roughly contemporaneous breaks with the past, all of which are of a piece.

In light of the vast scope of the *Erie* generation of reforms, further reform in the direction of *Swift* needs to proceed cautiously and by degrees. It is unrealistic to imagine federal courts reacquainting themselves with general common law all at once. But a good place to begin might be in the context of *Bivens*¹⁰⁵ actions—claims against federal officials for violations of federal constitutional rights.¹⁰⁶ In the *Bivens* context, courts have been confronted with difficult issues in applying judicially created remedies, determining whether those remedies are permitted depending on the existence of an adequate state remedy, and attempting to determine whether the *Bivens* cause of action should be extended to new areas of tort law.

Instead of continuing down such uncertain pathways, claims against federal officials for invasions of citizens' rights might more easily be evaluated against a baseline of general common law. In particular, in any *Bivens* action, a federal court might ask first whether the accused federal agent violated a general common law right and then, assuming so, whether the official enjoyed a lawful and constitutionally permissible immunity from suit. A notable advantage of choosing *Bivens* as a starting point for reacquainting courts with general common law is the weakness in the *Bivens* context of objections based on fears of judicial policymaking. Deducing citizens' substantive rights from the common law tradition as illuminated by modern jurisprudential conceptions of common law neutrality surely provides more sound and objective guideposts than does either looking to state law for the substance of federal rights or inventing such rights from a whole cloth spun from the Constitution.

Finally, careful attention to lessons learned from modern doctrine might also help solve Judge Friendly's question about the hypothesized common law tort immunity. Contrary to what Judge Friendly may have believed, his hypothetical does not require sacrificing one of the essential attributes of the general common law. To be sure, in contending as we do above that the general common law, unlike political laws, must be comprehensive, integrated, politically neutral, and legally subsidiary, we disqualify ourselves from relying on the too-easy answers to Judge Friendly's question. But even if one insists on traditional conceptions of common law, and even if one accepts that the commerce power does not extend to non-economic interstate transactions, there is no need to overthrow the general common law as a whole. In particular, there is no need to sacrifice the es-

¹⁰⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

¹⁰⁶ See generally Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013) (noting that courts have dismissed *Bivens* actions because Congress had not provided a remedy, even though a remedy would have been available at common law).

sententially comprehensive and integrated nature of the general common law, as fashioned in the federal courts.

For us, the key to solving the Friendly riddle is recognizing that, although common law must be subsidiary to and capable of being displaced by *some* legislative determination, it does not have to be subsidiary to the *same* legislative determination in all cases. Accordingly, to the extent parties need to know in advance what law applies to issues of charitable immunity, there is nothing stopping Congress from providing a conflicts-of-law rule designating which state's law of charitable immunity controls in various cases, plus expressly providing a presumption as to the applicable substantive rule in the absence of an authoritative legislative or judicial determination from the relevant state. In this fashion, an essential adjudicatory baseline would be set in place, state decisional authority would be preserved, and the invasion of state authority hypothesized by Judge Friendly would be avoided.

CONCLUSION

Jurists in the era of *Erie* did not know and could not have known what we know today about general common law. In *Erie*'s time, general common law was understandably feared by many as a brooding, omnipresent usurper of political law. If we see today that there is no reason why the general common law should not—without undue danger—fulfill its properly benevolent, confined, subservient, politically neutral, and essential adjudicatory role, it is because we have come a long way since 1938. Our hard-won confidence is owed to the remarkable jurisprudential advances made over the past seventy-five years. The task now, however, is to apply theoretical advances in practice. The path forward leads toward a modern general common law that departs equally from the excesses of the classical regime of *Swift* and *Erie*'s medieval interregnum. The path will be long but worth treading, and we propose *Bivens* as a safe and sure first step. We predict that taking this step will leave citizens safer, the law simpler, and our constitutional republic not imperceptibly reoriented in the right direction.

OFF THE TRACK OR JUST DOWN THE LINE? FROM *ERIE*
RAILROAD TO GLOBAL GOVERNANCE

Jeremy Rabkin *

INTRODUCTION

Almost from the outset, *Erie Railroad v. Tompkins*¹ was seen as a momentous case. Only a few years after it was decided, Justice Frankfurter described *Erie* as a decision which “did not merely overrule a venerable case. It overruled a particular way of looking at law” and so uprooted “pre-vailing views concerning the nature of law.”²

Six decades later, Harold Koh, then dean of the Yale Law School, applied this characterization to a very different case, the Second Circuit’s 1980 ruling in *Filártiga v. Peña-Irala*.³ Professor Koh thus suggested that *Filártiga* was the modern counterpart of *Erie*. *Filártiga* was certainly a remarkable case; it held that federal courts could supply remedies for human rights abuses perpetrated by foreign officials against their own citizens in their own nations. In effect, it opened American courts as forums to litigate human rights abuses from all over the world.

Filártiga’s venture into international diplomacy might seem a long way from the mundane accident claim that launched *Erie*. *Filártiga* might seem even further from *Erie* in other ways. *Erie* renounced the authority of federal courts to displace state-court doctrine in common law disputes involving citizens of different states in the United States. *Filártiga* embraced international human rights law as a body of law binding on all courts in the United States while asserting federal court jurisdiction over human-rights disputes throughout the world.

Yet in decades of ensuing debate about the *Filártiga* precedent, *Erie* has remained a touchstone for scholars on both sides. *Erie* also figured prominently on both sides when the Supreme Court addressed the *Filártiga* line of cases in its 2004 ruling in *Sosa v. Alvarez-Machain*.⁴ Even the Court’s 2013 ruling in *Kiobel v. Royal Dutch Petroleum*,⁵ which restricted the reach of *Filártiga*, maintains the terms of post-*Filártiga* and post-*Erie*

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¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

² *Guaranty Trust Co. v. York*, 326 U.S. 99, 101–02 (1945).

³ Harold Hongju Koh, *Filártiga v. Peña-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, in *INTERNATIONAL LAW STORIES* at 45 (John E. Noyes et al. eds., 2007).

⁴ 542 U.S. 692 (2004).

⁵ 133 S. Ct. 1659 (2013).

debates. The globalist visions of *Filártiga* and its progeny derive from the jurisprudential premises of *Erie*.

Erie has been subject to much interpretation and debate over the past seventy-five years, but most of it focused on technical questions of civil procedure. Commentators have focused on the precise holding, while tending to overlook the insistent rhetoric of the opinion regarding the proper grounding of law in general. In kicking aside the premises of earlier reasoning, *Erie* made very different and very strange perspectives on law seem almost reasonable. I hope to illustrate the point by tracing the trajectory from *Erie* to the vision of global human rights law in the twenty-first century. The implications of that grandiose vision have prompted some sober second thoughts from the Supreme Court, but no willingness to rethink its starting point—*Erie v. Tompkins*. What links *Erie* to the fumbling of recent rulings on international human rights law is a common refusal to embrace common law ordering as a solid foundation for judicial decisions. The Court's hesitant engagements with international human rights law show where that confusion can lead.

The argument proceeds as follows: Part I sketches the main links in the chain of precedents and scholarly landmarks running from *Erie* to recent Supreme Court rulings on international human rights claims in U.S. courts. In brief, the repudiation of general federal common law in *Erie* pushed courts (on the urging of prominent commentators) to see cases involving foreign states as governed by a special (and preemptive) federal common law of foreign affairs, which was then extended to cover international human rights claims. Part II emphasizes the novelty of this approach: before *Erie*, state courts had been trusted to adjudicate property claims touching basic international law principles, on the theory that such principles were part of the common law—state as well as federal. Starting in the late 1930s, *Erie*'s repudiation of general common law was reinforced by the perception that the federal executive needed broad discretion to handle relations with foreign states—even in disputes regarding private property. Part III shows that this new approach to foreign relations law, prevalent through the 1970s, has encountered resistance in more recent decades, as the Supreme Court has revived traditional constitutional concerns about federalism and separation of powers. The revival of older constitutional perspectives raises new doubts about the notion that federal courts can be trusted to implement such a sweeping, extraconstitutional project as international human rights law.

Part IV explains this paradox: judges and commentators who favor deference to the executive in international disputes about property are still open to the notion that courts may supplant executive judgments in cases about human rights. Both these postures reflect a common, positivist view of the law applicable to international disputes, both reflect a repudiation of the older common law view, and both embrace a broadly regulatory perspective on relations between states and on transactions that cross interna-

tional boundaries. Part V sketches the view of commerce and international relations that prevailed before the 1930s and was assumed by the older, common law outlook, which found inspiration in the natural law philosophy of the Founding era. That philosophy has been silently repudiated by advocates for international human rights regulation. Yet those justices who resist this project do not embrace the earlier outlook of the common law. Both sides remain under the spell of *Erie* and its positivist premises. Part VI concludes by noting the parallel between international human rights adjudication and public interest regulatory litigation, both reflecting a positivist, public law perspective that supersedes the outlook of the common law. But just as the Court has tried to impose limits on regulatory management by courts, some justices have, on occasion, endorsed doctrines of international jurisdiction that reflect the traditional common law view. The precise holding in *Erie* does not prevent judges from embracing older and sounder perspectives—if they are not still in thrall to the positivist dogmas propounded by Legal Realists in the interwar era.

I. REVERBERATIONS: FROM *ERIE* TO *KIOBEL*

The Supreme Court's opinion in *Erie v. Tompkins* offered a sweeping and seemingly uncompromising opinion: "There is no federal general common law."⁶ The ruling repudiated nearly a century of practice in federal courts, starting with Justice Story's opinion in *Swift v. Tyson*, which had held that federal courts, when hearing cases in diversity jurisdiction, could base their decisions on their own understanding of common law.⁷ Justice Brandeis's opinion for the majority in *Erie*—endorsed by only four other justices—insisted that this practice "invaded rights which in our opinion are reserved by the Constitution to the several States."⁸ The culminating argument for this claim rested on a string of quotations from earlier, dissenting opinions of Justice Holmes, by then retired from the Court:

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in federal courts 'the parties are entitled to an independent judgment on matters of general law':

'But law 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 au-

⁶ *Erie*, 304 U.S. at 78.

⁷ *Swift v. Tyson*, 41 U.S. 1 (1842).

⁸ *Erie*, 304 U.S. at 80.

thority of that State without regard to what it may have been in England or anywhere else

“The authority and only authority is the State and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or its Supreme Court) should utter the last word.”⁹

The following year, the *American Journal of International Law* (AJIL) ran a brief note about *Erie*.¹⁰ The author, Philip Jessup, then a professor at Columbia Law School, had already achieved considerable prominence as a scholar of international law. He would later serve as a judge on the International Court of Justice at The Hague. He wrote as an editor of the AJIL in what was termed an “Editorial Comment.” The Comment did not criticize the reasoning or the immediate result in *Erie* but insisted that “any attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court.”¹¹ As Jessup saw it, “applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power.”¹² The “duty to apply” international law is “imposed upon the United States as an international person” whereas the “several States of the Union are entities unknown to international law.”¹³ So Jessup concluded it “would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.”¹⁴

It took more than two decades, but when the Supreme Court embraced this exception, it duly cited Professor Jessup’s intervention. The clarification appeared in the Court’s ruling in *Banco Nacional de Cuba v. Sabbatino*.¹⁵ This case concerned a shipment of sugar from an American-owned sugar company in Cuba to a commodities broker in New York (Farr, Whitlock).¹⁶ The Castro government had nationalized the sugar company, claiming the right to do so as retaliation for hostile actions by the American government.¹⁷ Faced with litigation in New York courts, Farr, Whitlock passed along the sugar to previously agreed buyers, then left a deposit for the agreed purchase price with a temporary receiver, appointed by the state supreme court in New York (Sabbatino).¹⁸ Meanwhile, the Cuban govern-

⁹ *Erie*, 304 U.S. at 79 (citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370–72 (1910); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532–36 (1928)).

¹⁰ Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 740–43 (1939).

¹¹ *Id.* at 743.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

¹⁶ *See id.* at 401.

¹⁷ *See id.* at 403.

¹⁸ *Id.* at 406.

ment bank, Banco Nacional, filed suit in federal court, demanding release of the funds now owed (in its view) to the Cuban government.¹⁹ A federal district court dismissed the claim on the grounds that the Cuban expropriation was contrary to international law, so Cuba had no title to claim the sale proceeds in New York.²⁰ The U.S. Court of Appeals affirmed.²¹

The U.S. Supreme Court took a different view. It held that the “act of state” doctrine prohibited American courts from challenging the ownership of the confiscated sugar.²² The sugar belonged to the Cuban government because the Cuban government said it did. The decrees of the Cuban government must govern ownership of property originally located on Cuban territory.²³

There were precedents for the act of state doctrine, as the Court explained, most notably the late nineteenth century ruling in *Underwood v. Hernandez*.²⁴ Underwood was an American engineer working on a water system in Venezuela.²⁵ During an uprising against the government there, he was coerced into continuing his service by the leader of an insurgent force, General Hernandez.²⁶ The Supreme Court rejected Underwood’s damage claims against Hernandez because the insurgents had subsequently prevailed and the general’s policies were subsequently ratified by the new government.²⁷ “Every sovereign state is bound to respect the independence of every other sovereign state,” the *Underhill* decision held, so “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”²⁸

In *Sabbatino*, the Supreme Court disregarded the reasoning of such precedents.²⁹ It expressly rejected the notion that American courts should honor the act of state doctrine as an obligation arising from international law.³⁰ Instead, the Court depicted the doctrine as reflecting “the strong sense of the Judicial Branch” of the federal government that judging “the validity of foreign acts of state” might often “hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole.”³¹ Having formulated the doctrine as a device to further nation-

19 *Id.*

20 *Banco Nacional De Cuba v. Farr*, 243 F. Supp. 957, 981 (1965).

21 *Banco Nacional De Cuba v. Farr*, 383 F.2d 166, 185 (1967).

22 *Sabbatino*, 376 U.S. at 439.

23 *Id.* at 438–39.

24 *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

25 *Id.* at 251.

26 *Id.*

27 *Id.* at 253–54.

28 *Id.* at 252.

29 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964).

30 *Id.* at 425.

31 *Id.* at 423.

al policy, the Court held it “must be treated exclusively as an aspect of federal law.”³²

What about *Erie*? *Sabbatino* addressed that challenge in the next sentence: “It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.”³³ The opinion then invoked Jessup’s 1939 article as its sole authority for this claim.³⁴

Nearly two decades passed before the *Sabbatino* precedent was extended to disputes unrelated to confiscated property. The new application was the Second Circuit’s 1980 ruling in *Filártiga v. Peña-Irala*.³⁵ The Filártigas sought damages from Peña-Irala, a Paraguayan police official, for the torture and murder of Joel Filártiga back in Paraguay.³⁶ They based their claim on a provision of the Judiciary Act of 1789, known as the Alien Tort Statute (ATS): “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁷ The *Filártiga* court found that statute a sufficient basis for jurisdiction to invoke “international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”³⁸

As the court saw it, the jurisdiction was very clear: “The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”³⁹ *Erie* was not mentioned. But *Sabbatino* received prominent attention as confirmation that federal courts did, indeed, have common law jurisdiction over issues touching foreign affairs.⁴⁰ Over the next two decades, federal appellate courts recognized similar claims against Bosnian warlords, African tyrants, and a variety of other human rights abusers around the world.⁴¹

³² *Id.* at 425.

³³ *Id.*

³⁴ *Id.*

³⁵ *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

³⁶ *Id.* at 878.

³⁷ *Id.* at 880 (quoting 28 U.S.C. § 1350 (2012)).

³⁸ *Id.* at 881.

³⁹ *Id.* at 886.

⁴⁰ *Id.* at 886–87.

⁴¹ *See, e.g.*, *Khumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 259–60 (2d Cir. 2007) (recognizing claims against multinational corporations operating under South Africa’s apartheid system); *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005) (involving the alleged execution of a Chilean official); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (involving an alleged human rights violation in Burma); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (involving an allegation against the president of the Philippines); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (involving an allegation against an Ethiopian official for acts against Ethiopian prisoners); *Kadic v. Karadzic*, 70 F.3d 232, 238–39, 250 (2d Cir. 1995) (recognizing claims against Bosnian warlords), *reh’g denied*,

The doctrine was quickly embraced by academic authorities. In 1984, Professor Louis Henkin published an influential article affirming that customary international law should be seen as a branch of federal law, like U.S. treaties and federal statutes.⁴² As such, he insisted, interpretations of customary international law by federal courts should be binding on the states under the Supremacy Clause.⁴³ The doctrine was embraced in the *Third Restatement of Foreign Relations Law*, published in 1987: “Based on the implications of *Sabbatino*, the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the state courts.”⁴⁴ The *Restatement* offered an entire chapter to develop its claim that “[t]he United States is bound by the international customary law of human rights.”⁴⁵

A decade later, Curtis Bradley and Jack Goldsmith published an article offering a head-on challenge to the doctrine of the *Restatement*.⁴⁶ They warned about threats to the democratic legitimacy of American government if “unelected federal judges” were authorized to “apply customary international law made by the world community.”⁴⁷ But their central argument was an appeal to precedent. If *Erie* remains good law, there is no general federal common law. Federal courts thus have no clear basis to rule on claims regarding customary international law, especially not with regard to any customary law of human rights. Even if federal courts grant themselves an exception from *Erie*, that would only give them jurisdiction to decide particular cases—not to impose their interpretations of customary international law on state courts, since they never claimed authority to do that before *Erie*.

A firestorm of protest followed in the pages of major law reviews.⁴⁸ Most indignant was Harold Koh, who expressed incredulity at the idea that

74 F.3d 377, 378 (1996); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (involving an alleged murder in El Salvador); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (involving alleged ethnic cleansing in Sudan); *Beanal v. Freeport-McMoRan*, 969 F. Supp. 362 (E.D. La. 1997) (involving an American company’s mines in Indonesia).

⁴² Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556–57 (1984).

⁴³ *Id.* at 1565–66 (“[T]oday it is established that customary international law, as incorporated into U.S. law, fits comfortably into the phrase ‘the laws of the United States’ for purposes of supremacy to state law.”).

⁴⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, n.3 (1987).

⁴⁵ *Id.* at § 701, cmt. e.

⁴⁶ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–70 (1997).

⁴⁷ *Id.* at 868 (“The modern position, however, posits that unelected federal judges apply customary law made by the world community at the expense of state prerogatives.”).

⁴⁸ See, e.g., Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L. L. 301, 306, 310–11 (1999) (calling the argument “astonishing,” “erroneous” and “bizarre and unreal”); Gerald L. Neuman, *Sense and Nonsense About Customary International Law*, 66 FORDHAM L. REV. 371, 371 (1997) (“Bradley and Goldsmith have more in mind than

international law could be left to the states when the Constitution clearly makes the federal government responsible for foreign relations.⁴⁹ Koh insisted that precedents back to the time of John Marshall plainly indicated that foreign affairs were a federal responsibility and international law a necessary part of federal law.⁵⁰ Others echoed these claims.⁵¹

The Supreme Court finally pronounced its own view in 2004, when it ruled in *Sosa v. Alvarez–Machain*.⁵² The case concerned a Mexican doctor, Alvarez–Machain, accused of helping Mexican drug lords torture an agent of the U.S. Drug Enforcement Agency, who had been working in Mexico.⁵³ Sosa, also a Mexican national, had helped capture and detain Alvarez–Machain in Mexico, before he was brought to the United States—where charges against him were subsequently dismissed.⁵⁴ Alvarez–Machain tried to sue Sosa on the grounds that Sosa’s detaining him was in violation of human rights standards—hence, a tort in violation of today’s law of nations.⁵⁵

The Supreme Court rejected this claim. All the justices agreed that the Alien Tort Statute was not applicable because it did not itself establish a cause of action.⁵⁶ It was not sufficient to show that a particular action might be regarded as a violation of customary law in some abstract sense. To prevail under the ATS, plaintiffs must demonstrate that their claim was the sort of “tort” for which the statute could be understood to offer a personal remedy.⁵⁷

The majority opinion, by Justice Souter, quoted Justice Holmes’s rejection of any notion of the common law as “a transcendental body of law outside of any particular State” and affirmed the “general understanding that the law is not so much found or discovered [in a new context] as it is either made or created.”⁵⁸ Then it proceeded to invoke *Erie*, “the watershed in which we denied the existence of any federal ‘general’ common law, which largely withdrew to havens of specialty.”⁵⁹ A few pages later, Souter

those criticisms, but much of what they add is seriously in error and is embedded in a bizarre conspiracy theory.”).

⁴⁹ Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–26 (1998).

⁵⁰ *Id.* at 1825 (citing *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815)).

⁵¹ See, e.g., Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301 (1999); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

⁵² *Sosa v. Alvarez–Machain*, 542 U.S. 692, 738 (2004).

⁵³ *Id.* at 697.

⁵⁴ *Id.* at 698.

⁵⁵ *Id.* at 692.

⁵⁶ *Id.* at 714, 738.

⁵⁷ *Id.* at 720.

⁵⁸ *Sosa v. Alvarez–Machain*, 542 U.S. 692, 725 (2004).

⁵⁹ *Id.* at 726.

belabored the point: “[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction”—again citing *Erie*.⁶⁰ So the Court seemed to embrace *Erie* as a barrier against the *Restatement*’s doctrine of customary international law as federal common law.

But then the Court cited *Sabbatino* for the proposition that within “limited enclaves . . . federal courts may derive some substantive law in a common law way.”⁶¹ And within this particular “haven of specialty,” Justice Souter acknowledged that there might, after all, be an evolution of permissible claims over time:

We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism The position we take today has been assumed by some federal courts . . . ever since the Second Circuit decided *Filártiga v. Peña-Irala*.⁶²

So, on the one hand, Justice Souter’s opinion “found no basis to suspect Congress [in 1789] had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors and piracy.”⁶³ But, on the other hand, the *Sosa* majority denied there was any “development” since the enactment of the ATS which “has categorically precluded federal courts from recognizing a [new] claim under the law of nations as an element of common law.”⁶⁴ Accordingly, claims grounded in “the present-day law of nations” might be pursued under the ATS if those claims were “defined with a specificity comparable to features of the 18th Century paradigms we have recognized.”⁶⁵

A concurring opinion by Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, insisted it would be wrong to go beyond the precise claims recognized in 1789.⁶⁶ The conservatives also gave a starring role to *Erie*: “The question is not what case or congressional action *prevents* federal courts from applying the law of nations as part of the general com-

⁶⁰ *Id.* at 729.

⁶¹ *Id.*

⁶² *Id.* at 730–31.

⁶³ *Id.* at 724.

⁶⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 744 (2004) (Scalia, J., concurring in part and concurring in the judgment).

⁶⁵ *Id.* at 725 (majority opinion).

⁶⁶ *Id.* at 749–50 (Scalia, J., concurring in part and concurring in the judgment).

mon law; it is what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not exist*.⁶⁷

The division within the court reappeared in 2013—along with the agreement on background assumptions—when the Court decided *Kiobel v. Royal Dutch Petroleum*.⁶⁸ It was a case brought by Nigerian nationals alleging torture and other abuses perpetrated by the Nigerian government and taking place on the territory of Nigeria.⁶⁹ The plaintiffs claimed that their victimization had been abetted by a Dutch oil company, since the latter accommodated demands of the Nigerian military while these abuses were occurring.⁷⁰ All the justices agreed the claims were too remote for American courts to take jurisdiction.⁷¹ But only four other justices joined Justice Roberts's opinion, holding that the ATS should be subject to the general presumption against extraterritorial application of U.S. statutes.⁷²

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, insisted that the ATS should apply not only to cases arising on American soil but cases involving an American defendant (wherever arising) and any case which "affects an important American national interest."⁷³ They agreed that this dispute about Nigerian government abuses against Nigerians in Nigeria, even if abetted by a Dutch company, was not such a case.⁷⁴ But to emphasize its resistance to cutting off all resort to international human rights claims, Justice Breyer's opinion began with a respectful nod to *Filártiga*—as if a similar case might well be properly pursued in U.S. courts in the future under the criteria offered by the concurring justices.⁷⁵

The whole trajectory might look like zigging and zagging, from the renunciations expounded in *Erie* and *Sabbatino*, to the boldness of *Filártiga*, and back toward cautious judicial stances in *Sosa* and *Kiobel*. If one looks more closely, the confusing back and forth seems at first to resolve into a more definite pattern—of genuine paradox. It is a paradox that goes all the way back to *Erie*.

⁶⁷ *Id.* at 744.

⁶⁸ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013).

⁶⁹ *Id.* at 1663.

⁷⁰ *Id.* at 1662–63.

⁷¹ *See id.* at 1669 (Roberts, C.J., for the Court), *id.* at 1669 (Kennedy, J., concurring), *id.* at 1669–70 (Alito, J., concurring), *id.* at 1677–78 (Breyer, J., concurring).

⁷² *See id.* at 1662, 1669.

⁷³ *Id.* at 1674.

⁷⁴ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1677–78 (2013).

⁷⁵ *See id.* at 1671 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723 (2004)).

II. THE WIDER CONTEXT: WHAT WAS NEW IN THE NEW FOREIGN RELATIONS LAW

For Professor Jessup in 1939, it was “as unsound as it would be unwise” to let state courts meddle in questions of international law.⁷⁶ Sixty years later, Professor Koh denounced such a role for state courts as nearly unthinkable.⁷⁷ But it was more than thinkable to earlier generations. They had, in fact, seen it done.

Not everywhere, of course, and not routinely—if by “international law” or “the law of nations” we mean cases actually involving relations with foreign nations. At the outset of the Civil War, Thaddeus Stevens complained that Lincoln’s proclamation of a blockade of southern ports seemed to promise compliance with international standards.⁷⁸ Lincoln confessed the international law issues were a bit beyond his experience: “I’m a good enough lawyer in a Western law court, I suppose, but we don’t practice the law of nations up there [in Illinois and Indiana] . . .”⁷⁹ Still, the practice was not so exotic in other states. As Julian Ku has demonstrated, state courts were quite active in applying international doctrines and deciding cases involving foreign parties from the earliest years of the Republic.⁸⁰ By the twentieth century, cases involving international law were common in states hosting large currents of commerce from abroad. A particularly interesting and revealing range of cases arose in New York state courts in the 1920s and 1930s regarding the status of property, once owned by Russian companies, that was seized by the Bolshevik regime.

In *Wulfsohn v. Russian Socialist Federated Soviet Republic*, New York’s highest appellate court ruled that the Soviet government could not be sued by a businessman whose property had been confiscated in Russia because even an unrecognized government was entitled to sovereign immunity.⁸¹ In *RSFSR v. Cibrario*, the same court held that a government not recognized by the United States could not sue in U.S. courts.⁸²

In *Sokoloff v. National City Bank*, the court held, in an opinion by Judge Cardozo, that the New York bank was obliged to repay *Sokoloff* for

⁷⁶ Jessup, *supra* note 10, at 743.

⁷⁷ See Koh, *supra* note 49, at 1825.

⁷⁸ See CONG. GLOBE, 37th Cong., 2d Sess. 180–81 (1861).

⁷⁹ JOHN FABIAN WITT, LINCOLN’S CODE 146 (2013).

⁸⁰ See generally Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001) (describing the historical role of state courts in the interpretation of customary international law in the American legal system and concluding that such law weakened historical foundations of nationalist views and allowed state courts to interpret, apply, and create their own customary international law).

⁸¹ *Wulfsohn v. Russ. Socialist Federated Soviet Republic*, 138 N.E. 2d, 25–26 (N.Y. 1923).

⁸² *Russ. Socialist Federated Soviet Republic v. Cibrario*, 139 N.E. 259, 262 (N.Y. 1923).

money deposited with the bank to be drawn from its Petrograd branch.⁸³ The opinion starts with this understated acknowledgement: “The first defense states that there was a revolution in Russia in November 1917”⁸⁴ The court was not impressed. Cardozo cited “courts of high repute”—in fact, English courts—holding that “confiscation by a government to which recognition has been refused has no other effect in law than seizure by bandits or by other lawless bodies.”⁸⁵ He then acknowledged “a rule so comprehensive and so drastic” might be “subject to exceptions under pressure of some insistent claim of policy or justice.”⁸⁶ Still, the court ruled for Sokoloff, since National City Bank had not made a convincing case for exceptional treatment “even were we to assume the existence of such exceptions.”⁸⁷

Similarly, in *James & Co. v. Second Russian Insurance Co.*, the New York court, again speaking through Judge Cardozo, upheld a claim against a Russian insurance company.⁸⁸ The Soviet government had nationalized the company, but a branch was still operating in New York under its original private management.⁸⁹ The case looked relatively straightforward given that the United States government still had not recognized the Soviet regime. The Soviet confiscation decree “is denied recognition as an utterance of sovereignty.”⁹⁰ In these circumstances, “the problem before us is governed, not by any technical rules, but by the largest considerations of public policy and justice.”⁹¹ The New York judges took it for granted that they were competent to make judgments on the basis of such “considerations.”⁹²

A decade later, New York courts were still struggling with similar issues, notwithstanding U.S. recognition of the Soviet government in the meantime. In *Vladikavkazky Railway v. New York Trust*, the New York branch of a Russian corporation tried to withdraw money from its account with a New York bank, though the main assets in Russia had been confiscated by the Soviets and the corporation itself ordered dissolved.⁹³ The court emphasized that the contract obligation had been undertaken in New York, with a New York bank and the original deposit placed with the bank in New York.⁹⁴ To object to the Railway’s claim, then, it would be neces-

⁸³ Sokoloff v. Nat’l City Bank, 239 N.Y. 158, 170 (1924).

⁸⁴ *Id.* at 163.

⁸⁵ *Id.* at 164.

⁸⁶ *Id.* at 163–64 (citing decisions of the U.S. Supreme Court dealing with confiscations by the revolutionary regime in Mexico and a similar decision by the New Jersey Supreme Court).

⁸⁷ *Id.* at 166.

⁸⁸ *James & Co. v. Second Russ. Ins. Co.*, 239 N.Y. 248, 259 (1925).

⁸⁹ *Id.* at 253–54.

⁹⁰ *Id.* at 256.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Vladikavkazsky Ry. Co. v. N.Y. Trust Co.*, 263 N.Y. 369, 373–74 (1934).

⁹⁴ *Id.* at 378.

sary to give extraterritorial effect to the Russian government's nationalization policies as a matter of comity. Under standard conflicts of laws principles, however, the host forum was entitled to insist on its own public policy.

The claims of "comity" could not overrule "our public policy" and "our sense of justice and equity as embodied in our public policy" and "the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decree" was "contrary to our public policy" and "shocking to our sense of justice and equity."⁹⁵ In these circumstances, the subsequent U.S. recognition of the Soviet government "affords no controlling reason why [the Soviet decree] should be enforced in our courts."⁹⁶

Even the U.S. Supreme Court recognized that state courts had authority to determine questions involving foreign governments. After Wulfsohn's claim against the Soviet government was dismissed by New York's highest court, he tried an appeal to the U.S. Supreme Court. It promptly rejected the appeal "for want of jurisdiction."⁹⁷ The Court's ruling in *Wulfsohn* cited its ruling the year before in *Oliver American Trading Co. v. Mexico*.⁹⁸ That case involved a similar compensation claim for assets seized by the Mexican government, which New York courts had rejected under the doctrine of sovereign immunity. The U.S. Supreme Court there held that federal jurisdiction

is not presented where the question of jurisdiction to be decided turns upon matters of general law applicable alike to actions brought in other tribunals. . . . The question of sovereign immunity is such a question of general law applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States.⁹⁹

Lower federal courts did not see any reason to change this approach when the Roosevelt administration signed an agreement with Soviet Foreign Minister Litvinov.¹⁰⁰ Along with establishing diplomatic relations, the agreement assigned to the United States government all Soviet claims against former Russian companies in the United States (with the understanding that the United States government would use the proceeds to compensate Americans or American firms with claims against the Soviet gov-

⁹⁵ *Id.*

⁹⁶ *Id.* at 378–79.

⁹⁷ *Wulfsohn v. Russ. Socialist Federated Soviet Republic*, 266 U.S. 580, 580 (1924).

⁹⁸ *Id.* (citing *Oliver Am. Trading Co. v. U.S. of Mexico*, 264 U.S. 440, 442 (1924)).

⁹⁹ *Oliver*, 264 U.S. at 442–43.

¹⁰⁰ See generally DONALD GORDON BISHOP, *THE ROOSEVELT–LITVINOV AGREEMENTS: THE AMERICAN VIEW* (Syracuse U. Press) (1965) (describing the promises exchanged between President Roosevelt and Maxim Litvinov including implementation of the agreement, as well as problems that arose out of it).

ernment arising from its earlier confiscations).¹⁰¹ The agreement did not at first impress federal judges any more than state judges in New York.

In *U.S. v. Belmont*, the U.S. Court of Appeals for the Second Circuit held that the federal government had no right to seize assets of Russian corporations from the Belmont bank because “the bringing of suit gives the assignee [no] greater rights than the assignor had.”¹⁰² The court pointed out that the Fifth Amendment to the federal Constitution prohibited uncompensated confiscation so “the public policy of the United States . . . would seem clearly adverse to a claim based on the Russian decree.”¹⁰³ But the court found the claim governed by “the policy of New York”: “The question is whether the plaintiff’s assignor had an enforceable right as successor to the Russian corporation after its nationalization. This is really a question of title and state law, not federal law, governs the matter of title.”¹⁰⁴

On appeal, the Supreme Court offered a quite different view.¹⁰⁵ Justice Sutherland’s majority opinion found that the President’s executive agreement with the Soviet government had the same status as a treaty and treaties are “supreme law of the land,” fully binding on the states.¹⁰⁶ The public policy of the state was irrelevant, since for purposes of implementing international obligations of the United States, “the state of New York does not exist.”¹⁰⁷

What about the federal Constitution? Justice Stone filed a concurring opinion expressing concerns about the reach of the ruling.¹⁰⁸ He acknowledged that confiscation of assets in Russia might be given legal recognition in the United States by the Litvinov agreement.¹⁰⁹ But in Stone’s view, New York still had grounds to refuse Soviet claims to ownership of assets located in New York (or Soviet claims to exemption from liabilities contracted in New York).¹¹⁰ He cited, among other precedents, the New York State court rulings summarized above.¹¹¹ Stone acknowledged that the United States government could assert claims that might previously have been asserted by the Soviet government.¹¹² He denied that the Litvinov

¹⁰¹ Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 692–93 (1998).

¹⁰² *United States v. Belmont*, 85 F.2d 542, 544 (1936).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Belmont*, 301 U.S. 324, 332–33 (1937).

¹⁰⁶ *Id.* at 331.

¹⁰⁷ *Id.* at 331.

¹⁰⁸ *Id.* at 333–37.

¹⁰⁹ *Id.* at 333.

¹¹⁰ *Id.* at 335.

¹¹¹ *United States v. Belmont*, 301 U.S. 324, 335 (1937).

¹¹² *Id.* at 336.

agreement gave the federal government authority to claim anything more.¹¹³ He was joined in these cautions by Justices Cardozo and Brandeis.

What Justice Stone worried about in *Belmont* would soon come to pass. In *United States v. Pink*, the Court upheld federal claims on the assets of a Russian corporation that had been operating under the supervision of New York insurance commissioner Pink.¹¹⁴ Justice Douglas's majority opinion acknowledged that New York courts had some grounds, under New York law and policy, for declining to recognize Soviet ownership of a particular Russian insurance company (previously operating in New York and still claiming to maintain an independent existence despite nationalization of its home assets in Moscow).¹¹⁵

But as the majority saw it, the Litvinov agreement had changed all that. Justice Douglas's opinion was most emphatic in rejecting any suggestion that New York law could obstruct the national policy:

In the first place, such action by New York, no matter what gloss be given it, amounts to official disapproval or nonrecognition of the nationalization program of the Soviet government. That disapproval or nonrecognition is in the face of a disavowal by the United States of any official concern with that program. It is in the face of the underlying policy adopted by the United States when it recognized the Soviet government. In the second place, to the extent that the action of the State in refusing enforcement of the Litvinov Assignment results in reduction or nonpayment of claims of our nationals, it helps keep alive one source of friction which the policy of recognition intended to remove.¹¹⁶

Chief Justice Stone, joined by Justice Roberts, was not persuaded. He cited the cases discussed above (and some others to the same effect) as indications of New York law.¹¹⁷ He asked what could have "compelled the state to surrender its own rules of law applicable to property within its limits, and to substitute rules of Russian law for them."¹¹⁸ If the President's recognition agreement had that effect, it would have a "potency . . . which is lacking to the full faith and credit clause of the Constitution."¹¹⁹ And it "can make no difference" that "New York has chosen to express its public policy . . . by the common law determinations of its courts."¹²⁰ The first supporting citation for this proposition was to *Erie v. Tompkins*.¹²¹

Stone did not feel it necessary to reach the constitutional issue in the background, however. In his view, the actual text of the Litvinov agree-

¹¹³ *Id.*

¹¹⁴ *United States v. Pink*, 315 U.S. 203, 232–34 (1942).

¹¹⁵ *Id.* at 222.

¹¹⁶ *Id.* at 231–32.

¹¹⁷ *Id.* at 242–46.

¹¹⁸ *Id.* at 248.

¹¹⁹ *Id.* (citing *Clark v. Williard*, 292 U.S. 112 (1934); *Fischer v. Am. United Life Ins.*, 314 U.S. 549 (1942)).

¹²⁰ *United States v. Pink*, 315 U.S. 203, 248 (1942).

¹²¹ *Id.*

ment did not squarely claim to supersede contrary state law.¹²² Stone insisted that, when asked to extend federal authority in ways that would impose “impairment of state and private rights,” federal courts should not act on the basis of any “conceptions of policy which . . . [have] been left unexpressed” by the political branches of the government.¹²³

Justice Frankfurter tried to answer in his concurring opinion, insisting that federal claims must be viewed in their broader political context:

The exchanges between the President and Ambassador Litvinov must be read not in isolation but as the culmination of difficulties and dealings extending over fifteen years The controlling history of the Soviet regime and of this country’s relations with it must be read between the lines of the Roosevelt-Litvinov Agreement It does violence to the course of negotiations between the United States and Russia and to the scope of the final adjustment to assume that a settlement thus made on behalf of the United States—to settle both money claims and to soothe feelings—was to be qualified by the variant notions of the courts of the forty-eight states regarding “situs” or “jurisdiction” over intangibles or the survival of extinct Russian corporations. In our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.¹²⁴

At the time the Court announced its decision in *Pink*, German armies were besieging Leningrad and were still within close range of Moscow. The United States had entered the war less than two months before. It was eager to retain Russia as a full ally. It was not the best time for the Court to haggle over which courts had jurisdiction over the disposition of Russian assets in New York.

Something similar might be said of *Sabbatino*. The case was decided less than two years after the Cuban Missile Crisis, when the United States was trying to rally skittish allies in the Cold War, including allies with differing views about nationalization and private property. Justice Harlan’s opinion insisted that courts must defer to the executive to seek compensation for American victims through diplomatic negotiations, particularly in a case of this sort, where the relevant international standards were much disputed—citing contrary views of communist states and states in the developing world.¹²⁵

Even so, Justice White filed a long dissent in *Sabbatino*, objecting to the Court’s refusal to allow any consideration of the validity of Cuba’s uncompensated taking of American property. White questioned how it could help the executive’s bargaining position for the Court to offer its own opinion that the legal claims (under customary international law) were not clear

¹²² *Id.* at 249.

¹²³ *Id.* at 256.

¹²⁴ *Id.* at 241–42.

¹²⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).

or well established.¹²⁶ Nonetheless, the other justices were clear on one point: the Court's doctrine of deference to the executive was binding on state courts, as well as lower federal courts.¹²⁷

Congress was not pleased. Within weeks, it enacted the Hickenlooper amendment to the Foreign Assistance Act of 1964, instructing courts to allow suits against foreign sovereigns when they had expropriated American property "in violation of the principles of international law."¹²⁸ On remand, the trial court accepted this directive, rejecting the Cuban bank's claims and allowing the proceeds of the sugar sale to revert to the original American owners.¹²⁹ The Second Circuit affirmed.¹³⁰ The Supreme Court denied cert.¹³¹

But nearly a decade after the litigation started, the Supreme Court still treated *Sabbatino* as sound precedent, even on the question of challenging foreign expropriation decrees in federal courts. In *First National City Bank v. Banco Nacional de Cuba*, a fractured Court endorsed a counterclaim on behalf of American owners in a suit brought by the Castro government in American courts.¹³² But the Court did not repudiate *Sabbatino*. Four Justices (Brennan, Stewart, Marshall, and Blackmun) argued, in fact, that *Sabbatino* ought to govern the result and force the rejection of the American claims.¹³³ Three Justices (Rehnquist, Burger, and White) found the immediate holding of *Sabbatino* inapplicable—but only because the State Department had supported a judicial hearing for the counterclaim and these justices interpreted *Sabbatino* as a counsel to hear cases when the executive so urged.¹³⁴ Only Justice Powell held that *Sabbatino* had been wrongly decided and should be abandoned as precedent in future cases.¹³⁵

Lower court judges seem to have gotten the message. Subsequent cases found ways to circumvent the Hickenlooper amendment and endorse the *Sabbatino* approach.¹³⁶ American courts would not be readily available to help even American citizens (or American-based firms) claim compensation for property seized by foreign governments, even when the compensation was arguably in violation of international law, even when the relevant assets were in the United States.

¹²⁶ *Id.* at 463–64.

¹²⁷ *Id.* at 427–28.

¹²⁸ 22 U.S.C. §2370(e)(2) (2012).

¹²⁹ *Banco Nacional v. Farr*, 243 F. Supp. 957, 980–81 (S.D.N.Y. 1965).

¹³⁰ *Banco Nacional v. Farr*, 383 F.2d 166, 166 (2d Cir. 1967).

¹³¹ *Banco Nacional de Cuba v. Farr*, 390 U.S. 956, 956 (1968).

¹³² *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

¹³³ *Id.* at 776–96 (Brennan, J., dissenting).

¹³⁴ *Id.* at 768.

¹³⁵ *Id.* at 774 (Powell, J., concurring).

¹³⁶ *See Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394, 403–04 (1970) (limiting claims to assets already present in the United States), *vacated*, 400 U.S. 1019 (1971).

In the late 1980s, the *Restatement (Third)* also endorsed the *Sabbatino* position. It acknowledged that the Universal Declaration of Human Rights recognized a right not to be arbitrarily deprived of property.¹³⁷ But it emphasized the “widespread disagreement among states as to the scope and content of that right, which weighs against the conclusion that a human right to property generally has become a principle of customary law.”¹³⁸

The contrast might seem obvious, though it is never acknowledged in cases and almost never in commentary. How could it be dangerous to let state courts consider property claims against foreign governments, even when the disputed property is in the territory of the state, but quite acceptable for federal courts to hear claims against foreign officials for abuses of foreigners in foreign territory?

Although it might seem so at first, differing signals from the executive do not explain the paradox. Certainly, the Roosevelt Administration did urge the results in *Belmont* and *Pink*, the Johnson Administration did urge the result in *Sabbatino*, and the Carter Administration did urge the result in *Filártiga*. But during the Nixon Administration a majority of the Justices in *First National Bank* rejected the notion that challenges to foreign confiscations should be allowed or disallowed in accord with promptings from the executive. During the Reagan and Bush Administrations, lower courts opened their doors to *Filártiga* claims, even when Justice Department briefs questioned the legal basis for such lawsuits.¹³⁹

A political scientist might notice that the pattern follows the larger trajectory of constitutional doctrine. In the 1930s, liberal critics denounced courts for striking down legislation—when courts did so on behalf of economic liberty, liberal critics saw it as serving the interests of business. By the 1960s and 70s, liberal commentators applauded court rulings that struck down legislation when such rulings were thought to advance the cause of equality, generally associated with the interests of racial or cultural minorities. Often the very same commentators continued to denounce pre-New Deal cases on economic liberty while applauding egalitarian rulings of the Warren and Burger Courts.¹⁴⁰

The cases concerning international law followed exactly the same trajectory. New Deal Justices and their successors scorned judicial interventions to protect owners of confiscated property, seeing such cases as an unacceptable distraction from weightier concerns of foreign policy. In later

¹³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 702 cmt. k (1987).

¹³⁸ *Id.*

¹³⁹ William S. Dodge, *Customary International Law in the Supreme Court, 1946-2000*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, 353, 378–79 (David L. Sloss et al. eds., 2011) (“The Carter administration had supported *Filártiga*, but later administrations were lukewarm, ambivalent, or openly hostile.”).

¹⁴⁰ For a classic political science survey, see Martin Shapiro, *The Supreme Court: From Warren to Burger*, in THE NEW AMERICAN POLITICAL SYSTEM (Anthony King ed., 1979).

years, liberal judges and Justices embraced the use of American courts to provide compensation for oppressed foreigners—not owners of confiscated property but victims of torture and personal human rights abuses. Property rights were disparaged, human rights exalted.

The Supreme Court has done some backtracking in the past decade, but has not closed the door altogether on enforcement of international human rights claims by American courts. Only three Justices in *Sosa*—Scalia, Thomas, and Rehnquist—rejected claims based on international human rights law altogether.¹⁴¹ The majority in *Kiobel* offered a compromise, which Scalia and Thomas embraced, along with Chief Justice Roberts and Justices Alito and Kennedy: no claims should be recognized under the ATS which did not have some connection to American territory.¹⁴² That approach did not in itself exclude claims based on international law doctrines developed long after 1789. The four liberal Justices (with encouragement of a sort by Justice Kennedy) urged a wider opening for appeals to international human rights claims, at least when they had a bit more connection to “American interests” and were not disapproved by the Department of State.¹⁴³

The Supreme Court’s rulings in *Sosa* and *Kiobel* acknowledged that it would be too ambitious for federal courts to take on the enforcement of everything associated with a customary international law of human rights. In neither case did the majority try to explain why such a venture would be wrong in principle. The Court’s reticence—both in declining to embrace international human law and in declining to repudiate it—deserves a closer look. The Court’s stance looks even more curious when one looks more closely. Then we can recognize the strangeness as a distant echo of the jurisprudential big bang that was *Erie*.

III. THE NEW FOREIGN RELATIONS LAW DOES NOT FIT THE OLD CONSTITUTION

The *Sosa* Court’s reluctance to embrace the doctrine of the *Restatement (Third)* is much easier to understand if one thinks about the implications of embracing international human rights law as federal common law. The *Restatement* assumed that international human rights standards could be derived from the Universal Declaration of Human Rights. The Universal Declaration was adopted in 1948 by resolution of the U.N. General Assembly but not actually submitted for ratification by any government.¹⁴⁴ It was

¹⁴¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 746 (2004) (Scalia, J., concurring).

¹⁴² *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1669 (2013).

¹⁴³ *Id.* at 1673–74 (Breyer, J., concurring).

¹⁴⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

eventually followed by a whole series of formal human rights conventions, which were submitted to governments for ratification like other treaties. Such treaties might seem more compelling evidence of international standards.

The United States has only ratified a handful of international human rights treaties, and in each case the Senate resolution of consent specified that the treaty would not be self-executing—that is, binding in domestic law.¹⁴⁵ If customary international law can be inferred from widely subscribed treaties—and that customary law is binding law for U.S. courts—then U.S. courts could enforce the terms of treaties the Senate had understood to be non-self-executing. Courts might well claim authority to enforce provisions the Senate had not ratified at all. If that sort of customary law were understood as binding federal common law, federal and state officials could be held liable for failing to uphold rights that no American legislature has actually endorsed, such as the right promised by the Convention on the Elimination of All Forms of Discrimination Against Women to assure that jobs largely filled by female workers are paid at equal rates to male-dominated jobs of “comparable worth.”¹⁴⁶ Or federal courts might hold state governments accountable for failing to implement the guarantee in the Covenant on Economic and Social Rights that higher education be made available to all students capable of benefitting—without cost to the students.¹⁴⁷

It is hardly surprising, therefore, that all the Justices in *Sosa* recoiled from an open-ended commitment to customary international law as federal common law. What the Court’s majority was not willing to do, however, was to repudiate all of the background assumptions of *Filártiga*. Justice Souter’s majority opinion in *Sosa* still cited *Filártiga* with approval, as if the latter remained a relevant precedent for future ventures in international human rights protection. *Filártiga* was mentioned in much the same way by Justice Breyer’s concurring opinion in *Kiobel*.

Narrow decisions are now the fashion. Still, the continuing hesitations displayed in these recent cases seem at odds with the larger trend. Would judicial enforcement of a customary international law of human rights really be consistent with the distribution of powers and responsibilities set out in the U.S. Constitution? At the time of *Erie*, and even more so at the time of *Sabbatino*, the Court seemed uninterested in limits imposed by the Constitution—at least in limits as traditionally understood. But in recent dec-

¹⁴⁵ Penny M. Venetis, *Making Human Rights Treaty Law Actionable In The United States: The Case For Universal Implementing Legislation*, 63 ALA. L. REV. 97, 101 (2011) (citing the Congressional Record for the treaties).

¹⁴⁶ Convention on the Elimination of All Forms of Discrimination Against Women art. 11, par. 1, subsec. (d), Sept. 3, 1981, 1249 U.N.T.S. 13.

¹⁴⁷ International Covenant on Economic, Social and Cultural Rights art. 13, par. 2, subsec. (c), Dec. 16, 1966, 993 U.N.T.S. 3.

ades, the Court has become much more sensitive to these concerns. All the more notable, then, that the Court has been content to leave open the idea that we might, after all, see a time when federal courts would impose a whole range of new obligations—even on state and local governments—in the name of international human rights law.

As far back as 1920, Justice Holmes, the spiritual father of *Erie*, had embraced an extremely expansive view of federal authority in foreign affairs. In *Missouri v. Holland*, Holmes's opinion for the Court upheld a federal statute asserting federal protection over migratory birds.¹⁴⁸ A lower court had previously struck down a similar statute on the ground that protection of wildlife belonged to the states.¹⁴⁹ The Court's 1920 ruling in *Holland* emphasized that the current case was different because the United States had since entered into an international treaty committing it to protect migratory birds.¹⁵⁰ The Court held that Congress has broader powers when it comes to implementing treaties than it does when implementing the powers enumerated in Section Eight of Article I.¹⁵¹

In the course of reaching this conclusion, Justice Holmes raised the question whether there were *any* constitutional limits on the power to implement treaties, with this gloss on the Supremacy Clause of Article VI:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.¹⁵²

There were dissenters in *Holland*, but Justice Brandeis was not among them.

In its day, the questions raised in *Missouri v. Holland* seemed entirely theoretical. The questions seemed much more urgent in the 1950s, when the United Nations had begun to elaborate international human rights standards, codified in treaties. Would the U.S. Bill of Rights then be subordinated to notions of rights preferred by communist countries? In 1954, the Senate came within one vote of endorsing a constitutional amendment, urged by Senator John Bricker (a Republican from Ohio), aimed at closing this "gap in the Constitution": it would have stipulated that treaties could only have force in U.S. law if implemented by statutes and such implementing legislation would only be constitutional if a valid exercise of congressional

¹⁴⁸ 252 U.S. 416, 435 (1920).

¹⁴⁹ *Id.* at 432–33.

¹⁵⁰ *Id.* at 435.

¹⁵¹ *Id.* at 432–33.

¹⁵² *Id.* at 433.

authority without the treaty.¹⁵³ The Supreme Court seemed to quiet concerns in *Reid v. Covert*, holding that treaties could not supply binding authority to implementing measures or enforcement actions which conflicted with guarantees in the Bill of Rights.¹⁵⁴ But the Court did not say federal implementing measures for treaties or international agreements must be consistent with the normal distribution of powers between the federal government and the states.

In the decades after the Second World War, the Court was prepared to strike down state laws even when there was no conflicting federal treaty or statute on the ground that the whole field of foreign affairs was “reserved” for the federal government. In *Zschernig v. Miller*, the Court struck down an Oregon state law which excluded inheritance claims from residents of communist countries.¹⁵⁵ A state law of that kind, said the Court, would interfere with federal policy—even potential policy. The decision seemed to embrace a sort of dormant power theory for foreign affairs. Justice Douglas’s opinion displays the same outlook in *Zschernig* as his majority opinion in *Pink*.¹⁵⁶

In recent decades, however, the Court has voiced cautions against expansive New Deal views of federal power in domestic affairs. In a few cases, since the mid-1990s, it has even held federal statutes invalid for exceeding the enumerated powers of Congress.¹⁵⁷ In the same period, the Court has shown a corresponding concern about open-ended deference to federal authority in foreign affairs as well. Notably in *Crosby v. National Foreign Trade Council*, the Court struck down a Massachusetts law imposing trade sanctions on the repressive government of Myanmar (Burma), but it cited a federal statute authorizing the President to impose conditional sanctions on Myanmar as a contrary federal policy.¹⁵⁸ The Court did not offer any suggestion of an exclusive federal power over policies affecting foreign nations.

In *American Insurance Ass’n v. Garamendi*, the Court struck down a California law requiring insurance companies to provide records to assist recovery of lost assets by Holocaust survivors.¹⁵⁹ It held that the state law might conflict with presidential agreements or understandings with European governments regarding such compensation claims.¹⁶⁰ There was no acknowledgment of an exclusive federal power in this area. In 2011, a unan-

¹⁵³ S.J. RES. 1, 84th Cong. (1954) (Senator Bricker originally introduced the resolution as S.J. RES. 130, 82nd Cong. (1952)).

¹⁵⁴ 354 U.S. 1, 16–17 (1957).

¹⁵⁵ 389 U.S. 429, 441 (1968).

¹⁵⁶ *Id.* at 430; *United States v. Pink*, 315 U.S. 203, 210 (1942).

¹⁵⁷ For notable examples of cases upholding structural limits on federal power, see *U.S. v. Lopez*, 514 U.S. 549 (1995); *Printz v. U.S.*, 521 U.S. 898 (1997); *U.S. v. Morrison*, 529 U.S. 598 (2000).

¹⁵⁸ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000).

¹⁵⁹ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003).

¹⁶⁰ *Id.* at 401.

ymous Court agreed to a test of the doctrine in *Missouri v. Holland*, insisting that a private citizen had standing to challenge the constitutional validity of a statute authorizing federal prosecution of intrastate crimes, ostensibly justified by an international treaty on the subject.¹⁶¹

A case like *Garamendi* might suggest the Court was primarily concerned to protect actual federal policies from state interference. But in the decades since *Sabbatino*, the Court has expressed more caution about unilateral executive actions involving the rights of Americans. In *Dames & Moore v. Regan*, the Court endorsed President Carter's executive agreement with Iran, overriding the claims of American creditors already pending in U.S. courts.¹⁶² But the Court went out of its way to emphasize the special and limited circumstances of the agreement—freeing Iranian assets in the United States in return for Iran's freeing of U.S. diplomats held hostage in Tehran.¹⁶³ Justice Rehnquist claimed that some aspects of the agreement could be seen as authorized by previous statutes.¹⁶⁴ Others might be grounded in congressional acquiescence to past negotiations for release of foreign-held assets.¹⁶⁵ None of this analysis would be pertinent if the Court thought *Belmont* and *Pink* were adequate precedents to establish the legal validity of any international agreement the President might make. And with all these qualifications, the decision provoked a partial dissent from Justice Powell, who worried that American creditors had suffered a “taking” without a recognized right to fair compensation.¹⁶⁶

More tellingly, in *Medellin v. Texas*, the majority held that the President lacked the authority to order Texas courts to honor the decision of the International Court of Justice regarding U.S. obligations under the Vienna Convention on Consular Relations.¹⁶⁷ Even the dissenters were not prepared to endorse such an open-ended presidential power.¹⁶⁸ The opinion of Justices Breyer, Souter, and Ginsburg did not, however, go along with the

¹⁶¹ *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011) (concerning federal prosecution for using a chemical prohibited under the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. § 229 (2006)). The following year, Justice Scalia seemed to reject the fundamental premise of old rulings like *Missouri v. Holland* and *U.S. v. Belmont*:

Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers. . . . Though it may upset foreign powers—and even when the Federal government desperately wants to avoid upsetting foreign powers—the States have the right to protect their borders against foreigners.

Scalia, J. in *Arizona v. United States*, 132 S. Ct. 2492, 2514–15 (2012) (Scalia, J., concurring in part and dissenting in part).

¹⁶² 453 U.S. 654, 686 (1981).

¹⁶³ *Id.* at 688.

¹⁶⁴ *Id.* at 667–87.

¹⁶⁵ *Id.* at 678–88.

¹⁶⁶ *Id.* at 690–91 (Powell, J., dissenting).

¹⁶⁷ 552 U.S. 491, 532 (2008).

¹⁶⁸ *Id.* at 538–67 (Breyer, J., dissenting).

majority's repudiation of such power either.¹⁶⁹ Breyer and his fellow dissenters left open the possibility that the President might have some authority to override state law in order to implement at least some sorts of international obligations of the United States.¹⁷⁰

Amid these renewed concerns about constitutional limits, it is much easier to understand the caution of the *Sosa* ruling. All the Justices in *Sosa* rejected the doctrine of the *Restatement*—that customary law is already federal law which federal courts have jurisdiction to enforce on that basis.¹⁷¹ Further, all of the Justices were uneasy about allowing federal courts to retain an open-ended power to impose their own views of customary international law.¹⁷²

What may seem puzzling, in retrospect, is the orientation of those Justices who supported and elaborated *Erie* in the first several decades of the new era. Why did Justices who were so solicitous of state courts in domestic commerce also prove so deferential to open-ended presidential power in foreign affairs?

Regarding the trend of later years, as the Court grew more cautious or conservative about federal power, there is a parallel question: Why were justices who were generally skeptical about federal power (or sympathetic to claims of the states) still open to the notion that federal courts could enforce some elements of an international law of human rights—and perhaps enforce such law on state and local governments within the United States? These questions seem much less puzzling, and the patterns seem much more intelligible, if one thinks about the larger context. All these doctrinal currents are rooted in related strains of post-*Erie* positivism.

IV. THE COMMON PREMISE OF INTERNATIONAL ACTIVISM

Start with the outlook of courts before *Erie*. In a relatively peaceful and orderly world, you might think common law courts could be relied on to sort out routine commercial disputes, unless these courts are influenced by some pressing political bias. Before *Erie*, federal judges embraced federal common law as an alternative to—and therefore a potential check on—localist bias in state courts. For similar reasons, they also accepted a role for state courts, in cases involving foreign assets, as a check on presidential overreaching in foreign affairs. It might all look quite different if you think the world is on the brink of cataclysmic confrontations; then you might think the national government needs very broad powers. You might also think these powers should generally be vested in the President, who might

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 564–66 (Breyer, J., dissenting).

¹⁷¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736–38 (2004).

¹⁷² *Id.*

seem most suited to find the safest path through recurring crises. If you also thought the economy was in crisis or might return to crisis, then your view of presidential power in foreign affairs would reinforce your general inclination to acknowledge broad federal administrative power to regulate the domestic economy.

Seen from this perspective, the *Filártiga* cases might seem all the more puzzling. Why would so many lower courts—and so many more academic advocates—think the President needed help from private litigants in federal courts? Invoking a customary law of human rights in federal courts might seem plausible, but only for those who held a quite opposite view of the world from that exemplified in *Belmont*, *Pink*, and *Sabbatino*. Only an extremely peaceful, orderly world, one might think, could sustain a legal system in which private litigants in any country could use local courts to make accusations of officials in other countries regarding sensitive aspects of their own official conduct.

But viewed from the perspective of pre-*Erie* jurisprudence, there may be much more continuity between these later outlooks than appears on the surface. Before the mid-twentieth century, judges tended to assume a certain set of organizing principles, articulating a more or less natural ordering of human activity—public and private, foreign and domestic, military and commercial. If you think these basic assumptions about the articulation of political reality are arbitrary or anachronistic, then you may find it quite plausible that the world would be just as well governed by encompassing international conventions establishing the personal rights and entitlements of every person in the world, and these agreements could then be implemented by federal courts at the instigation of more or less anyone.

If you scoff at the idea that any set of governing arrangements is more natural than any other, then you might as well embrace arrangements that seem more inspiring and progressive, or simply more consistent with your current preferences, however derived. You won't need much theorizing if you start from the premise that all arrangements are ultimately the reflection of what those in power choose to impose.

If you do think that federal courts in the United States can enforce human rights around the world, then you may even feel it is morally urgent for courts to make that effort. If you could save people around the world from oppression and abuse and denial of rights, how could you choose not to do so? If there were legal doctrines that promised at least a start on the project of guaranteeing universal standards of human rights protection to all human beings on the planet, how could you decline to embrace them? Wouldn't it seem a matter of highest urgency to advance this project? Wouldn't you think it imperative to go forward? You might even see obstructions to the program as a threat to world order.

Viewing the challenge from this perspective, you would probably have little patience for legal analysts who raised constitutional objections to your program. They would seem equivalent to officials who locked away food

supplies in the midst of a famine. Or more aptly, they would look like pedantic defenders of state court jurisdiction, complicating President Roosevelt's strategy for saving the world.

So when Professor Koh launched his attack on the "revisionist thesis" of Bradley and Goldsmith, he went right to the top register in moral intensity:

Under [their] reasoning, the fifty states of the Union had no domestic legal obligation to obey customary norms against genocide during the period from December 1948, when the United States first signed the Genocide Convention, until November 1988, when the United States finally ratified that treaty and executed it as domestic federal law.¹⁷³

Koh did not speculate on what might have restrained genocidal impulses in state governments prior to 1980, when the *Filártiga* court affirmed the binding force of the customary international law of human rights.¹⁷⁴

V. WHAT IS NATURAL?

Professor Koh's moralism did not impress the Supreme Court. But even Professor Henkin, in the 1984 article that launched the doctrine of the *Restatement (Third)*, did not actually claim that courts would sort through the customary international law of human rights by distinguishing the most morally urgent from the secondary claims.¹⁷⁵ Henkin, in fact, retreated to the logic of *Erie*.¹⁷⁶ He argued that customary international law was "like federal common law" in being cognizable by federal courts and preemptive of state law.¹⁷⁷ But at root it was different:

Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment In a real sense, federal judges find international law rather than make it . . . as is clearly not the case when federal judges make common law pursuant to constitutional or legislative delegation.¹⁷⁸

The distinction is revealing. The difference is not that customary international law is "found" by a more fully developed method or a more determinate process. Henkin admitted that it remains "mysterious" how a particular practice or norm of states comes to be established as customary

¹⁷³ Koh, *supra* note 49, at 1840.

¹⁷⁴ *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

¹⁷⁵ See Louis Henkin, *Int'l Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-67 (1984).

¹⁷⁶ *Id.* at 1558.

¹⁷⁷ *Id.* at 1561.

¹⁷⁸ *Id.* at 1562.

law.¹⁷⁹ But he did not want the force of customary international law to rest on anything like deductions from first principles. That would sound too much like the discredited notion of a general common law. So, better a “mystery” than a “brooding omnipresence,” as Justice Holmes sneeringly characterized the general common law.¹⁸⁰ And better to embrace a law that just happens to be international or “universal” than one which claims to be natural or rational because rooted in first principles.

Thus, the *Restatement (Third)* provides a list of rights and guarantees which have become “established” in the customary international law of human rights.¹⁸¹ The Reporters’ Note cautions that this list is not closed, but characteristically offers no theory to explain how or why new rights might be added to the list.¹⁸² Justice Souter’s opinion in *Sosa* rejected the conclusion that all of customary international law is “law” for federal courts.¹⁸³ But he honored the premise of the doctrine expressed in Henkin’s article and then in the *Restatement*: The relevant question is not whether a particular claim follows from a fundamental principle or even whether it has come to be generally credited by other nations, but whether it has now come to be “defined with . . . specificity” by outside authorities.¹⁸⁴ The highest concern—the one criterion Souter’s opinion actually mentions—is the quantity of evidence indicating that a particular claim is not an independent creation of federal courts. So far as one can discern from Souter’s opinion, claims grounded in customary international law might be anything, so long as they are not disputable.

Justice Scalia and his fellow conservatives in *Sosa* offered a far narrower view, but one that proved in important ways complementary.¹⁸⁵ Customary international law claims can be enforced by federal courts if known to the Framers of the Constitution or at least to the framers of the Judiciary Act of 1789.¹⁸⁶ So all the Justices in *Sosa* agreed that the Alien Tort Act allows claims based on international offenses listed in Blackstone’s *Commentaries*.¹⁸⁷ The conservatives wanted to close the ATS with that one reference. Souter and the more liberal justices remained open to supplemen-

¹⁷⁹ *Id.* at 1566.

¹⁸⁰ *S. Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917).

¹⁸¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

¹⁸² §702 lists “genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhumane or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; consistent patterns of gross violations of human rights.” Comment a: “The list is not necessarily complete and is not closed.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, cmt. a (1987).

¹⁸³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728–29 (2004).

¹⁸⁴ *Id.* at 725.

¹⁸⁵ *Id.* at 728–31.

¹⁸⁶ *Id.* at 717.

¹⁸⁷ *Id.* at 724.

tary material so long as new offenses could be “defined with a specificity” comparable to that found in Blackstone’s *Commentaries*.¹⁸⁸

Why so much harping on Blackstone? Evidently because any doctrine endorsed by Blackstone cannot be denounced as an “exercise of law-making” by contemporary judges.¹⁸⁹ But where did Blackstone get these doctrines? Nobody on either side of the debate in *Sosa* expressed any interest in that question. But it’s hardly a remote and obscure question, if you want to understand what “the law of nations” meant to eighteenth century statesmen.

In the four volumes of his *Commentaries*, Blackstone offered only one short chapter on “offences against the law of nations.”¹⁹⁰ It begins by acknowledging that “in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent as adopted by the law of England.”¹⁹¹ He mentions in this context “mercantile questions, such as bills of exchange” and “disputes relating to prizes, to shipwrecks, to hostages and ransom bills” (that is, maritime disputes, usually arising from war measures).¹⁹² These claims, once considered part of the common law, drop out of the Court’s discussion in *Sosa*, in favor of Blackstone’s thematic treatment of three “offences against the law of nations”: “1. Violation of safe-conducts; 2. Infringement of the rights of [a]mbassadors; and, 3. Piracy.”¹⁹³

Even here, Blackstone was not simply reciting formulas bequeathed to English judges from the days when dragons and druids stalked the land. Blackstone was, in fact, the first treatise writer to discuss any international claims as part of the common law. His one chapter on international “offences” seems to have been based on a handful of English precedents, none much older in Blackstone’s day than the *Filártiga* precedent was at the time of *Sosa*.¹⁹⁴ And, of course Blackstone talked about “offences against the

¹⁸⁸ *Id.* at 725.

¹⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

¹⁹⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (Univ. of Chicago, 1979, facsimile of original 1765–69 four volumes).

¹⁹¹ *Id.* at 67.

¹⁹² *Id.*

¹⁹³ *Id.* at 68.

¹⁹⁴ See Harold Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT’L L. 280, 282–83 (1932) (noting that: “No commentator previous to Blackstone mentions this doctrine [that the law of nations is part of the common law].” It seems to have arisen in the early eighteenth century, in a dispute over the arrest of the Prussian ambassador.). For a more extended account, see Roger O’Keefe, *The Doctrine of Incorporation Revisited*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 1186 (James Crawford, et al., eds., 2010) (“The statement that customary international law is part of English law is traceable to Lord Mansfield’s account in *Triquet v. Bath* in 1764 [regarding *Barbuit’s* case, in which Mansfield had participated as counsel in 1736] . . . Blackstone appeared in *Triquet* as plaintiff’s counsel . . . Lord Mansfield CJ’s recollection in *Triquet* was strictly obiter, since the case, like *Barbuit’s* case before it [the precedent he cited] turned

law of nations”—not “torts.” His discussion begins by acknowledging that “offences against the law of nations can rarely be the object of the criminal law of any particular state.”¹⁹⁵ The U.S. Constitution seems to reflect this view when it gives *Congress* the power to “define . . . offences against the law of nations.”¹⁹⁶ Perhaps Congress could delegate this definitional responsibility to courts. Could it do so without limit? How would we establish those limits? None of these questions are even acknowledged in *Sosa* or *Kiobel*.

The skirting of basic questions might be easier to understand if so many precedents had already accumulated that today’s judges could infer the rules without remembering the reasons. But as the Court acknowledged in *Sosa* (and in *Kiobel*), actual claims under the ATS were virtually unknown before *Filártiga*.¹⁹⁷ If there are no precedents and no surrounding theory, how do we figure out when a new kind of claim has come to be established with “specificity”?

The questions don’t stop with the Alien Tort Statute. Scholars urging ambitious understandings of customary law—such as Henkin and Koh—have quoted precedents running back to the days of Chief Justice John Marshall, affirming that international law is part of our law.¹⁹⁸ If international law has always had that authority, why was there not more dispute about the obligations it imposed? Why do we not hear more of great courtroom battles between advocates for “international law” and advocates for competing domestic policies? How could “international law” have such a long history in American courts if the Supreme Court was still so unsure, in 2004, what it covered or even what it could, in principle, cover?

Historically minded scholars have advanced quite plausible answers to some of these questions. In particular, Anthony Bellia and Bradford Clark argue that the ATS did not aim at all norms or claims that might be associated with the law of nations but with those that involved “perfect rights” of other nations¹⁹⁹; in the eighteenth century understanding, perfect rights were those rights that would justify resort to force if the rights were violated. Interference with ambassadors is an obvious example. Thomas Lee has offered a more focused account: the ATS was concerned to protect the

on the construction of an Act of Parliament, 7 Anne c 12, also known as the Diplomatic Privileges Act of 1708.”).

¹⁹⁵ BLACKSTONE, *supra* note 190, at 68.

¹⁹⁶ U.S. CONST. art. I, § 8; see Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 844 (2007).

¹⁹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

¹⁹⁸ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984).

¹⁹⁹ Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 CHI. L. REV. 445, 476 (2011).

rights of British owners claiming compensation for property seized during the Revolution.²⁰⁰

I want to emphasize a larger and more general point that offers a clarifying perspective on post-*Erie* confusions. The original view was based on a theory that in the eighteenth century was called natural law. So Blackstone characterized “the law of nations” as a “system of rules . . . to decide all disputes . . . and to insure the observance of justice and good faith in that intercourse . . . between two or more independent states and the individuals belonging to each.”²⁰¹ He then noted that since “none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest, but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree”—or as he says a bit earlier, from “rules deducible by natural reason.”²⁰²

The law of nature and the law of nations were not seen as interchangeable, but still seen as sufficiently related that both phrases appeared together in the titles of leading treatises. The most influential treatise at the time of the American Founding, for example, was *The Law of Nations*, by the Swiss diplomat Emer de Vattel, which carried this subtitle: “The Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns.”²⁰³

In its traditional understanding, from the seventeenth century down to the early twentieth century, the law of nations had two main objects. The first object was to promote peace by establishing clear jurisdictional boundaries. The law recognized sovereignty as a kind of property right in governing authority and then sought to clarify the boundaries around each sovereign’s rights. As Vattel put it, “each Nation should be left to the peaceable enjoyment of that liberty which belongs to it by nature. The natural society of nations can not continue unless the rights which belong to each by nature are respected.”²⁰⁴ It is easy to see the logic of this from a classical liberal perspective. Vattel applied Lockean doctrine quite directly:

²⁰⁰ Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 882 (2006).

²⁰¹ BLACKSTONE, *supra* note 190, at 66–67. (Blackstone also acknowledges that the law of nations may “depend upon mutual compacts and treaties between the respective communities” but then immediately notes that “in the construction” of such positive agreements “there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are conversant, and to which they are equally subject.”)

²⁰² *Id.* at 66.

²⁰³ Originally published in French in 1758 as “Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite aux Affaires des Nations et des Souverains.” An English translation was published in London in the following year, followed by nine separate editions by 1834. In the United States, twelve English editions were published by the late Nineteenth Century. See E. DE VATTEL, *THE LAW OF NATIONS* lvii–lix (Hein reprt. 1995) (Charles Fenwick trans., Carnegie Institute 1916).

²⁰⁴ *Id.* at 6.

Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature,—nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights.²⁰⁵

As Locke taught, in the state of nature there is property and obligation to honor contracts, a right to self-defense and other basics of moral and legal order.²⁰⁶

The second main object of the traditional law of nations was to facilitate exchange, particularly private exchange, particularly commercial exchange between nations. So, as Vattel says:

If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its land and its industry in the most advantageous manner; and mankind in general prove gainers by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce.

Every nation ought, therefore, not only to countenance trade, as far as it reasonably can, but even to protect and favour it.²⁰⁷

Fostering commerce required sovereigns to limit the powers they might otherwise exert. That did not seem contradictory in the eighteenth century. Just as property would lose much of its point in a world where property could not be sold, sovereignty would lose much of its point in a world where it could not be restrained to promote exchange. As the liberal theory conceived sovereignty as a protection for private property, it saw much of international law—the agreed terms of self-restraint among sovereigns—as a protection for private exchange.

The logic does not require appeals to precedent from a remote state of nature. You will not have much foreign trade if your sovereign claims the right to confiscate the property of foreign merchants at will (or absolve his own citizens of contract obligations to foreigners). You will not have much foreign trade if your sovereign claims the right to arrest ambassadors and consuls (the latter especially involved in facilitating trade) whenever it suits his fancy, leaving foreign merchants without local representatives. You will not have much foreign trade if your sovereign claims the right to let brigands and pirates attack foreign merchants in his domains or in areas (like the high seas) where he would normally act to protect his own citizens.

But the traditional view assumed that restraints on sovereignty would only be acceptable if sovereignty remained secure. So it acknowledged strong obligations to fellow sovereigns—to recognize their territorial au-

²⁰⁵ *Id.* at 75.

²⁰⁶ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 81–88, 92–94 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

²⁰⁷ VATTEL, *supra* note 203, §§ 21–22, at 274.

thority, to respect the inviolability of their ambassadors, and of their ships at sea. A great many doctrines designed to facilitate commerce were regarded as lesser claims, which a foreign sovereign was not entitled to protest—or at least not entitled to invoke as *causus belli*. As Vattel says:

But although it be in general the duty of a nation to carry on commerce with others, . . . a nation ought to decline a commerce which is disadvantageous or dangerous; since . . . her duties to herself are paramount to her duties to others, she has a full and clear right to regulate her conduct, in this respect, by the consideration of what her advantage or safety requires . . . The obligation of trading with other nations is in itself an imperfect obligation, and gives them only an imperfect right . . .²⁰⁸

So the courts of one sovereign might recognize property and contract claims originating in a foreign jurisdiction, but not when some clear local policy stood in the way. And what applied to property and contract did not necessarily apply at all to criminal conviction or indictment: courts of one nation were not obliged to recognize determination of criminal status from another, as Justice Story emphasized in his treatise on conflict of laws.²⁰⁹

The Articles of Confederation and the original U.S. Constitution thus include provisions on “full faith and credit” and extradition of “fugitives from justice.” Such obligations could not be taken for granted, even among neighboring states. The Declaration of Independence seems to assume these background understandings. It protests “cutting off our Trade with all Parts of the World,”²¹⁰ “obstructing the Laws for Naturalization of Foreigners,”²¹¹ and “refusing to pass others to encourage their Migrations hither”²¹²—but also protests the policy “to subject us to a Jurisdiction foreign to our Constitution and unacknowledged by our Laws.”²¹³

Quite a lot of historic practice becomes intelligible if one situates it between these two aims—limiting conflict and facilitating exchange. On one side there are jurisdictional limitations and immunities, like the act of state doctrine or the immunity of foreign ambassadors or foreign governments from suit in local courts. These were doctrines recognized in the eighteenth century and honored by state and federal courts down to the mid-twentieth century. On the other side is the embrace of the law merchant (seen as a

²⁰⁸ *Id.* § 25, at 275 (citations omitted).

²⁰⁹ See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 516–20 (1834). Chapter XVI explains the nontransferability of criminal status across jurisdictions and reports even the duty to extradite as a doctrine of Continental European publicists, not embraced in England. See *id.* at 521. The subtitle of the treatise sums up the areas where Story assumed extraterritorial applications might apply: “Foreign and Domestic, In Regard to Contracts, Rights and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgments.” See *id.* at 533–57.

²¹⁰ THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776).

²¹¹ *Id.* para. 9.

²¹² *Id.*

²¹³ *Id.* para. 15.

body of transnational commercial practices) by common law courts. Similarly, state and federal courts adopted rules to deal with conflicts of law, which would later come to be called “private international law.”

The two concerns—limiting conflict and facilitating exchange—often came together in cases arising on the high seas (which Article I, Section Eight groups together in authorizing Congress to “define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations”²¹⁴). Under the traditional international law doctrine, no nation has exclusive authority on the high seas, but each nation retains authority over its own ships (or ships owned by its own nationals). Pirates were thought to be vulnerable to attack by warships of any nation—but not because piracy was so odious. Many nations authorized the seizure of enemy ships and cargo as a tactic of war. The U.S. Constitution makes provision for Congress to do so when it authorizes “Letters of Marque and Reprisal”²¹⁵—and the Congress exercised this power before the Constitution was even a decade old, in the quasi-war with France in the late 1790s.²¹⁶

In a world in which nations authorize the seizure of enemy ships and cargoes, you can even see the logic of a “tort” claim against “pirates”: it might be a way for owners to recover property wrongly seized under a letter of marque. You can certainly see the logic of allowing neutrals to challenge such seizures in the courts of the seizing states. If you are using aggressive naval tactics to pressure an enemy (or quasi-enemy) in a limited war, you don’t want to arouse all other trading nations against you. So you assure neutral states—and owners and operators of trading ships of neutral states—that you won’t allow your own captains to rampage across the high seas like out-and-out pirates. Hence, prize courts.²¹⁷

As it happens, the most commonly quoted Supreme Court assertions about “international law as part of our law” come from Court rulings on the status of seized ships—that is, from prize cases.²¹⁸ These were not flukes.

²¹⁴ U.S. CONST. art. I, § 8, cl. 10.

²¹⁵ *Id.* art. I, § 8, cl. 11.

²¹⁶ ALEXANDER DE CONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE* 124–130 (1966).

²¹⁷ DONALD PETRIE: *THE PRIZE GAME* 145 (1999) (“Prize practice was . . . widely accepted and supported by the international merchants of the world because it brought a valuable element of certainty to their dealings.”).

²¹⁸ *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“the Court is bound by the law of nations which is part of the law of the land.”). Both *The Paquete Habana* and *The Nereide* are cited in a great many articles insisting that federal courts must embrace international law—even the customary international law as understood by academics writing on the subject in American law schools today. *See, e.g.*, Harold Hongu Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 43, 45 (2004); Jessup, *supra* note 10 (discussing international law and *Erie*).

A solid majority of Marshall Court rulings invoking some aspect of “the law of nations” concerned disputes about the status of ships.²¹⁹

As it also happens, one of the most famous statements by Justice Holmes about the status of international law arose in a case about maritime law:

There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. Also, we must realize that the authority that makes the law is itself superior to it and that if it consents to apply to itself the rules that it applies to others, the consent is free and may be withheld. The sovereign does not create justice in an ethical sense to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is a question of power and no human power is unlimited. But from the necessary point of view of the sovereign and its organs, whatever is enforced by it as law is enforced as the expression of its will But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to grasp.²²⁰

You might say this has all changed, now that we have what Professor Koh described as the “positivistic order” of the UN system.²²¹ We can now know what is wrong, because the UN tells us or at least provides a forum in which diplomats can agree. The *Filártiga* Court assumed that the international denunciations of torture showed there was international consensus

²¹⁹ See BENJAMIN MUNN ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 365–70 (The Lawbook Exchange, Ltd. 2006) (1939) (of the 145 Marshall Court cases listed, seventy have the name of ships). The relevant percentage is somewhat higher, since some cases concern domestic boundary disputes and derivations of land claims from treaties rather than actual disputes between parties of different nations. See *id.* The introduction to this study offers a revealing data point regarding scholarly perception of international law in 1939: “To assert dogmatically, as does the title of this book, that John Marshall was at all concerned with the ‘law of nations,’ as international law was called in his day, still occasions surprise, doubt and even disbelief in the minds of far too many students of the subject.” *Id.* at 1.

²²⁰ *Western Maid v. Thompson*, 257 U.S. 419, 432–33 (1922) (emphasis added) (citations omitted) (holding that rule of maritime law, making a ship liable to those it injures in collisions, does not apply to ships that have come into possession of the federal government). Justice Holmes, writing for the majority, dismisses the notion that the ship itself can be blamed as a quaint relic of remote superstitions. See *id.* As Justice McKenna explains in his dissent, there is considerable logic in making the ship a kind of deposit for collision claims against the owners since shipping may impose harms on victims who cannot reach the owners. See *id.* at 435–36 (McKenna, J., dissenting).

²²¹ Harold Hongju Koh, *A World Transformed*, 20 *YALE J. INT’L L.* ix, x (1995) (“Following World War II, the architects of the postwar political and economic system posited in place of this loose customary web of state-centric rules an ambitious positivistic order, built on institutions and constitutions: international institutions governed by multilateral treaties organized proactive assaults on all manner of global problems. This complex positive law framework of charters, treaties, and formal agreements reconceptualized international law as a creative medium for organizing activities and relations of numerous transnational players, now expanded to include intergovernmental organizations with independent decision-making capacity regarding a broad array of planetary issues.”).

that today's torturer could be regarded, like pirates of old, as an "enemy of all mankind."²²²

Or perhaps not. States condemned unauthorized commerce raiding, not wartime seizure of property on the seas, per se. What made pirates so vulnerable was that they had renounced ties to their home states. They operated in international waters without seeking home authorization. They did not only attack enemies designated by their own sovereign, but ships of any nation that came in their path, including those of their original home state. That does not describe officials who inflict torture on their own citizens on behalf of their own government.²²³

The *Filártiga* court assumed that as so many diplomats had denounced torture, everyone had agreed on what it was. That seems much less plausible today, after the debates over coercive interrogation during the administration of George W. Bush. If it were true, moreover, that there are a range of international offenses which everyone has agreed to punish under the same terms, one would expect many states to follow the *Filártiga* doctrine and open their courts to tort claims against foreign officials for human rights offenses against foreign nationals and taking place in foreign countries. No other country has done so. Even when it came to perpetrators of mass murder—the followers of Pol Pot in Cambodia in the 1970s, for example—no outside country was willing to host criminal trials of the accused in its own courts, despite pleas from the UN to do so.²²⁴

Starting in the late 1990s, a few countries in Western Europe did assert universal jurisdiction to try the most egregious violators of human rights of any nations. When prosecutors announced that they were considering indictments of top American officials for international policies that resulted in civilian deaths (Henry Kissinger, Richard Cheney, and Donald Rumsfeld were among those threatened), U.S. protest was swift and emphatic. Spain, Belgium, and Germany quickly amended these statutes to restrict their original claims of open-ended jurisdiction. Almost no cases have been pursued

²²² *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). As the opinion emphasized, the offense required state sponsorship, since the relevant international "declarations"—there was, at the time, no formal treaty, let alone a treaty ratified by Paraguay or the United States—required this: "Paraguay's renunciation of torture as a legitimate instrument of state policy [in its constitution] . . . does not strip the tort of its character as an international law violation, if in fact it occurred under color of government authority." *Id.*

²²³ The contrasts have been very well developed in Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004).

²²⁴ Diane Orentlicher, *The Future of Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 221 (Stephen Macedo ed., 2006).

under the new statutes.²²⁵ It turns out that the world does not have such a strong moral consensus as the *Filártiga* Court supposed.

But jurists in earlier times, while recognizing the necessarily local reach of criminal law, did not suppose the world was therefore a moral chaos. To the contrary, they assumed that the independence of nations was itself a moral doctrine—as well as a practical and sensible arrangement, modified by agreements to facilitate commerce and exchange among themselves. Here is the opening exposition from the mid-eighteenth century treatise of Emer de Vattel:

The natural society of nations cannot continue unless the rights which belong to each by nature are respected. No nation is willing to give up its liberty In consequence of that liberty and independence it follows that it is for each Nation to decide what its conscience demands of it and what it can or can not do; what it thinks well or does not think well to do; and therefore it is for each Nation to consider and determine what duties it can fulfill towards others without failing in its duty towards itself. Hence in all cases in which it belongs to a Nation to judge of the extent of its duty, no other Nation may force it to act one way or another. Any attempt to do so would be an encroachment upon the liberty of Nations. We may not use force against a free person, except in cases where this person is under obligation to us in a definite matter and for a definite reason not depending upon his judgment; briefly, in cases in which we have a perfect right against him.²²⁶

Here is John Marshall's version, setting up his argument in a Supreme Court case concerning claims on a foreign ship in an American port:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.²²⁷

And as a final example, here is Chancellor Kent at the outset of his *Commentaries*:

When the United States . . . assumed the character of an independent nation, they became subject to that system of rules which reason, morality and custom had established among the civilized nations of Europe, as their public law By this law we are to understand that code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other. . . . There has been a difference of opinion among writers, concerning the foundations of this law. It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that the law

²²⁵ For review of the general trends, see Luc Reydam, *The Rise and Fall of Universal Jurisdiction*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337–354 (William Schabas & Nadia Bernaz eds. 2010).

²²⁶ VATTEL, *supra* note 203, at §15–16, 16–17.

²²⁷ *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

of nations was essentially the same as the law of nature, applied to the conduct of nations, in the character of moral persons, susceptible of obligation and laws. We are not to adopt either of these theories as exclusively true. The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent and agreement. But it would be improper to separate this law entirely from natural jurisprudence, and not consider it as deriving much of its force and dignity and sanction from the same principles of right reason, and the same view of the nature and constitution of man, from which the science of morality is deduced.²²⁸

A few pages later, Kent remarks that the modern law of nations reflects not only “the Christian system of morals” but “the restraints of commerce.”²²⁹ The distance from these views to the program of international human rights law cannot be covered by simple extrapolation. If what you mean by international law is a set of rules to moderate dealings between nations, then you will focus on activity that crosses from one nation to another. If that is what you mean by international law, you might think the relevant norms must be reasonably accepted as rules governing actual transactions or interactions between nations. You might think, then, that you could rely on the injured nation to protest those violations of the agreed standards that cause it direct injury. If, by contrast, what you mean by international law is a body of law that controls the way each sovereign state treats its own citizens in its own territory, you are talking about something vastly more ambitious. It is not a law *between* nations but almost inescapably a law *above* nations. It implies that there must be enforcement from supranational authority or from all nations or any nation—since this law is no longer focused on disputes between one nation and another.

To put the point in a different way, the classical scheme looked at international law as a special kind of private law—in which states could dispute treaty claims like private contract claims, boundary claims like private property claims, aggression or wrongful interference like private trespass or tort claims. Most of these disputes would not be arbitrated by courts, of course, because nations would not normally accept the decision of an outside authority for a question concerning their own basic rights. But even as diplomatic discourse, private law analogies break down in disputes about compliance with international human rights standards. The issue is whether a particular state has behaved well toward its own citizens. Not many outside states are eager to litigate such issues. No human rights case involving a single nation has ever been brought before the International Court of Justice.²³⁰ Most human rights abuses remain unaddressed even in political fo-

²²⁸ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1–2 (O. Halstead, ed., 1832), available at <http://www.lonang.com/exlibris/kent/kent-01.htm>.

²²⁹ *Id.* at 8.

²³⁰ Gentian Zyberi, *Human Rights in the International Court of Justice*, in INTERNATIONAL HUMAN RIGHTS LAW; SIX DECADES AFTER THE UDHR AND BEYOND 296 (Mashood Baderin & Manisuli Ssenyonjo, eds. 2010) (despite numerous peripheral references to human rights issues, only

runs, unless there is some foreign policy agenda animating the critics (such as the hope of stigmatizing a rival state or its allies).²³¹

If you do think the international community can regulate how a state governs its own people at home, you are no longer thinking about trying to isolate and remedy particular disputes. Instead, you must think about how to engage the attention of other states—that is, how to broaden the dispute. You would need to do that to summon sufficient moral authority (or physical threat) to intimidate the delinquent—in the manner of criminal law or public law. Prior to recent decades, the whole idea of a transnational criminal law seemed bizarre—to Vattel, to Joseph Story, and even to the government of the Netherlands in 1918, when it hosted the first permanent international judicial institutions but refused to cooperate in any way with an attempted trial of the German Kaiser.²³²

Even today the United States, like the majority of permanent members of the Security Council, does not accept the jurisdiction of the International Criminal Court (ICC). True, the project has unanimous support from European states. The European Union and the Council of Europe (sponsor of the European Convention on Human Rights and its enforcing European Court of Human Rights (ECHR)) are emphatic in their support of the ICC. On the other hand, the EU and the ECHR have no real counterparts—involving such extensive delegation of sovereign powers to supranational authorities—elsewhere in the world. One might say it is no longer so clear what is the rule and what is the exception. Or what is the natural way of organizing public authority.

So it is logical that Harold Koh speaks of *Filártiga* as an exercise in “transnational public law litigation” and compares it in this way with *Brown v. Board of Education*.²³³ *Brown*’s holding makes no sense without a

case where Universal Declaration of Human Rights used in judgment on the merits was U.S. claim against Iran for holding U.S. diplomats hostage in 1979).

²³¹ On problems of official UN machinery, see HELEN STACY, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE 45–55 (2009).

²³² GARY J. BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 77 (2000) (“Having granted asylum [to Kaiser Wilhelm] the Dutch government was not to be easily budged [to extradite him], to [British Prime Minister] Lloyd George’s surprise. Holland, neutral in the shadow of its huge German neighbor, took a dim view of Allied victors’ justice. Nor did the Dutch monarchy relish the precedent of turning another monarch over for trial.”).

²³³ Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2365–70 (1991). The author calls *Filártiga* the “*Brown v. Board* of transnational public law litigation.” *Id.* at 2366. Koh attributes the term “public law litigation” to an influential article by Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), describing the complexities of “institutional reform litigation” aimed at integrating public schools or protecting inmates in prisons or mental institutions, where the judge presides over bargaining among a variety of representatives of multiple constituencies, seeking to reach agreement on future policies, rather than providing specific compensation to a specific, identified plaintiff. *Id.* at 2348. It may or may not be coincidence that a decade before he wrote this article, Chayes had been Legal Advisor in the State Department—where diplomacy often involves efforts to resolve disputes through extensive bargaining among representatives

preexisting infrastructure of public educational institutions. The ensuing cases generally involved a range of different “parties”—or at least constituencies, represented before the court—with each pressing their own claims on the future development of school policy in the affected district. No one in school desegregation suits was given the opportunity to accept financial compensation and walk away. That was not the point.

In a similar way, *Filártiga* does not make sense without a preexisting public setting, in which states are obligated to punish perpetrators of human rights abuses and another state can therefore step into the role of the state that defaults on this obligation. No officials have actually paid damage claims. The point is to use litigation to draw attention to disputes, to initiate a complex process of bargaining over future policy. These are public interest lawsuits, usually sponsored by university clinics or public interest organizations. The aim (as Koh asserts) is to bring outside pressure to bear in order to reform public authority in places where it fails to live up to international standards. It is, in a phrase, about global governance.

One might even say (borrowing an analogy Koh points at) that it is about judicial forays into public administration. Koh emphasizes the analogy between transnational human rights litigation and domestic American cases in the 1970s, asking federal courts to remodel prisons, schools, and other public institutions that were operated by states or localities and failing to live up to federal standards.²³⁴ Such endeavors may seem a long way from Holmesian skepticism about courts. They might seem to reflect blind faith in judicial capacity rather than Holmesian skepticism. Yet these ventures are, in one sense, entirely in the spirit of Holmesian skepticism about law and courts: they assume the law might be anything, because the only real test is one of force—what can be done, as Holmes says, without “fear of revolution.” A polite term for this view is positivism.

VI. CONCLUSION AND IMPLICATIONS

The connection between *Erie* and positivism was once taken for granted by commentators, as it was embraced by justices on all sides in *Sosa*. The connection was challenged by Jack Goldsmith and Steven Walt in a closely argued essay published in 1998.²³⁵ They argued that positivism could not be the basis for the holding in *Erie*, because some self-avowed positivists could (and did) favor the idea of federal common law, while an

of different constituencies, with loose supervision from the great powers or the UN in the background (with some threat of force or sanction for failure to reach agreement).

²³⁴ *Id.* at 2365.

²³⁵ Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

advocate of natural law could favor the rule in *Erie* on different grounds from Justice Holmes.

These are appropriate cautions but not, it seems to me, entirely compelling arguments. There were southerners who opposed slavery but embraced secession in 1860, as there were supporters of slavery in border states who remained loyal to the Union. These counterexamples do not prove the Civil War was essentially unrelated to slavery. I would say Lincoln's Second Inaugural was right in calling slavery the central issue of the conflict.²³⁶

A more telling challenge might seem to be this: The positivist premise of *Erie* can't be taken seriously, because the same justices who endorsed *Erie* were quite ready to embrace a great deal of judicial improvisation in other areas. A mere five years after *Erie*, a unanimous Court ruled in *Clearfield Trust v. United States* that general common law rules could be enforced by federal courts in preference to state rules (regarding liability for processing a bad check) when the money was owed to the federal government.²³⁷ If federal courts could find sensible rules to protect the federal government, why couldn't they discern rules to protect out-of-state business firms? Nor was *Clearfield* a unique case. The same day *Erie* was announced, the Supreme Court handed down *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, insisting that federal courts had authority to apply common law principles in a dispute affecting the distribution of water rights between two states—even when Colorado courts had pronounced their own view of the state's obligations.²³⁸ The opinion in *Hinderlider* was by Justice Brandeis.

In later years, of course, courts would continue to invoke *Erie* as a caution against judge-made law—while confidently asserting ever more elaborate judge-made rules purporting to have some relation to vague phrases in the Constitution. Eventually, justices found the self-confidence (if that's the right term) to impose the complicated trimester scheme adumbrated in *Roe v. Wade*²³⁹ while simultaneously imposing special procedural

²³⁶ “One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union even by war, while the Government claimed no right to do more than to restrict the territorial enlargement of it.” Pres. Abraham Lincoln, Second Inaugural Address (March 4, 1865), available at <http://millercenter.org/president/speeches/detail/3512>.

²³⁷ *Clearfield Trust Co. v. U.S.*, 318 U.S. 363, 366 (1943).

²³⁸ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1983).

²³⁹ For landmarks in the Court's unpredictable turns on abortion, see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (no restrictions in first trimester of pregnancy, restrictions allowed to protect woman's health in second trimester, protection for fetus allowed in third trimester); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (invalidating requirement that second trimester abortions be performed only in hospitals), overruled by *Planned Parenthood of Se. Pa.*, 505 U.S. 833; *Thornburgh v. Am. Coll.*

rules for the administration of capital punishment.²⁴⁰ If justices can swallow such extrapolations from Delphic phrases in the Constitution, how can they be so unsettled by the thought that the pre-*Erie* common law was not, after all, the “articulate voice of some sovereign that can be identified.”²⁴¹

But we ought to take seriously the thought that supporters of *Erie* meant what they said. The premise of *Erie*, stated explicitly and insisted upon in the opinion, is that there can’t be a *general* federal common law, because it would have to be the invention of federal judges. That claim makes sense to the degree that one doubts there is or could be compelling foundations for the general common law.

When *Erie* was decided, it was increasingly common for legislatures to restrict or modify the common law. *Erie* did not merely acknowledge the priority of statutes; it insisted that federal courts could not give preference to the general common law (in their own understanding of it) as against state judicial doctrines modifying the common law. It followed from this holding—as the Supreme Court duly found a few years later—that federal courts could have no preference between one state’s version of common law and another’s, but must be bound by the choice of law rules of the state in which they operate.²⁴² The logic of *Erie* even undermined the traditional canon that statutes in derogation of common law must be interpreted strictly (to avoid displacing the common law more than intended).²⁴³ The

of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating requirements that physicians provide information to potential patients on risks of abortion and alternatives); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe* but rejecting “rigid trimester scheme” to allow waiting periods and other measures to assure “informed consent” for abortion seekers); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating limits on ‘partial birth’ late term abortions); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal statute imposing similar limits on late-term abortion procedures).

²⁴⁰ *Furman v. Georgia*, 408 U.S. 238 (1972) (prohibiting capital sentences because imposition unpredictable); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (prohibiting mandatory capital sentences for excluding jury sentencing discretion); *Gregg v. Georgia*, 428 U.S. 153 (1976) (approving capital sentences when imposed by juries following statutory criteria, determined in a separate jury process); *Lockett v. Ohio*, 438 U.S. 586 (1978) (prohibiting capital sentences where juries not permitted open discretion to apply “mitigating” factors); *Beck v. Alabama*, 447 U.S. 625 (1980) (prohibiting capital punishment where juries not notified of discretion to convict on lesser charges); *Tennard v. Dretke*, 542 U.S. 274 (2004) (prohibiting capital sentences were sentencing jury not given adequate notice of defendant’s low IQ).

²⁴¹ “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified. . . .” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

²⁴² *Klaxon Co. v. Stentor Elec. Mfg. Co. Inc.*, 313 U.S. 487 (1941).

²⁴³ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318 (2008) (deriding this traditional rule as “a relic of the courts’ historical hostility to the emergence of statutory law” but acknowledges that statutes should be understood to change the common law whenever that is their “clear implication.”) (quoting Harlan Fiske Stone, *Common Law in the United States*, 50 HARV. L. REV. 4, 18 (1936)).

Holmesian rhetoric in *Erie* offered an intellectual grounding for such postures of detachment or indifference.

It all makes much more sense if one starts from the skeptical premise that courts have no independent ground for decisions about basic private relations—*A* and *B*, Blackacre and Whiteacre. Distrust of the common law is related to distrust of the common law outlook with its insistence on a relatively abstract view of legal relations between private parties—what might be called an economy-wide perspective. The general common law was not developed with the aim of protecting any particular interest but of commerce in general. In the course of the twentieth century, the generality of common law came to be replaced by specialized federal regulatory programs—for particular industries, for particular commercial relations. After *Erie*, the general common law was, in turn, replaced by “enclaves” of special common law—in labor law, antitrust law, and other fields where judges confidently elaborated new categories of rules, clinging to the consoling thought that each such category was “special.”

The common law of foreign relations is certainly something special. So, too, in a way, is the new conception of customary international law, which federal courts have authorized themselves to embrace—at least here and there (or, since *Kiobel*, perhaps mostly here). For sure, international law does not now appear as a common law elaboration of natural norms regulating relations between equal parties. Instead, much of it now can be conceived as implementing regulatory aims—a kind of global public law. Human rights norms are not about facilitating private exchange across borders. Still less are they about trying to keep one sovereign authority from intruding into the rightful domain of another. International human rights law is about enforcing standards that (in the view of advocates) ought to be universal—but require enforcement to see that they are. International human rights law might be better conceived as the core of an emerging global constitutional law, as a number of commentators have forthrightly asserted.²⁴⁴

If you view transnational public law in that light—as a law about government obligations rather than private relations—it might seem entirely appropriate to shrug off jurisdictional boundaries when it comes to enforcing this law. Whatever the law requires, courts could then enforce. That might easily be thought to follow from the notion that there is a universal law of human rights, binding on all governments. Why not conclude, as the *Filártiga* court did, that any court in any nation is entitled to enforce this law on any government, anywhere?

We have seen a similar pattern in domestic regulatory law. Historically, most commercial transactions were governed by common law rights and remedies. When schemes of administrative regulation were imposed on

²⁴⁴ See, e.g., 2013 GLOBAL CONSTITUTIONALISM: HUMAN RIGHTS, DEMOCRACY AND RULE OF LAW (Cambridge University Press) (implying all will be guaranteed by global standards).

many industries, advocates for such schemes urged courts to forget the common law and defer to the special expertise of the new regulators. By the 1970s, common law ordering was so thoroughly eclipsed that it came to seem plausible for courts to provide relief to private claimants, demanding more or better enforcement from regulatory agencies, even when they had suffered no injury cognizable at common law.²⁴⁵ By the 1970s, courts could see themselves as “part of the administrative process,” and “partners” with administrative agencies in common “furtherance of the public interest.”²⁴⁶ Courts could see themselves as helping to ensure that “important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”²⁴⁷ Advocates for judicial deference in earlier years were often quite sympathetic to the new style of judicial activism. And not illogically—both stances were means of elevating new public purposes above private or common law ordering. By the 1980s, a more cautious Supreme Court began to emphasize the need for deference to administrative judgment and restrictions on standing,²⁴⁸ but did not squarely repudiate the notion that courts could hear cases based on broad public claims brought by private advocates, seeking more extensive or vigorous regulatory action.²⁴⁹

So with international law. The more you extend the reach and inflate the aims of international law, the harder it is to separate international law—law between nations—from global constitutional law. But global constitutional law has never existed in history. Not even people who advocate this project conceive that it can derive precise answers from general principles, in the manner of common law adjudication. Not even its advocates imagine that global constitutional law can proceed without something like sanctions, exemplary punishments, and international institutions capable of focusing and directing them. If one compares the aims of international human rights law with the international doctrines of Story, Kent, and Marshall, it is the former that seems more “positivistic” in spirit. And the Supreme Court’s cautions against this approach, in *Sosa* and *Kiobel*, are also notably positivist in spirit. The Justices are, one might say, still in the shadow of *Erie*.

²⁴⁵ For an astute commentary on the larger trend, see MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 51 (1988) (“At a certain point, the expansion of standing goes beyond improving pluralism with more pluralism [giving access to more affected groups] and becomes countering pluralism with the intervention of good citizens who will push for the right rather than their own particular interests.”).

²⁴⁶ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970).

²⁴⁷ Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

²⁴⁸ Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 864–66 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 556–78 (1992).

²⁴⁹ Friends of the Earth v. Laidlaw Env’tl. Servs., 528 U.S. 167 (2000); Ctr. for Auto Safety v. NHTSA, 793 F.2d 1322, 1334–35 (1986); Nat’l Assoc. of Recycling Indus. v. Sec. of Labor, 453 U.S. 913 (1981).

Contemporary visions of an international law of human rights, presided over by an International Criminal Court, may seem far removed from the skeptical spirit of Oliver Wendell Holmes. But the Holmes of the *Lochner*²⁵⁰ dissent and the dissent in *Hammer v. Dagenhart*²⁵¹—the Holmes who saw the Constitution offering no principles that courts could invoke against a determined legislature—was a hero to New Deal liberals. His doctrines promised to open vast new fields to state control. There was, in Holmes's view, no principle to restrain state control other than "fear of war or revolution."²⁵²

The Jessup who cautioned that *Erie* had to make room for a special federal common law of foreign affairs was the Jessup who, in later years, foresaw a future in which human rights claims could be appealed from national courts to an international human rights authority, just as (he noted) we have become accustomed to appeals from state to federal courts.²⁵³ Just as Jessup envisioned a federal common law which would be uniquely constitutionalized (hence supreme over state law), he envisioned an international law which would somehow rule supreme over federal law (in ways never before true of international law).

Jessup's vision was progressive—in the literal sense that it had few roots in past practice and was not much concerned with enduring principles. His famous 1939 article in the *AJIL*²⁵⁴ cited no precedents for its proposed federal common law of foreign affairs—just as it embraced the rule of *Erie* with no effort to explain how or why it should be constitutionally required to disable federal courts from exercising a jurisdiction that Article III seems to confer under diversity jurisdiction.

It is logical that with the renewal of respect for the traditional Constitution—the pre-New Deal Constitution of federalism and separation of powers—the Supreme Court has shown itself more cautious about the Jessup–Douglas–Henkin version of the federal common law or the federal court enforcement of customary international law. The actual structure of our traditional law does not go readily with the new project. The premises

²⁵⁰ *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

²⁵¹ *Hammer v. Dagenhart*, 247 U.S. 251, 277–81 (1918) (Holmes, J., dissenting).

²⁵² *Western Maid v. Thompson*, 257 U.S. 419, 432 (1922).

²⁵³ PHILIP C. JESSUP, *A MODERN LAW OF NATION: AN INTRODUCTION* 90 (1948). "In the early stages of the international development of protection of human rights, enforcement [would be] left to the national state, subject to review by international authority" but "gradually" the scheme could evolve toward "a situation analogous to that in the federal system in the United States, where constitutional rights may be first considered by state courts and ultimately reviewed by federal courts." He conceded this would involve a good deal of change: "not merely international law and the international system but also human nature . . . must be revolutionized." He expressed no doubt about the prospects for "revolutionizing" of "human nature" but also failed to identify the methods that could be expected to secure this result.

²⁵⁴ Philip C. Jessup, *The Doctrine of Erie v. Tompkins Applied to International Law*, 33 *AM. J. INT'L L.* 740, 740–43 (1939).

of the old Constitution don't easily fit with the ambitions of global governance. It is hard to articulate a convincing theory to explain how it would foster peace and security for each nation to allow private individuals to challenge their own government's officials in the courts of every outside nation.

If it is hard to understand the logic of this scheme, it is much easier to defend it as already law, grounded in the will of states that can agree to anything, even indirectly, and even inadvertently.²⁵⁵ Then, however it got to be that way, it remains *law*: not a “mystic over-law,”²⁵⁶ not a “brooding omnipresence,”²⁵⁷ not a “ghost”²⁵⁸ or an inference from “Mr. Herbert Spencer’s Social Statics,”²⁵⁹ but the sort of law that federal courts can be trusted to enforce because obedience to the voice of the sovereigns is a duty as inescapable as payment of “taxes”—“what we pay for civilized society.”²⁶⁰ Viewed that way, there is nothing to argue about.

Unless you have doubts. But if, like Justice Souter and colleagues, you have doubts but few firm convictions, you may move toward closing the door on this project while still leaving that door somewhat ajar. That can prove your open-mindedness and your distance from the world of *Swift*, or even the world of Russian asset claims in 1920s New York.

Five Justices in *Kiobel* saw the point more clearly, noting that extraterritorial claims risked exacerbating international conflict. The majority did not, however, distinguish extraterritorial claims about American citizens from claims involving foreigners. They offered no word of caution against applying a customary international law of human rights if it could be applied in a domestic setting.

For the *Kiobel* majority, it was enough to invoke the presumption against giving extraterritorial effect to statutes. That would do at least half the work of the doctrine announced by the conservatives in *Sosa* (the doctrine that the law of nations was closed to new claims in 1789).

All the Justices seem afraid to reach fundamental principles or orienting frameworks, as if haunted by the ghost of Justice Holmes. That might seem ironic because Holmes was so dismissive of ghosts. But perhaps it is

²⁵⁵ See, e.g., the opinion of Britain’s House of Lords in *Regina v. Bartle*, 2 All ER 97 (1999), 2 WLR 827, holding that former Chilean President Pinochet could be extradited for trial in Spain on the assumption that Chile had waived his head of state immunity when it ratified the Convention Against Torture. As the dissenting opinion by Lord Goff protested, the ruling thus treated a mere “implied term” in a complicated treaty text as sufficient basis to conclude that a sovereign state had actually consented to the waiver of its traditional claim to head of state immunity in foreign courts.

²⁵⁶ *W. Maid v. Thompson*, 257 U.S. 419, 432 (1922).

²⁵⁷ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

²⁵⁸ *W. Maid*, 257 U.S. at 433.

²⁵⁹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

²⁶⁰ *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927).

not surprising. If you keep harping on the nonexistence of ghosts, you may end up being haunted by fear of ghosts.

When not haunted by the idea of judicial lawmaking, even justices skeptical of international law have seen that it has something to tell us. Here is Justice Scalia:

“[T]he law of nations,” or customary international law, includes limitations on a nation’s exercise of its jurisdiction to prescribe [law]. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.²⁶¹

This analysis was offered in a dissent by Justice Scalia, though a dissent joined by Justices O’Connor, Kennedy and Thomas.²⁶² The issue was whether to read the Sherman Antitrust Act as applying to overseas activities.²⁶³ As Scalia noted, the majority opinion, by assuming U.S. jurisdiction in the absence of a particular, competing foreign statute, was a “breathtakingly broad proposition.”²⁶⁴ By contrast, the presumption of statutory deference to international law (in the sense of respect for foreign jurisdictions) had been embraced by the Court as recently in the 1950s, in cases about maritime jurisdiction, most notably in Justice Jackson’s opinion in *Lauritzen v. Larsen*.²⁶⁵ That opinion, in turn, cited the ruling of Chief Justice Marshall in *Murray v. The Charming Betsy*—dealing with the imposition of U.S. law on the foreign commerce of neutral states.²⁶⁶

Some later cases have endorsed Justice Scalia’s concern about needless interference with international commerce.²⁶⁷ Other cases, however, have insisted on giving a literal reading to federal states even when (read

²⁶¹ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 820.

²⁶⁵ *Lauritzen v. Larsen*, 345 U.S. 571, 571 (1952).

²⁶⁶ “By usage as old as the Nation, such statutes [touching claims at sea] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrine.” *Id.* at 577 (citing *U.S. v. Palmer*, 16 U.S. (3 Wheat) 610 (1818) (on reach of piracy statute); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (on application of U.S. Embargo Act to former U.S. citizen operating in Danish territory); concluding with *The Peterhoff*, 72 U.S. (5 Wall.) 28, 57 (1866) (“[W]e administer the public law of nations and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country.”). The Court reached the same conclusion in *Romero v. Int’l. Term Co.*, 354 U.S. 383 (1958) regarding nonapplication of U.S. law to foreign ships, even in U.S. waters, but Justice Frankfurter’s opinion, rather than simply invoking “international law” or “the law of nations,” speaks in characteristically resonant but vague terms about giving “due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.” *Id.* at 383.

²⁶⁷ See generally *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869 (2010); *Hoffman LaRoche v. Empagran*, 542 U.S. 155 (2004) (examples of later cases generally endorsing Justice Scalia’s concern).

that way) they do risk entangling American courts in foreign criminal proceedings—without a word of acknowledgement (or a word of protest from Justice Scalia) regarding the presumption against such readings.²⁶⁸ Even when the Court has given a restrictive reading to the overseas reach of U.S. law, it has generally done so by invoking the presumption against extraterritorial effect. Today's Court does not invoke the far older canon that federal statutes should be presumed consistent with the law of nations—meaning, international understandings on the demarcation of national jurisdictions.²⁶⁹ So it was in *Kiobel*, where federal jurisdiction was rejected solely on the grounds that the Alien Tort Statute²⁷⁰ should not be accorded extraterritorial effect. No Justice noticed that a customary international law of human rights would be an inversion of the law of nations, making each nation the rightful meddler in the affairs of its neighbor (as of nations on the other side of the world).

It is not necessary to challenge the specific holding in *Erie* to recover that traditional understanding of the law of nations. You don't even have to repudiate the notion of a special federal common law of foreign relations. In his youth, Judge Henry Friendly of the Second Circuit Court of Appeals had clerked for Justice Brandeis. In 1963, on the twenty-fifth anniversary of *Erie*, he delivered a widely noted lecture, "In Praise of *Erie*," and before publication the next year he inserted an appreciative comment about the new special common law of foreign relations, recognized in *Sabbatino*.²⁷¹ But in 1975, just a few years before *Filártiga*, Judge Friendly delivered a decision for the Second Circuit, denying federal jurisdiction to hear claims of fraud and abuse brought by a European investment trust against a financial services firm operating in the Bahamas.²⁷²

In rejecting a claim for jurisdiction under the ATS, Judge Friendly mocked the notion that any serious abuse must be regarded as the basis for

²⁶⁸ Cf. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 242 (2004) (Justice Breyer's dissent emphasizes the incongruity of allowing U.S. plaintiffs to invoke foreign criminal or regulatory authorizations for discovery in U.S. courts); *Olympic Airways v. Husain*, 504 U.S. 644 (2004) (the majority approves a broad interpretation of the Warsaw Convention, on recovery for accidents arising in international air travel, relying on a unilateral American interpretation, while Justice Scalia's dissent (joined by Justice O'Connor) urges an effort to coordinate the U.S. reading with more restrictive interpretation by foreign courts—in a sort of common law way).

²⁶⁹ "In the post-World War II era, the presumption against extraterritoriality had become unmoored from the Charming Betsy cannon and had taken on a life of its own." Melissa Waters, *International Law as an Interpretive Tool in the Supreme Court, 1946–2000*, 2012 INT'L L. IN THE U.S. SUP. CT. 380. The article notes some exceptions but emphasizes that with Justice Scalia's failure to secure five votes in *Hartford Fire*, "the Court missed an important opportunity to clarify the precise relationship" between "the presumption against extraterritoriality" and "the *Charming Betsy* canon." Dodge, *supra* note 139 at 393.

²⁷⁰ 28 U.S.C. § 1350 (2012).

²⁷¹ Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 (1964).

²⁷² *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

an international claim: “We cannot subscribe to the plaintiffs’ view that the Eighth Commandment, ‘Thou shalt not steal,’ is part of the law of nations.”²⁷³ It did not matter that “every civilized nation doubtless has this as a part of its legal system” because international law was not simply a summation of national legal systems.²⁷⁴ Quoting a district court ruling from a decade earlier, Judge Friendly insisted that “a violation of the law of nations” could only be found by a court when there had been “a violation . . . of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state and (b) used by those states for their common good and/or dealings inter se.”²⁷⁵ The district court had supported this definition with entirely apt citations from commentaries by Kent and Story and early works of European commentators on natural law.²⁷⁶

You might hold to this view—as Judge Friendly did, as Justice Scalia did later, and Justice Jackson did earlier—and still think, as all these Justices did, that a federal court must respect the common law doctrines accepted by the state where it sits. After so many decades and so much case law, it might be more disruptive to challenge this precise holding of *Erie*. But it is easier to see the rational foundation to the traditional view of the law of nations if one has open eyes. With open eyes, one might even notice that if federal courts can discern baseline rules for common law disputes involving special parties (like the federal government as recipient of bad checks), there must be some ground for recognizing baseline rules, at least when it comes to standard sorts of disputes about commercial relations.

To derive value from this understanding, we wouldn’t need to return to the world of the Soviet nationalization cases of the 1920s—let alone to the 1840s, when *Swift v. Tyson* entered the U.S. Reports. It would be sufficient to remember the logic of Judge Friendly’s ruling in 1975 and Justice Scalia’s dissent of 1993: not every wrong is everyone’s business.²⁷⁷ Claims that arise from transactions between private individuals can be understood against the logic of voluntary transactions; claims that arise under public norms must follow the different norms of different public authorities.

So, if Congress wants to establish special claims to extraterritorial jurisdiction, even to claims based on respect for international human rights conventions, Congress may create new causes of action, to the extent of its constitutional authority to do so.²⁷⁸ Where Congress has not done so, federal judges should remember that the division of the world into separate, competing jurisdictions is not an arbitrary or merely contingent aspect of

²⁷³ *Id.* at 1015.

²⁷⁴ *Id.*

²⁷⁵ *Lopes v. R.R. Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963).

²⁷⁶ *ITT*, 519 F.2d at 1008.

²⁷⁷ *See id.* at 1001; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 764 (1993).

²⁷⁸ *See* Torture Victim Protection Act, 28 U.S.C. § 1350 (2012).

our world. And this aspect of the world's basic architecture is not in transition to something different. There is continuing logic to respecting boundaries. It is not a mere contingency that happens to be reflected in today's accumulated materials of positive law.

Once one sees the logic of division between public law authorities, however, it is easier to recognize the logic of common law standards for private law claims that cross boundaries—the other side of the coin. Once free of *Erie*'s dogmatic premise—there is nothing for judges to see! everything flows from sovereign commands!—we might feel more comfortable acknowledging that federal judges have something to offer in disputes regarding international trade. We might even let federal judges develop their own rules regarding choice of law in such disputes, rather than force them to rely on the local state's choice of law rules—as we do now, in the name of *Erie*.²⁷⁹ We might rediscover the logic of having federal courts that are independent shifting executive policy—but still exercising authority as *American* courts.

²⁷⁹ Donald Childress makes a sensible case for this approach, but it rests on arguments about institutional logic rather than appeals to positive precedent. See Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531 (2011).

