Marquette Law Review

Volume 96
Issue 2 *Winter 2012*

Article 5

Expanding the Federal Common Law?: From *Nomos* & *Physis* and Beyond

Sam Kalen

EXPANDING THE FEDERAL COMMON LAW?: FROM *NOMOS* & *PHYSIS* AND BEYOND

SAM KALEN*

The Supreme Court's decision in AEP v. Connecticut, as well as litigation involving the threat posed by Asian Carp, reflect an emerging trend of testing the federal judiciary's willingness to expand the federal common law to include claims for interstate environmental threats. There is an assumption, including by the Supreme Court, that a federal common law for public nuisance exists, and that the pressing question is whether to expand that common law. This article challenges that assumption. The article illustrates that the widely shared view about the persistence of a federal common law for interstate pollution overlooks the Supreme Court's formulation of its original jurisdiction. The article briefly explores the evolution of the jurisprudential basis for the common law, how the common law and custom became inextricably tied to eighteenth and nineteenth century enlightenment principles, and how those ideas shaped the growth of and demise of a general federal common law. The Article then examines how and why the interstate pollution cases reflect the Court's struggle with the scope of its constitutionally assigned original jurisdiction to decide disputes between states on the basis of law and equity, not on the basis of any federal common law theory. The final part of the Article explores considerations animating any meaningful dialogue about whether to employ a federal common law for harms such as interstate pollution.

---

* Associate Professor, University of Wyoming College of Law. Much of this article benefited from my experience and informal dialogues, many years ago, with the students and faculty at the University of Virginia. I also am grateful to Stephen Feldman, Mark Squillace, J.B. Ruhl, and Michael Gerrard for their helpful comments and insights. Finally, I appreciate the assistance of the staff at the *Marquette Law Review*.

I. INTRODUCTION

> No just government ever did, nor probably ever can, exist, without an unwritten or common law. By the common law, is meant those maxims, principles, and forms of judicial proceeding, which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws; and, by such incorporation, form a part of the municipal code of each state or nation, which has emerged from the loose and erratic habits of savage life, to civilization, order, and a government of law.[1]

Searching for order in a world full of flux, lawyers and jurists grope for ideas, intellectual constructs, which allow for change while providing the illusion of continuity.[2] Justice Oliver Wendell Holmes told us that the lawyers' job is that of prediction,[3] but the task of prediction requires continuity between the past and the present, and between the present and the future. The nature of progress, however, raises important and interesting questions concerning the relationship between continuity and change.[4] Specifically, to what degree do legal actors develop, modify, or adopt ideas that accommodate such facially irreconcilable concepts as change and continuity? How do members in the legal profession speak of "legal certainty" if progress requires that the law exist in a state of flux?

These questions lie subtly beneath escalating efforts to test whether a federal common law should apply to complex interstate environmental harms.[5] After all, the *common law* operates against the background of our existing regulatory state. And when our existing environmental programs appear ill equipped to tackle complex environmental threats, the common law serves as a potentially viable solution for advocates concerned with protecting threatened resources. "The common law," as

---

1. Ohio v. Lafferty, Tapp. Rep. 113, 114 (Ohio 1817).

2. "[I]n the evolution of habit, custom and tradition in the field of politics there is a more or less constant interplay between the forces of continuity and change." BURLEIGH CUSHING RODICK, AMERICAN CONSTITUTIONAL CUSTOM: A FORGOTTEN FACTOR IN THE FOUNDING 132 (1953).

3. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

4. The idea of progress is itself relative. *See* J.B. BURY, THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH 352 (1932); ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS 4–5 (1980).

5. *See infra* notes 23–24, 26 and accompanying text.

Robert Percival explains, "now serves primarily as a backstop to be invoked when regulation fails, but common law concepts retain a powerful influence on judges distrustful of regulatory agencies."[6] Absent the common law, the only alternative is to secure a political solution through legislation. But in our present age of increased partisanship and attendant legislative gridlock at the national and occasionally state level, political solutions appear problematic. Not surprisingly, therefore, scholars and advocates increasingly focus attention on the flexibility of the common law to adapt and respond to modern threats. Jason Czarnezki and Mark Thomsen, for instance, argue for a "rebirth of the environmental common law."[7] Others suggest that, with the advent of scientifically proven methods for tracing pollutants, the common law offers increasing promise to address regulatory gaps in our modern environmental programs.[8]

The viability of pursuing federal common law clams is one aspect of this growing conversation. During the early 1990s, when the Federal Courts Section of the Association of American Law Schools addressed the question of federal common law, the issue arguably appeared somewhat academic.[9] But today, as we struggle to find solutions to modern, complex environmental threats that transcend political boundaries, the need for some nationally uniform standard seems apparent.[10] Federal common law claims naturally become attractive

---

6. Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 28 (2007).

7. Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 3 (2007); *see also* Stephen M. Johnson, *From Climate Change and Hurricanes to Ecological Nuisances: Common Law Remedies for Public Law Failures?*, 27 GA. ST. U. L. REV. 565, 575–94 (2011) (surveying recent common law actions brought in response to climate change and natural disaster).

8. *E.g.*, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 87–88 (6th ed. 2009).

9. George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New)* Erie *Problem?*, 12 PACE L. REV. 229, 229–30 (1992).

10. For articles addressing transboundary pollution, see generally Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49 (2008); Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155 (2002); Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931 (1997); Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717 (2004); A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381 (1985).

options against a background of congressional inaction. Some scholars advocate that federal courts, like state courts, *ought* to have expansive power to "create" law—fashion a federal common law.[11] And then there are those who argue otherwise.[12] This debate is evident—and increasingly relevant—in the effort to secure a federal common law of public nuisance for greenhouse gas (GHG) emissions.[13] While, at least for now, the Supreme Court in *American Electric Power Co. v. Connecticut* held that such claims, if they exist, would otherwise be displaced by the Clean Air Act (CAA), it repeated a now frequent refrain that some limited federal common law claims are possible.[14] In another prominent case, the Seventh Circuit decidedly left open the possibility that states might be able to use federal common law to sue the United States for allowing an invasive species into the Great Lakes region.[15]

Employing the common law to address emerging environmental threats assuredly might be a *means* for achieving legitimate *ends*—ends that we must achieve if we are to attain some level of sustainability, whether in connection with invasive species or rising greenhouse gas emissions. If, however, law "does the bidding of those whose hands are on the controls," and consequently "reflect[s] the goals and policies of those who call the tune,"[16] then whether law as announced by judges is an appropriate *means* to address modern environmental threats is worth exploring. But whether such *means* are themselves appropriate is missing from the current dialogue.

Instead, two fundamental premises support the "rebirth of the common law." The initial premise is that the legislative and executive branches are not adequately addressing modern environmental threats.

---

11. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 884 (1986); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989) [hereinafter Weinberg, *Federal Common Law*]; Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 861–62 (1989) [hereinafter Weinberg, *Rules of Decision Act*]. Others favoring a federal common law emphasize the problems attendant with forum shopping and procedural rules. *See, e.g.*, Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 314–16 (1980).

12. *See, e.g.*, MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 4 (1991).

13. *See infra* Part II.A.

14. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011).

15. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 769 (7th Cir. 2011).

16. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 14 (1973).

True enough; however, legislative action, at least at the national level, historically occurs only when a sufficient consensus coalesces around the need for immediate action to respond to discrete, readily observable problems. And in advance of that occurring, it is a normative judgment about whether the legal system must respond to those threats. The second largely ignored premise is that courts are capable, constitutionally, institutionally, and professionally of employing a common, or customary law—a "law" somehow tied to the past and yet capable of expanding to address new problems. While it may be utilitarian to urge an expanded common law, we ought to ensure first that the means—that is, the common law and particularly a federal common law—is an appropriate or efficacious tool for social change.

After all, the common law assumes that past, or customary practice, provides some defensible, respectable, and reasonably predictive guide for defining current or future rights and responsibilities between parties. Yet, paying homage to custom necessarily embodies some normative judgment. For most of our history, that normative judgment was an acceptance of—and allegiance to—the notion of shared values: custom reflected universal truths. That made sense in a pre-modern world, where jurists assumed human nature was universal. Few today accept this. "A major feature of the outlook against which the classical social theorists rebelled was the notion that there is a universal human nature, common to all men, regardless of their place in history."[17] And to the extent any particular custom arguably reflects a shared community value or vision, the custom can be as arbitrary as it might be rational. We see this on the international level, where customary law can conflict with modern sensibilities.[18] A good example of how custom can emerge with

17. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 5 (1976).

18. *See* Magaya v. Magaya, 1999 (1) ZLR 100, 104–05 (S) (gender equality conflicting with African customary law); Ephraim v. Pastory, (2001) AHRLR 236, 3 (TzHC 1990) (conflict between general equality and customary law). In *Ephraim*, Justice Mwalusanya opined,

> [H]owever much this court may sympathise [sic] with these very natural sentiments [against gender discrimination] it is cases of this nature bound by the Customary law applicable to these matters. It has frequently been said that it is not for courts to overrule customary law. Any variations in such law as takes place must be variations initiated by the altering customs of the community where they originate.

Ephraim, (2001) AHRLR at 237 (quoting Bi Verdiana Kyabuje and Others v. Gregory s/o Kyabuje (1968) HCD no. 459). Yet, relatedly, in the international arena, codifying international customary principles might unwittingly "entrench schisms in the law along

little appreciation for its modern relevance goes something like this: In ancient times, houses of worship were built with small doors, possibly as a consequence of the smaller height of many of the congregants. But even with smaller doors, congregants still had to bow when entering the holy sanctuary. While the average height of congregants increased over the centuries, the doors on these religious buildings were enlarged; the congregants, however, still bowed. Why? They believed it was tradition: A custom to be followed because it had been done that way for centuries.

This article, therefore, attempts to prompt a searching dialogue about the jurisprudential basis for promoting an expanded federal common law. Is there a custom? What is the basis for it? And if so, is there a principled rationale for applying it to new circumstances? This dialogue is both timely and necessary; the prevailing discussion assumes the existence of a general federal common law for interstate pollution without considering the relationship between past and present. This omission is evident in the cases discussed in Part I, and it infects the present exploration into the use of an expanded federal common law. Parts II and III illustrate that the prevailing conception of federal common law for interstate pollution buries history, that continuity with the past. In particular, Part II briefly explores the evolution of the jurisprudential basis for the common law, and how the common law and custom became inextricably tied to eighteenth and nineteenth century enlightenment principles, and how those ideas shaped the growth of and demise of a general federal common law. Part III, then, examines how and why the interstate pollution cases reflect the Court's struggle with the scope of its constitutionally assigned original jurisdiction to decide disputes between states on the basis of law and *equity*, not on the basis of any federal common law theory. This critical appreciation for history does not necessarily suggest that the present effort to expand the federal common law is inappropriate, only that it requires considering—apart from the past—whether it is jurisprudentially appropriate to do so. Part IV, therefore, offers suggestions for that consideration, and Part V concludes that perhaps the time is ripe for accepting the challenge to balance the desire for change with the need for continuity.

---

regional or ideological lines." Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1001–02 (2012).

II. GROWING INTEREST IN THE FEDERAL COMMON LAW

As we confront multi-jurisdictional environmental threats not addressed adequately by existing environmental programs, the pressure mounts for exploring common law remedies—particularly with a gridlocked political system.[19] Two recent cases, in particular, exemplify prominent attempts to persuade the federal judiciary that not only is there a federal common law of public nuisance, but that it ought to be expanded. In *American Electric Power Co. v. Connecticut* and *Michigan v. United States Army Corps of Engineers*, both the Supreme Court and the Seventh Circuit accepted a general federal common law of public nuisance for interstate pollution, and in both cases the parties pressed the judiciary to expand that law to suit new circumstances.[20] And in each instance, the court left open the possibility of expanding the doctrine. Unfortunately, as explained in Parts II through IV, they did so without any apparent appreciation for how or why the Court entertained past lawsuits that today we cite as evidence of a federal common law of public nuisance.

A. Addressing Rising Greenhouse Gases

In recent years, the viability of having federal courts apply federal common law has emerged as a possible venue for forcing large-scale GHG emitters to reduce their emissions. When congressional interest in responding to the threat of climate change began to wane, scholarly commentary encouraging the use of a federal public nuisance claim intensified.[21] And during the past few years, three principal GHG

---

19. Louise Weinberg, for instance, commented several years ago:

> If Congress is in gridlock, must that disable the Supreme Court from rationalizing mass disaster litigation? The inaction of Congress in the face of so much proposed legislation says very little about national policy, save that powerful minorities are likely to be aligned on each side. Unlike legislatures, courts can attempt to strike policy balances on a case-by-case basis, feeling their way toward lines of responsive authority.

Weinberg, *Federal Common Law*, *supra* note 11, at 845.

20. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765 (7th Cir. 2011).

21. *E.g.*, Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591 (2007); Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197 (2010); Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605 (2007); Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring*

common law cases surfaced.[22] *Comer v. Murphy Oil,* for instance, focused primarily on state common law.[23] It involved the devastation following hurricane Katrina, with Mississippi homeowners alleging that but for the rising GHG emissions the degree and intensity of the storms off the Coast would not have occurred.[24] Next, residents of the village of Kivalina, Alaska, alleged that rising GHG emissions contributed to rising sea levels, forcing residents of the small village to relocate.[25] And finally, in *American Electric Power Co. v. Connecticut*, the State of Connecticut and others alleged that some of the largest electric utility GHG emitters were liable under a federal common law public nuisance theory for the emissions.[26]

The Supreme Court's decision in *American Electric Power Co.* has

---

Liability for Extraordinary Risks, 43 VAL. U. L. REV. 1075, 1091 (2009); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003); Henry W. McGee, Jr., *Litigating Global Warming: Substantive Law in Search of a Forum*, 16 FORDHAM ENVTL. L. REV. 371 (2005); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005); Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of* AEP v. Connecticut, 46 VAL. U. L. REV. 447 (2012); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance:* Connecticut v. American Electric Power, 16 FORDHAM ENVTL. L. REV. 407 (2005); *cf.* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009). *But see* Victor E. Schwartz et al., *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 VAL. U. L. REV. 369 (2012).

22. *Am. Elec. Power Co.*, 131 S. Ct. 2527; Native Vill. of Kivalina v. ExxonMobil Corp., No. 09-17490, 2012 WL 4215921 (9th Cir. Sept. 21, 2012); Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009); *see also* California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept 17, 2007) (dismissing GHG case against car manufacturers). For a survey of climate change litigation cases, see David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15 (2012); David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENVTL. L. REP. 10,644 (2010); and Jason Scott Johnston & Heidi M. Hurd, Debate, *Climate Change and the Courts*, 160 U. PA. L. REV. PENNUMBRA 33 (2011), http://www.pennumbra.com/debates/pdfs/ClimateChange.pdf (debating whether, in light of *Am. Elec. Power v. Connecticut*, GHG emissions should be subject to a public nuisance tort).

23. *Comer*, 585 F.3d. at 870.

24. *Id.* at 859; *see* Katherine A. Guarino, Note, *The Power of One: Citizen Suits in the Fight Against Global Warming*, 38 B.C. ENVTL. AFF. L. REV. 125, 143 (2011) (describing the plaintiffs' theory of the case).

25. *Kivalina*, 2012 WL 4215921, at *1.

26. *Am. Elec. Power Co.*, 131 S. Ct. at 2532.

since eclipsed the other cases.[27] In the case, the plaintiffs invoked the common law against some of the country's largest GHG emitters.[28] Collectively, the defendants, four private utilities and the Tennessee Valley Authority (TVA), allegedly emit approximately 650 million tons of GHGs, accounting for roughly 25% of emissions from the domestic electric power sector.[29] "Plaintiffs sought [injunctive] relief under the federal common law of public nuisance or, in the alternative if federal claims were not available, under the state common law of public nuisance."[30] The Second Circuit held that the complaint stated a valid federal common law nuisance claim.[31] In requesting certiorari, the companies argued that "[t]he threat of such litigation and the indeterminate exposure to monetary and injunctive relief that it entails will substantially impede and alter the future investment decisions and employment levels of all affected industries, and ultimately every sector of the economy."[32]

The Court decided the case on narrow grounds, holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[33] In doing so, however, the Court observed that its past cases allowed federal common law suits for a public nuisance, citing *Missouri v. Illinois*,[34] *New Jersey v. City of New York*,[35] *Georgia v. Tennessee Copper Co.*,[36] and two lawsuits[37] between

27. *Kivalina*, 2012 WL 4215921, at *4. In *Kivalina*, the Ninth Circuit held that the Court's decision in *American Electric Power Co.* establishes that the Clean Air Act displaces such claims. *Id.* at *6.

28. *Am. Elec. Power Co.*, 131 S. Ct. at 2533–34.

29. *Id.* at 2534.

30. Brief for Respondents Connecticut, New York, California, Iowa, Rhode Island, Vermont, and the City of New York at 5, *Am. Elec. Power Co.*, 131 S. Ct. 2527 (No. 10-174); *see also Am. Elec. Power Co.*, 131 S. Ct. at 2534 ("[T]he plaintiffs asserted . . . [a] violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law.").

31. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 353 (2nd Cir. 2009).

32. Petition for a Writ of Certiorari at 5, *Am. Elec. Power Co.*, 131 S. Ct. 2527 (No. 10-174).

33. *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

34. Missouri v. Illinois (*Missouri I*), 180 U.S. 208 (1901).

35. New Jersey v. City of New York, 283 U.S. 473 (1931).

36. Georgia v. Tennessee Copper Co., 240 U.S. 650 (1916).

37. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981); Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972).

Illinois and Milwaukee.[38] And while adding that the common law adapts to new circumstances and science, the Court observed that it has "not yet decided whether private citizens . . . may invoke the federal common law of nuisance to abate out-of-state pollution."[39] But the Ninth Circuit recently interpreted the Court's approach in *American Electric Power Co.*, as confirming that the "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution," and that a federal common law doctrine of public nuisance "can apply to transboundary pollution suits."[40]

B. Protecting Against Invasive Species

Michigan's reliance on federal common law represents a similar effort to test how far federal common law might adapt to new circumstances. Seeking to prevent an alleged influx of Asian carp into Lake Michigan, the five Great Lakes region states of Michigan, Ohio, Pennsylvania, Wisconsin and Minnesota (collectively "the "States"), as trustees of the water and aquatic resources and as *parens patriae* on behalf of their citizens, brought suit against the United States over the operation of the Chicago Area Waterway System ("CAWS").[41] The

38. *Am. Elec. Power Co.*, 131 S. Ct. at 2535–36.

39. *Id*. at 2536. The Court expressed hesitancy about creating "controlling law," although it quoted approvingly Justice Jackson's comment that courts can fashion federal common law. *Id.* at 2536–37. But Jackson's comments in *D'Oench, Duhme & Co. v. FDIC.*, referred to a lawsuit brought by a federal corporation under a specific federal statute that lacked any direction on what law to apply. 315 U.S. 447, 455, 472 (1942). And the *D'Oench* Court relied upon *Deitrick v. Greaney*, which involved national banks and a federal question. *Id.* at 456 (citing Deitrick v. Greaney, 309 U.S. 190 (1940)). In *Deitrick*, the Court indicated that the federal statute left it to "judicial determination . . . to be derived from it and the federal policy which it has adopted." *Deitrick*, 309 U.S. at 201.

40. Native Vill. of Kivalina v. ExxonMobil Corp., No. 09-17490, 2012 WL 4215921, at *3 (9th Cir. Sept. 21, 2012).

41. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 768 (7th Cir. 2011). The "more than 70 miles" of canals in the CAWS resolved Chicago's long-standing problem with contaminated water supplies, by, *inter alia*, altering the hydrology of the region and allowing water to flow from Lake Michigan into the Mississippi River Basin. Brief for Plaintiffs-Appellants at 8, *Michigan v. Corps*, 667 F.3d 765 (No. 10-3891). The Chicago Sanitary and Ship Canal, completed in 1900, connected Lake Michigan with the Mississippi drainage basin, and is now operated and maintained by the Corps pursuant to congressional directives. *See* Energy and Water Development Appropriation Act of 1982, Pub. L. No. 97-88, § 107, 95 Stat. 1135 (1981); Supplemental Appropriations Act of 1983, Pub. L. 98-63, Tit. I, Ch. IV, 97 Stat. 311. The CAWS, as a consequence, created several opportunities for fish and other biota to move into Lake Michigan. *See* Complaint for Injunctive and Declaratory Relief para. 25,

States' complaint charged that the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago violated the Administrative Procedure Act (APA) and created a federal common law public nuisance, by allowing non-native (invasive) species of carp (the bighead and silver) to enter the Great Lakes through the CAWS.[42] Federal and state resource agencies agreed that invasive species posed a threat to the region. In 2007, Congress even directed that the Corps prepare a feasibility analysis of options for addressing invasive species in the Great Lakes and Mississippi River Basin region.[43] Concerned that the Corps was not adequately responding to the threat of invasive carp species, the States, since 2009, "repeatedly urged the Defendants to promptly take additional, comprehensive action to minimize the risk that Asian carp will migrate through the CAWS into Lake Michigan."[44]

Initially, in December 2009, the State of Michigan attempted to compel a Corps response by seeking to reopen and amend a decree in the Supreme Court's Original Nos. 1, 2 and 3 proceedings, or in the

---

Michigan v. Corps, 667 F.3d 765 (No. 10-3891) ("[T]he diversion project, the CAWS and associated infrastructure as created, maintained, and operated by the District and the Corps provide a conduit for the movement of fish and other biota between the Illinois River and the Great Lakes at multiple locations on the shore of Lake Michigan.").

42. The plaintiffs asserted federal question jurisdiction under 28 U.S.C. § 1331, diversity jurisdiction under 28 U.S.C. § 1332 (between plaintiff states and the Illinois unit of government), and both jurisdiction and relief pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701, 702. Complaint for Injunctive and Declaratory Relief, *supra* note 41, para. 2.

43. Water Resources Development Act of 2007 ("2007 WRDA"), Pub. L. No. 110-114, § 3061(d), 121 Stat. 1121; *see also* District of Columbia Appropriations Act of 2005, Pub. L. No. 108-335, § 345, 118 Stat. 1352 (2004); Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1135, 100 Stat. 4251. In 2009, Congress granted the Corps certain emergency authority for invasive species, until Oct. 28, 2010, later extended. Energy and Water Development and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2853 (2009).

44. Complaint for Injunctive and Declaratory Relief, *supra* note 41, para. 59. A summer 2012 report warned that it is likely that Asian carp will enter Lake Michigan through the Chicago waterway system absent affirmative barriers. Becky Cudmore et al., *Binational Ecological Risk Assessment of the Bigheaded Carps (*Hypophthalmichthys *spp.) for the Great Lakes Basin*, 2011/114 CAN. SCI. ADVISORY SECRETARIAT 7–11, 19. For information about multi-jurisdictional efforts and studies by the U.S. Army Corps of Engineers, see U.S. ARMY CORPS OF ENG'RS, GREAT LAKES AND MISSISSIPPI RIVER INTERBASIN STUDY REPORT: MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT SECTION 1538(B)(5) OF PUBLIC LAW 112-141, INTERIM REPORT TO CONGRESS (Oct. 3, 2012). *See generally* EUGENE H. BUCK ET AL., CONGRESSIONAL RESEARCH SERVICE, ASIAN CARP AND THE GREAT LAKES REGION (April 15, 2011) (describing the history through 2011).

alternative file a new original jurisdiction action.[45] In 1967, the Supreme Court issued a decree in *Wisconsin v. Illinois*, establishing limits on the amount of water that Illinois can divert from Lake Michigan.[46] The United States opposed Michigan's efforts, arguing that the only appropriate forum would be an APA-type case in federal district court, assuming the presence of a final agency action.[47] Soon thereafter, the Asian Carp Regional Coordinating Committee, which includes the federal agencies, issued framework reports; the coordinating committee rejected Michigan's suggestion of temporarily closing locks and sluice gates and deferring until 2012 any decision on a long-term solution.[48] On June 3, 2010, the Corps then released its *Interim III, Modified Structures and Operations, Chicago Area Waterways Risk Reduction Study and Integrated Environmental Assessment*.[49] This Interim III

45. Motion to Reopen and for a Supplemental Decree, Petition, and Brief and Appendix in Support of Motion, *Michigan v. Corps*, 667 F.3d 765 (No. 10-3891). The Supreme Court twice denied preliminary injunctive motions by Michigan. *See* Gabriel Nelson, *Supreme Court Again Rejects Injunction in Asian Carp Case*, N.Y. TIMES (Mar. 22, 2010), http://www.nytimes.com/gwire/2010/03/22/22greenwire-supreme-court-again-rejects-injunction-in-asia-55113.html.

46. Wisconsin v. Illinois, 388 U.S. 426 (1967). Chicago has been diverting water from Lake Michigan since the 1920's. Wisconsin v. Illinois, 278 U.S. 367, 399–401 (1929); *see also* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 423 (1925). The Court limited the diversions exclusive of domestic purposes and required reporting on the progress of constructing sewerage treatment facilities. Wisconsin v. Illinois, 281 U.S. 179, 201–02 (1930); *see* Wisconsin v. Illinois, 311 U.S. 107, 110–11 (1940); Wisconsin v. Illinois, 352 U.S. 945 (1956); Wisconsin v. Illinois, 449 U.S. 48 (1980); *see also* Act of July 3, 1930, ch. 847, 46 Stat. 929.

47. Brief for the United States in Opposition at 13, *Michigan v. Corps*, 667 F.3d 765 (No. 10-3891). The United States explained that, while actions among states *and* the United States are subject to concurrent original jurisdiction in the Court, 28 U.S.C. § 1251(b)(2) (2006), the Court exercises jurisdiction in such cases sparingly; the Government further argued that reopener provisions in existing decrees cannot expand the scope of the issues that were originally before the Court, and that the appropriate approach is to seek leave of the Court to initiate a new original jurisdiction action. *Id.* at 16–21. Here, such an original jurisdiction action lacked any opposing state, according to the United States, because the Water District, and not Illinois, is the defendant along with the Corps. *Id*. at 23–28.

48. Complaint for Injunctive and Declaratory Relief, *supra* note 41, para. 59–60. Some temporary closures did occur, such as the closure of a 2.5-mile segment to allow the application of rotenone poisoning, with a subsequent public statement that no invasive carp species were among the fish killed. Plaintiff's Brief in Support of Motion for Preliminary Injunction at 19, *Michigan v. Corps*, 667 F.3d 765 (No. 10-3891).

49. U.S. ARMY CORPS OF ENG'RS, DISPERSAL BARRIER EFFICACY STUDY: INTERIM III—MODIFIED STRUCTURES AND OPERATIONS, ILLINOIS & CHICAGO AREA WATERWAYS RISK REDUCTION STUDY AND INTEGRATED ENVIRONMENTAL ASSESSMENT 25 (2010) [hereinafter INTERIM III REPORT]; Lynne Whelan, *U.S. Army Corps of Eng'rs Releases*

report, suggesting the need for additional testing and monitoring, arguably downplays any potential imminent threat.[50]

The States then filed their APA and federal common law complaint in federal district court.[51] The United States principally argued that no reviewable final agency action existed, and that the only "tort" based remedy would be under the Federal Tort Claims Act ("FTCA"), not under a federal common law theory, and that the FTCA did not allow the issuance of equitable relief—here, the requested mandatory preliminary injunction.[52] The States presented the court with volumes of information, testimony, and argument, and the district court judge decided that the States had failed to overcome the high burden necessary to warrant issuing either a preliminary or permanent mandatory injunction.[53] The court assumed that a final agency action existed, and concluded that little suggested that the agency had acted "wrong," "much less arbitrary and capricious[ly]."[54] And, although the court agreed with the States that the APA waives sovereign immunity even for non-APA cases, including the State's common law claim,[55] Judge Dow concluded that the States failed to present sufficient evidence that the United States had created a public nuisance[56]—an "unreasonable interference with a common public right."[57] But Judge

---

Interim Report III & IIIA, ASIAN CARP REGIONAL COORDINATING COMMITTEE (June 3, 2010), http://www.asiancarp.us/news/usaceiiireport.htm.

50. INTERIM III REPORT, *supra* note 49, at 51. The Corps reaffirmed its Interim III report on June 8, 2010, when responding to a letter from the States. Complaint for Injunctive and Declaratory Relief, *supra* note 41, para. 76. This and other public statements led the States to conclude that the Corps was proposing "no change in operation" of the system regarding lock operations. *Id.* para. 80.

51. Complaint for Injunctive and Declaratory Relief, *supra* note 41, para. 2. *See* Michigan v. U.S. Army Corps of Eng'rs, No. 10CV4457, 2010 WL 5018559, at *14 (N.D. Ill. Dec. 2, 2010). U.S. District Court Judge Robert Dow, Jr., noted that the States filed the case "on the heels of . . . Michigan's unsuccessful bid to persuade the Supreme Court . . . to address the subject matter of this dispute." *Id.* at *1 n.1.

52. *Id.* at *16. The Government argued that the FTCA is the only waiver of sovereignty applicable to the State's complaint, and the FTCA limits relief to monetary damages. *Id.* The States countered that the APA (5 U.S.C. § 702 (2006)) waived sovereign immunity. *Id.*

53. *Id.* at *34.

54. *Id.* at *15.

55. *Id.* at *16–17 (relying principally upon *Blagojevich v. Gates*, 519 F.3d 370, 371–72 (7th Cir. 2008); *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006); and *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003) (en banc)).

56. *Id.* at *34.

57. *Id.* at *20.

Dow signaled, with sufficient evidence, that he did not believe that any federal statute had displaced the common law claim.[58]

The Seventh Circuit expressed reservations about the district court's assessment of the facts, and as such was "less sanguine about the prospects of keeping the carp at bay," but nonetheless concluded that the requested injunction was premature.[59] The court accepted that states may sue under federal common law for the abatement of interstate pollution, echoing the long-standing rationale that "[i]t is our federal system that creates the need for a federal common law to govern interstate disputes over nuisances."[60] And interstate pollution includes, according to the court, a wide range of areas and effects, including environmental and economic impacts from invasive species.[61] The principal question, therefore, is whether such suits are actionable against the United States.[62] The court assumed they were—noting what it believed were good arguments for both sides—and then proceeded to address whether the United States had waived its sovereign immunity, or regardless, if federal statutory law had displaced any federal common law claim.[63] The court first agreed with the lower court that the APA waives sovereign immunity for non-monetary claims, even those claims that are not brought under the judicial review provisions of the APA.[64]

---

58. *Id.* at *18–20.

59. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 769 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

60. *Id.* at 770 (invoking *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)).

61. *Id.* at 771. The States, and subsequently the court, invoked the RESTATEMENT (SECOND) OF TORTS section 821(B)(1) and *Illinois v. City of Milwaukee* as the basis for the underlying federal common law public nuisance tort. *See Michigan v. Corps*, 667 F.3d at 780–81 (citing Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979), *rev'd on other grounds*, *Milwaukee II*, 451 U.S. 304 (1981); RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979)); Brief for Plaintiffs-Appellants, *supra* note 41, at 25–26.

62. *Michigan v. Corps*, 667 F.3d at 773–74. The court noted Judge Kavanaugh's observation, from the D. C. Circuit, that "the Court has not endorsed any federal common-law causes of action against the Government during the post-*Erie* period." *Id.* at 773 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 853 (D.C. Cir. 2010) (Kavanaugh, J., concurring)).

63. *Id.* at 774–80.

64. *Id.* at 775; Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *16 (N.D. Ill. Dec. 2 2010). In addition to the cases relied upon by the lower court, *see supra* note 55, the Seventh Circuit relied upon *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011). *Michigan v. Corps*, 667 F.3d at 774. But the relevant portion from *Shinseki* involved a constitutional issue, with the plaintiff veteran group arguing that the Veteran Affairs Administration violated veterans' due process rights by not providing adequate and swift enough mental health care guaranteed by statute. *Shinseki*, 644 F.3d at 850. The United

It then rejected any suggestion that the FTCA somehow shields tort-based non-monetary relief cases against the United States.[65]

II. FOUNDATIONS OF THE FEDERAL COMMON LAW: FROM *SWIFT* TO *ERIE*

What seems striking about the Court's language in *American Electric Power Co. v. Connecticut*, and understandable and yet quite extraordinary about the issues left unresolved in *Michigan v. U.S. Army Corps of Engineers*, is that the *law* surrounding a federal common law for interstate pollution has evolved with minimal analysis or discussion, and, more importantly, it has become severed from its roots. This seems odd for two reasons. First, the history surrounding the federal common law is quite torturous. During the early Republic, the possibility of a federal common law became entangled in discussions about the general role and efficacy of the common law.[66] Whether or how a federal common law could exist necessarily depended upon how jurists conceived of the common law in the first place.[67] And as the country grew older, so too our conception of law matured to a degree that a federal common law made less sense.[68] Second, the cases today we associate with the rise, decline and lingering vestiges of a federal common law are anything but that. Instead, as explained in Part III, those cases demonstrate the Court's struggle with the scope of its original jurisdiction, and the application of equity principles—not common law doctrines.

To begin with, the common law morally, religiously, scientifically, and jurisprudentially, made sense to many of the leading jurists during the period surrounding the revolutionary war, up to at least the mid- to

States, there, did not even argue sovereign immunity for the constitutional claim, and the Ninth Circuit capitalized on the opportunity to assert that the APA's waiver of sovereign immunity did not necessarily only apply to reviewable final agency actions under the APA. *Id.* at 864–65.

65. *Michigan v. Corps*, 667 F.3d at 776. The fight to avert the Asian carp continues, and the Wisconsin State Journal recently urged that Wisconsin "keep fighting in court and in Congress to stop the Asian carp from reaching the Great Lakes." Editorial, *Keep Fighting to Stop Asian Carp*, WIS. STATE J., July 9, 2012, http://host.madison.com/news/opinion/editorial/article_cd9ba094-c7bb-11e1-8cd4-0019bb2963f4.html.

66. *See infra* notes 74–105 and accompanying text.

67. *See infra* notes 80–93 and accompanying text.

68. *See infra* note 140 and accompanying text.

late-nineteenth century.[69] The common law as it emerged in this country enjoyed a symbiotic relationship with the dominant natural law theory of the time.[70] Sir Isaac Newton's scientific discoveries in physics portrayed a mechanistic universe: Through observation we could glean fixed principles.[71] We could observe human behavior—customary human practices, and through reason deduce from these practices rules governing human relationships that, to many at the time, reflected some divine providence or plan.[72] The northeast Unitarians, in particular,

---

69. *See infra* notes 81–82, 90 and accompanying text.

70. Natural law "was conceived of as a collection of principles that, while universally subscribed to, had not been codified, and for this reason it was regularly contrasted with 'positive' . . . law." G. Edward White, *The Marshall Court and Cultural Change, 1815–1835*, *in* 3–4 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 676–77 (Paul A. Freund & Stanley N. Katz eds., 1988) [hereinafter G. Edward White, *Marshall Court*].

71. *See* J. BRONOWSKI & BRUCE MAZLISH, THE WESTERN INTELLECTUAL TRADITION: FROM LEONARDO TO HEGEL 200 (1960) (identifying "a Newtonian world which moved in mathematical regularity, like a 'great Clockwork'"). Cynthia Russett explains Newton's influence:

> Mechanism reigned in philosophy and politics, economics and ethics. Newtonian physics was the first great instance of science as a paradigm, i.e., when not only the method but the very substance of science spills over into the humanities. On a cosmic scale, Newton's achievement promoted a conception of the universe as a great machine operating in accordance with certain specified laws. At a lower level, it suggested that men and societies could similarly be interpreted as acting under fixed laws.

CYNTHIA EAGLE RUSSETT, DARWIN IN AMERICA: THE INTELLECTUAL RESPONSE 1865–1912, 18 (1976); *see also* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 58–59 (1955) (noting the influence of Newton). The positivist Auguste Comte embraced such a mechanical analogy in his SYSTÈME DE PHILOSOPHIE POSITIVE OU TRAITÉ DE SOCIOLOGIE (Paris 1854). Francis Bacon too further promoted how such a mechanistic approach could produce a science of law, by suggesting that observation—a level of empiricism—could distill patterns of human behavior—or custom worth protecting or promoting through the common law. *See* PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 159 (1965) [hereinafter MILLER, LIFE MIND] (noting the contribution of Bacon). *See generally* DANIEL R. COQUILLETTE, FRANCIS BACON (1992) (discussing Bacon's legal theory). And John Locke incorporated this scientific paradigm by suggesting that knowledge could be discovered through experience. *See* BRONOWSKI & MAZLISH, *supra*, at 200.

72. Even to the American Philosophical Society, science served a utilitarian purpose of revealing some divine plan upon which human society could better adjust its rules. *See* HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 216–17 (1976) ("[I]t was assumed that any discovery of the workings of nature, even any particular fact, from a new plant to mastodon bones or Indian customs, was bound to prove useful to man—that was how all nature had been framed."). In *Martin v. Hunter's Lessee*, for instance, Justice Story wrote that the Constitution "was not intended to provide merely for the exigencies of a few years,

embraced a theology that, following John Locke, allowed them to discern through reason and revelation a divine plan, and support utilitarian legal or moral rules that merged with facilitating the tendencies of human behavior—custom.[73]

Of course, while notions of fundamental, higher, and natural law pervaded legal, political, and philosophical discourse during the pre- and post-revolutionary period,[74] legal positivism emerged simultaneously with pockets of hostility toward the common law—an English institutional remnant.[75] And so, alongside common law advocates were

---

but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." 14 U.S. (1 Wheat.) 304, 326 (1816).

73. *See generally* DANIEL WALKER HOWE, THE UNITARIAN CONSCIENCE: HARVARD MORAL PHILOSOPHY, 1805–1861, at 2–8, 55–92 (1970) (discussing the northeast Unitarian world view); ROBERT LEET PATTERSON, THE PHILOSOPHY OF WILLIAM ELLERY CHANNING 183–254 (1952) (examining how Locke influenced the views of Unitarianism's foremost nineteenth century preacher with respect to the relation between reason and revelation).

74. *See* MILLER, LIFE MIND, *supra* note 71, at 239–65; *see also* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 78–79 (1930); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 261 (1968); MILLER, LIFE MIND, *supra* note 71, at 208–09, 241; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 260 (1969); BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT 1–12 (1931); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152–53 (1928); Stewart Jay, *Origins of Federal Common Law*, 133 U. PA. L . REV. 1003, 1010 (1985). *See generally* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) (investigating the unwritten constitution that formed the status quo in the period surrounding the revolution). For a discussion about how natural law theory became bundled in the framers' approach toward law and the constitution, see MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION (1987). Samuel Puffendorf, cited by many during this period, provided a natural law foundation for law, at least as it then related to international law and the law of nations. David Hoffman's textbook for law students at the time observed that "[t]he pages of Puffendorf, and of Wolf, or at least those of Rutherforth and of Burlamaqui, are presumed to be familiar to the student, before he takes up the works which treat of the law of nations." 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 451 (Balt., Joseph Neal 2d ed. 1836). Hoffman also instructed students about Vattel, although warning about his "novel and untenable positions," as well as others such as Selden, Grotius, and Bynkershoek. *Id*. at 453, 467.

75. Perry Miller aptly opines "the profession had to contend, in the post Revolutionary years, with a deep hostility among the people to the whole conception of the Common Law, which patriots now identified with British tyranny and with Tory endeavors . . . ." PERRY MILLER, THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 17 (1962) [hereinafter MILLER, LEGAL MIND]. Gordon Wood too observes how codification responded to the hostility toward judges exercising too much discretion, although recognizing the softening of this hostility over time. GORDON S. WOOD, EMPIRE OF LIBERTY: A

those who favored codification.[76] Even Justice Joseph Story, one of the leading jurists in the Nineteenth Century, "could marshal all the arguments against the inutility of a code, but then ask the still-persistent question: 'Because we cannot form a perfect system, does it follow that we are to do nothing?'"[77] And Story promoted incorporating civil law concepts into American jurisprudence.[78] Another pre-Civil War scholar, Theodore Sedgwick, echoed Justice Story, when he explained how both the common law and limited codification coalesced to address the needs of a changing society: the slow process of custom establishes general rules over time, while codification responds immediately and uniformly to present demands.[79]

Indeed, both Justice Joseph Story and the eminent Chancellor James Kent promoted the republic's common law heritage.[80] Both jurists clung

---

HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 402–03, 406–07 (2009); *see also id*. at 430–31 (describing tension between codification and common law). For a review of early codification efforts, see CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981) (noting that it was not necessarily a movement but an attempt to address legal development); George M. Hezel, *The Influence of Bentham's Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States*, 22 BUFF. L. REV. 253 (1973) (discussing three primary antebellum lawyers' views); and Roscoe Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 681–82 (1914) (noting public dissatisfaction with lawyers and the common law following the American Revolution).

76. *See* MILLER, LIFE MIND, *supra* note 71, at 239–65.

77. *Id.* at 254; *see also* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 6 (Melville E. Bigelow ed., Bos., Little, Brown, & Co., 13th ed. 1886) ("It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.").

78. "Story was optimistic about the prospects for a large infusion of civilian principles into America." Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 418 (1966). Story's writings constantly allude to the merits of civil law doctrines. *E.g*., JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW (Bos., Charles C. Little & James Brown 1839); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW (Cambridge, Hilliard & Brown 1832). The Justice's view on riparian water rights, for instance, incorporated French civil law. *See* Samuel C. Weil, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133, 135 (1919).

79. *See* MILLER, LEGAL MIND, *supra* note 75, at 296–306. Sedgwick apparently distinguished *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), when he further suggested "that there can be no common law of the Union," and such law could exist "only by legislative adoption." MILLER, LEGAL MIND, *supra* note 78, at 302.

80. The colonies "received" the English common law, and often explicitly did so in legislation and typically with caveats. *See generally* PAUL SAMUEL REINSCH, ENGLISH

tenaciously to a static system, often favoring vested forms of older common law property rights over dynamic, entrepreneurial forms of property.[81] Chancellor Kent, for instance, believed that jurists do not make law, but rather follow the law—that is, the common law.[82] And when describing the prohibition against marriage among lineal descendants, Chancellor Kent expressed how natural law provided a reasoned approach for deducing *ex ante* legal principles:

> That such a marriage is criminal and void by the law of nature, is a point universally conceded. And, by the law of nature, I

COMMON LAW IN THE EARLY AMERICAN COLONIES (Da Capo Press 1970) (1899) (on file with author) (providing a sociological treatment of colonial attitudes toward the English common law); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791 (1951) (describing the legal processes by which states and territories adopted the common law); William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968) (examining the American colonies' reception of the English common law); *see also* ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 11–30 (2011) (discussing post-revolutionary period attitudes toward the common law). David Hoffman, a prominent figure in post-Revolutionary America, also promoted the common law, believing that, through methodological rigor, law as a science legitimated legal principles. MILLER, LEGAL MIND, *supra* note 75, at 83–84; *see also* MILLER, LIFE MIND, *supra* note 71, at 159, 182–83.

81. Both jurists, for instance, expressed fear that property rights had been undermined by Chief Justice Taney's decision in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). MILLER, LIFE MIND, *supra* note 71, at 221. In *Charles River Bridge*, the Court—over Justice Story's objection—favored dynamic over static property rights. *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 172–79 (1971) (providing comprehensive treatment of *Charles River Bridge*); *see also* G. Edward White, *Marshall Court*, *supra* note 70, at 595 ("Story treated the principle of protection for vested property against legislative interference as settled and self-evident . . . ."). Chancellor Kent's rigid devotion to vested property rights led him to oppose universal suffrage. *See* MILLER, LIFE MIND, *supra* note 71, at 231. Kent undoubtedly was influenced by Adam Smith and, while tethered to tradition, promoted rules favoring commercial expansion. *See* Joseph Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290, 1291–92 (1961). For a glimpse of how these two jurists approached legal reasoning differently, see Daniel J. Hulsebosch, *Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 1 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

82. MILLER, LIFE MIND, *supra* note 71, at 235–36. Kent, a diest, infused his captivation of the common law with a universal religious sanction, *id.* at 194, and was an intellectually formidable leader during his era. *See* MAY, *supra* note 72, at 233–34. Ellen Pearson suggests that, to Chancellor Kent and others, "taking the common law out of American law would have been like taking the English language away from Americans." PEARSON, *supra* note 80, at 200.

> understand those fit and just rules of conduct which the Creator has prescribed to man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by divine revelation.[83]

But Justice Story more than Chancellor Kent is now principally associated with the promotion of a federal common law. After all, Story's opinion in *Swift v. Tyson* suggested that federal courts could apply a general common law.[84] While early in his tenure as a Justice, Story deftly avoided whether the United States, as a sovereign, adopted the common law, he did "contend, that when once an authority is lawfully given, the nature and extent of that authority, and the mode, in which it shall be exercised, must be regulated by the rules of the common law."[85] Story added "it can hardly be doubted, that the constitution and laws of the United States are predicated upon the existence of the common law."[86] When Story determined that a universal general principle of the common law applied, he expressed considerable trepidation about altering it:

> I do not sit here to revise the general judgments of the common law, or to establish new doctrines, merely because they seem to me more convenient or equitable. My duty is to administer the law as I find it; and I have not the rashness to attempt more than this humble discharge of duty.[87]

---

83. Wightman v. Wightman, 4 Johns. Ch. 343, 348 (N.Y. Ch. 1820). Justice Story agreed with the Chancellor's observations. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 176 (Bos., Charles C. Little & James Brown 2d ed. 1841).

84. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

85. United States v. Coolidge, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

86. *Id*. "In my judgment, nothing is more clear, than that the interpretation and exercise of the vested jurisdiction of the courts of the United States must, in the absence of positive law, be governed exclusively by the common law." *Id*. at 620.

87. Conyers v. Ennis, 6 F. Cas. 377, 377 (C.C.D.R.I. 1821) (No. 3,149). In *Conyers*, Story expressed reservations about the doctrine he felt compelled to apply, but observed that "[i]t is sufficient for me to stand upon the law, as it is now universally received. If there are public mischiefs growing out of its principles, let them be remedied by the legislature." *Id.* at 378. Story often copiously explored whether certain doctrines were, indeed, *universally* accepted and the reasons behind those doctrines. *See, e.g.*, Le Roy v. Crowninshield, 15 F. Cas. 362, 371 (C.C.D. Mass. 1820) (No. 8,269). In *Crowninshield* the court noted,

And while not categorically opposed to replacing aspects of the common law with codification (favoring it in the areas of criminal law, property, personal rights, and contracts),[88] Justice Story believed that aspects of law should "continually expand[] with the progress of society, . . . adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country."[89]

Yet it was Story's devotion to natural law that shaped his understanding of the common law. Each of the principal scholars examining Story's jurisprudence explain that, while Story embraced a measure of utilitarianism justifying "making law" when appropriate, he nonetheless believed in a natural law.[90] To Justice Story, the "law of

---

> I do not sit here to consider, what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides, in whose judgment the most implicit confidence might not have been originally reposed.

Id.

88. *See* MILLER, LIFE MIND, *supra* note 71, at 251.

89. JOSEPH STORY, *Codification of the Common Law*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698, 702 (William W. Story ed., Bos., Charles C. Little & James Brown 1852). Justice Story remarked that the common law sprung from the "dark and mysterious elements of the feudal system." JOSEPH STORY, *Autobiography*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra*, at 1, 19. But he championed the common law, and arguably its flexibility. In one of his classic statements, he observed "[t]he common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829).

90. *See* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 68 n.33, 73–77 (1971); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 113, 213 (1985) [hereinafter NEWMYER, OLD REPUBLIC]; *see also* Morgan D. Dowd, *Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge*, 18 VAND. L. REV. 643, 643, 661–62 (1965). Another biography of Justice Story is GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970). Many antebellum jurists were well acquainted with the moral philosopher William Paley, who championed the intersection of religion with a high dose of utilitarianism. "Actions are right or wrong," he wrote, "according to their tendency. . . . It is the *utility* of any moral rule that constitutes its obligation." B. JUDD, PALEY'S MORAL PHILOSOPHY, ABRIDGED & ADAPTED TO THE CONSTITUTION, LAWS, AND USAGES, OF THE UNITED STATES OF AMERICA 23–24 (N.Y.C., Collins & Hannay 1828); *see* MAY, *supra* note 72, at 342. Henry May, however, posits, arguably too broadly, "Paley's careful demonstrations of the prudential uses of Christianity were too utilitarian for American moral taste. Americans wanted to believe at once in social and even

nature" is the "first step in the science of jurisprudence. The law of nature is nothing more than those rules which human reason deduces from the various relations of man . . . ."[91] As one of the northeast Unitarians,[92] Story invoked natural law often, occasionally indirectly by referring to natural justice, and believed that through reason and revelation certain rules or principles—neither temporally nor geographically limited—would reveal themselves.[93]

Consequently, the debate over the ability of federal courts to employ the common law encompassed a variety of jurisprudential, practical and political issues. Early cases reflected the inherent difficulty in applying an English common law, particularly a federal common law, in the new country.[94] As Stewart Jay observes, "There was no coherent concept in

---

scientific progress and in unchanging moral principles." *Id.* at 342.

91. JOSEPH STORY, *Value and Importance of Legal Studies*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 89, at 503, 533.

92. *See* HOWE, *supra* note 73, at 9–10; MCCLELLAN, *supra* note 90, at 21 n.72 (indicating that Story was "head of the Unitarian Association" in 1832); *see also* JOSEPH STORY, *History and Influence of the Puritans*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 89, at 408, 441.

93. Consistent with many during his era, Story had confidence in human reason, and believed that reason and revelation were interconnected. STORY, *supra* note 92, at 408, 442; STORY, *supra* note 91, at 513. This translated into a belief that certain rules transcend political boundaries, such as equity principles. STORY, *supra* note 91, at 540. In his treatise on bailments, for example, Story observed that commercial transactions can hardly reflect the rules of any particular country, and they may "be deemed to be founded upon, and to embody, the usages of merchants in different commercial countries, and the general principles . . . as to the rights, duties, and obligations, of the parties, deducible from those usages, and from the principles of natural law applicable thereto." JOSEPH STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND, AS ADMINISTERED IN ENGLAND AND AMERICA, WITH OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF THE NATIONS OF CONTINENTAL EUROPE 25 (Bos., Charles C. Little & James Brown 1843). Pothier's influential treatise on partnerships echoed this understanding, proclaiming that partnerships reflected principles of natural justice—in effect, the law of nations. POTHIER, A TREATISE ON THE CONTRACT OF PARTNERSHIPS 4 (Owen Davies Tudor trans., London, Butterworths 1854). Blackstone too had merged natural law and revelation. *See* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900, at 58 (2011) ("All law, for Blackstone, was grounded in a law of nature 'co-eval with mankind and dictated by God himself.' This law was superior to all human law and could occasionally be uncovered by the law of revelation."). And it is well accepted that "the lawyers and judges and teachers of the formative era found their creating and organizing idea in the theory of natural law." ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 12 (1938); *see also* PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW AND EQUALITY IN THE CIVIL WAR ERA 67 (1975) (identifying that the legal thinkers "demonstrated the apparent identity between common and natural law").

94. *See, e.g.*, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842) ("All those laws of

the early nineteenth century of 'federal common law' as we now make use of that expression."[95] Assuredly, however, many of the leading jurists during this period supported a federal common law.[96] In *Chisholm v. Georgia*, for instance, Justice Iredell reviewed the common law as a guide for applying Congress' directive in Section 14 of the Judiciary Act, which authorized the federal courts to issue writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[97] And Iredell's canvassing of the common law (noting at one point that it was consonant

---

the parent country, whether rules of the common law, or early English statutes . . . —not being adapted to the circumstances of our colonial condition—were not adopted, used or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution . . . ."); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 16–17 (1992) (examining "the struggle between late nineteenth-century legal orthodoxy, often called 'Classical Legal Thought,' and 'Progressive Legal Thought'"); *see also* sources cited *infra* note 100 (discussing the federal common law of crimes).

95. Jay, *supra* note 74, at 1010.

96. *Id*. at 1016; *see also* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: 1789–1821, at 433 (1922). While the eminent Charles Haines observes, "Marshall differed from most of his Federalist brethren in holding that the courts of the United States had no common law jurisdiction," Haines only caveats his observation by suggesting that Marshall "adopted an attitude of subservience to the common law in interpreting the words of the Constitution relating to treason." CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789–1835, at 285 (1944). Focusing on Marshall's approach toward treason, particularly in connection with the trial of Aaron Burr, ignores too many factors to illustrate Marshall's attitude toward the common law. *See* HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835, at 130–31 (1997). It also overlooks that the Constitution makes treason a constitutional, not a common law crime. U.S. CONST. art. III, § 3, cl. 1. Others suggest that Marshall embraced the Blackstonian approach of merging a common law background with a progressive and reformist approach. *See, e.g.*, R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 346 (2001) [hereinafter NEWMYER, HEROIC AGE] (suggesting Marshall merged common law and common sense); NEWMYER, OLD REPUBLIC, *supra* note 90, at 101 (suggesting Marshall disclaimed federal criminal common law); THOMAS C. SHEVORY, JOHN MARSHALL'S LAW: INTERPRETATION, IDEOLOGY, AND INTEREST 15–16, 117 (1994) ("Marshall drew on the common law tradition of legal discourse to interpret two contradictory threads into constitutional law."). And Marshall's later acquiescence to preventing a federal common law of crime may simply reflect his aversion to separate opinions rather than acceptance of the conclusion. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 238 (2008). Jay suggests that Marshall rejected the notion that the common law could justify an assertion of federal jurisdiction, but it could be used once a federal court otherwise exercised *ex ante* jurisdiction. Jay, *supra* note 74, at 1087–88, 1273, 1331.

97. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 433–34 (1793).

with natural law) led him to conclude that nothing in the "old law" authorized the type of suit.[98] Of course, in *Calder v. Bull*, Justice Iredell opposed deploying natural justice as a guide for decision-making.[99]

The now classic instance where the common law clashed with a positivistic approach toward law occurred in the context of deciding whether federal courts could punish for common law crimes.[100] The common law, after all, had become a Federalist tool for suppressing speech antagonistic to emerging republican principles, particularly against the supporters of Thomas Jefferson.[101] Bruce Ackerman notes, "for Jefferson himself, the common law aspiration of the judiciary was the single most obnoxious feature of the Federalist program."[102] Some Federalists, such as Justice Chase, accepted that the United States lacked any common law.[103] Others, including the first Chief Justice Oliver Ellsworth, defended a federal common law for crimes.[104] William

98. *Id*. at 442, 449–50.

99. Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798). Justice Iredell's views changed during the course of his career, however. Jay, *supra* note 74, at 1041.

100. *See* DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 16 (1985); Jay, *supra* note 74, at 1017. *See generally* Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267 (1986); Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, 4 LAW & HIST. REV. 325 (1986); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223 (1986); Gary D. Rowe, *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).

101. *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 14 (1971); STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 77–80 (2008); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 274, 292–94 (1985); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 72–85 (1951); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 419–23 (1956). "Certainly most Federalists expected the federal judiciary to exercise the broadest possible jurisdiction, including that of the common law of crimes." WOOD, *supra* note 75, at 411.

102. ACKERMAN, *supra* note 96, at 236. Madison too opposed a federal common law. *Id*. Stewart Jay acutely warns, "[u]nderstanding the early relationship between the common law and the federal government involves an exercise in constitutional history . . . ." Jay, *supra* note 74, at 1030.

103. United States v. Worrall, 2 U.S. (2 Dall.) 384, 394–95 (1798). "Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?" *Id*. at 395; *see also* Jay, *supra* note 74, at 1067–69, 1072.

104. *See* G. Edward White, *Marshall Court*, *supra* note 70, at 120–21.

Rawle, for instance, argued that the federal courts could employ the common law to punish offenses that were unlikely to be prosecuted in any state court.[105]

When the Court ceremoniously abandoned permitting any federal common law for crimes, it did so without recognizing the extant debate. In *United States v. Hudson & Goodwin*, Justice Johnson began by noting that the issue had "long since [been] settled in public opinion."[106] But the precedent was not so clear; the case "swept aside a number of lower federal court precedents and reversed a general acceptance of the prosecution of common-law crimes in federal courts" and "subordinated common law to constitutional principle."[107] Justice Story, for one, disagreed with *Hudson & Goodwin*. Four years after the decision, Story twice noted his objection: first in passing in *Martin v. Hunter's Lessee*,[108] and then in *United States v. Coolidge*.[109] Justice Washington later observed that federal courts would not apply a federal common (civil or

105. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 257–65 (Phila., Philip H. Nicklin 2d ed. 1829); *see also* Jay, *supra* note 74, at 1050, 1082, 1280–81. A contemporary examination of the common law in federal courts is PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES (Phila., Abraham Small 1824).

106. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32 (1812). Premised on principles of state sovereignty and separation of powers, the opinion, according to Jay, "refut[ed] a supposed contention of the Federalists: that federal courts possessed a jurisdiction akin to the common-law courts of England—a connotation that would have entirely displaced the independent authority of the states." Jay, *supra* note 74, at 1241.

107. JOHNSON, *supra* note 96, at 141; *see also* Rowe, *supra* note 100. G. Edward White aptly summarizes the issue when he notes that the possibility of a federal common law for crime was "connected to the politics of extensive or limited jurisdiction for the federal courts in the late eighteenth and early nineteenth centuries." 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 231 (2012) [hereinafter G. EDWARD WHITE, LAW IN AMERICAN HISTORY].

108. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816) (referring to a federal court's ability to hear criminal cases when matters of national rights or national policy were involved).

109. United States v. Coolidge, 1 U.S. (1 Wheat.) 415 (1816); *see* ACKERMAN, *supra* note 96, at 239 (noting that Story's opinion in *Coolidge* "claimed that the Constitution presupposed the common law"). In *Coolidge*, the Court followed *Hudson & Goodwin*, although Justices Story, Washington, and Livingston all expressed interest in revisiting the issue. *Coolidge*, 1 U.S. (1 Wheat.) at 416. Justice Story assiduously believed that a federal criminal common law was necessary to protect the federal government. *See* Jay, *supra* note 74, at 1294–1300; *see also* G. EDWARD WHITE, LAW IN AMERICAN HISTORY, *supra* note 107, at 232 (discussing *Coolidge*). Justice Story, later with the aid of Chief Justice Marshall and Justice Washington, drafted for Congress what became the Crimes Act of 1825, designed to protect the "peace and dignity of the United States." *Id*. at 232.

criminal) law under the *Hudson & Goodwin* decision, although the matter was "open for discussion" should the appropriate case arise.[110] That never occurred.[111]

What occurred instead is that Justice Story solidified a federal civil general law for roughly the next century. To begin with, Justice Story distinguished between federal *jurisdiction* to hear a case and the governing *substantive* rules, if the Constitution or Congress assigned jurisdiction to the federal bench.[112] The Court addressed that distinction in *Swift v. Tyson,* in the context of "mercantile" law perceived of at the time as embodying national or international principles rather than local ones.[113] The case involved a complicated transaction, infected by fraudulent activity, and the ability of a creditor to recover on a negotiable instrument regardless of the facts surrounding the history of the instrument.[114] Negotiable instruments had become a critical element in the domestic and international mercantile system, and yet uncertainty surrounded the law governing commercial transactions.[115] Did, for instance, the holder of a negotiable instrument received in exchange for a pre-existing debt hold an enforceable instrument?[116] The English common law suggested no, the eminent English jurist Lord Mansfield suggested yes, and the New York courts were ambiguous.[117] Similarly, would an instrument tainted by prior fraudulent activity be

110. United States v. Ortega, 24 U.S. (11 Wheat.) 467, 475 (1826).

111. *See generally* TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 33 (1981) (noting that Chief Justice Marshall avoided addressing the doctrine of a federal common law). Freyer explains that most of the leading contemporary commentators, including Peter DuPonceau, St. George Tucker, William Rawle, and Thomas Sergeant, distinguished between "local" matters and "commercial" matters governed by the law merchant. *Id*. at 34–35.

112. *See* G. Edward White, *Marshall Court*, *supra* note 70, at 494 (describing distinction). White explains, "[J]urists at the time of the Marshall Court were vitally concerned about the jurisdictional limits of the federal courts . . . ." *Id*. at 113. This distinction resonated with Chief Justice Marshall, and even more ardent Federalists: It followed that, if the federal judiciary was afforded jurisdiction, the scope of its jurisdiction should be coextensive with Congress. *Id*. at 564. The converse also applied: If the federal judiciary had few limits on what it could address under the auspices of the common law, the same would be true for Congress. *Id*. at 124.

113. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

114. *See* FREYER, *supra* note 111, at 6.

115. *Id.* at 6–9.

116. *See id.* at 10.

117. *Id.* at 10–11.

enforceable?[118] When, therefore, Swift sued Tysen in the Southern District of New York, and Tysen's attorney attempted to show that Swift had procured the instrument through fraud and was not a bona fide creditor, the question eventually surfaced of whether New York law applied under Section 24 of the Judiciary Act of 1789.[119] After bouncing back and forth from the Circuit Court to the Supreme Court, the Court accepted the case in 1841 and decided it the following year.[120]

Justice Story treated the matter as if little doubt existed about "the law," indicating early in his opinion that some principles are "so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support."[121] And he then dismissed the suggestion that Section 24 of the Judiciary Act somehow applied to common law decisions on matters not of a *local* concern: Commercial law, or the law merchant, he reasoned is not dependent upon local usages but rather on "general principles and doctrines of commercial jurisprudence."[122] Tony Freyer amply demonstrates that Story's opinion in *Swift* reflected a widely accepted distinction between local and general law: general law being a part of the law merchant governed by the law of nations rather than local law or municipal law.[123] This general commercial law, moreover, "was based on the notion that unwritten law was something to be discovered and was merely evidenced by judicial opinions."[124]

Swift not only benefited the emerging new economy in the post-Civil War era, it seemed compatible with the sentiment of law as a science,

---

118. *Id.*

119. *Id.* at 13. The Court likely misspelled the defendant's name, George W. Tysen. *Id*. at 166 n.9. For articles on Section 34 of the 1789 Judiciary Act, see 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 (1984); and Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1924).

120. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); FREYER, *supra* note 111, at 11–13.

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

122. *Id.* at 19.

123. FREYER, *supra* note 111, at 35–36; *see also* Charles A. Heckman, *The Relationship of* Swift v. Tyson *to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. LEGAL HIST. 246, 247–49 (1973) (explaining that Story distinguished local from general law and the latter formed part of the merchant law, which in turn was governed by the law of nations). Newmyer similarly observes that *Swift* "was generally compatible with the prevailing assumptions of law at the time it was given." NEWMYER, OLD REPUBLIC, *supra* note 90, at 336.

124. Jay, *supra* note 74, at 1266.

which flourished in the legal academy throughout the fourth quarter of the nineteenth century—and later. As lawyers, we are all too familiar with the Langdellian case method, developed by Harvard law professor Christopher Langdell. Langdell believed law operates as a science, with principles or doctrines governing human relations (in the common law) capable of being discerned through carefully culling judicial opinions.[125] The "law" according to Langdell, was as much a science as physics, chemistry, biology, or geography.[126] Implicit in this approach is the assumption that one immutable rule of law exists, empirically verified by searching analysis of printed materials: In other words, a "brooding omnipresence in the sky" that, through the careful review of cases would become exposed.[127] This assumption fit nicely with the doctrine in *Swift*: a scientifically derived and nationally uniform principle (custom) could be divined, at least in areas of the law deemed necessary to promote a national market. And *Swift v. Tyson* is where Justice Story proclaimed that "[cases] are, at most, only evidence of what the laws are; and are not of themselves law."[128] In short, cases could reflect a higher,

125. *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 55–78 (1994); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 51–72 (1983); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937, at 94 (1998); M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 119–20 (1986). Langdell unfortunately never adequately expressed what he meant by law as a science. *See* RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870–1930, at 29 (1987). Nor did he explain how "law" could accommodate change if doctrines remain static. *Id*. at 31. Langdell's alleged scientific approach has provoked harsh personal critics, such as Grant Gilmore. GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (1977). Others are subtler than Gilmore. *See* LAWRENCE M. FRIEDMAN, LAW IN AMERICA: A SHORT HISTORY 167 (2002) (describing Langdell's method of "pretension to science and rigor"). For a defense of Langdell, see Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 345–47 (2007).

126. Langdell's method paralleled the newly emerging paradigm created by Charles Darwin's Origin of Species. Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 2–4, 27 (1980). For both Darwin and Langdell, the process involved observation and then the rule. *Id.* Marcia Speziale, therefore, suggests that, "[i]f he was not the very first legal realist, Christopher Langdell must at least be seen as the bridge from formalism to what came later in American legal theory." *Id.* at 3–4. While the "source" for what would be examined to determine "custom" might have shifted to reported decisions and away from those sources that earlier jurists and scholars relied upon, the Newtonian/Baconian paradigm remained inherent in the Langdellian case method. *Id.* at 27–28

127. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

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

scientifically derivable, common or customary law. Under such a system, continuity with the past purported to offer certainty for the future.

Ironically, as the case-method gained ascendency, the rise of the social sciences and concomitant late-nineteenth century intellectualism shattered aspects of the formalism inherent in his method. American intellectuals, in the words of Morton White, revolted against formalism, "since they had been convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life."[129] The new social scientists, as strident empiricists, rejected the past as inhibiting change. Dorothy Ross chronicles how "realism" came to embody a sense that the present differed from the past, warranting reexamining tradition and possibly developing new institutions capable of responding to modern human society.[130] And at the risk of oversimplification, the anti-formalism and emerging social sciences undermined law as a static system, facilitated divorcing law from religion and morality, promoted examining law empirically in its historical and evolutionary context, and sanctioned the use of law as a

---

129. MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11 (1957); *see also* MORTON WHITE, PRAGMATISM AND THE AMERICAN MIND: ESSAYS AND REVIEWS IN PHILOSOPHY AND INTELLECTUAL HISTORY 41–42 (1973). One of the best studies of this period, including its relationship to law, is EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973); *see also* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 882 (1981). The ostensible formalism of late nineteenth century judicial rhetoric is well documented. *See generally* GILMORE, *supra* note 125, at 10 ("American law has, from its late eighteenth-century beginnings, been self-consciously and self-critically aware of itself as a system which is supposed to make some kind of overall sense. It has never been allowed to grow in the chaotic, disorganized, unplanned, eccentric confusion which . . . continued to mark the growth of English law."); HORWITZ, *supra* note 94 (examining the battle between the Classic Legal Thought and Progressive Legal Thought); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895, at 3 (1960) (analyzing the "relationships among the doctrines and decisions of the courts, the social tensions of the time, and the changing attitudes of lawyers and judges"); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942). For a more nuanced review, see David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990).

130. DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 58–59 (1991); *see also id*. at 261 ("The sharp recognition of change, the sense of inherited traditions no longer appropriate to a new reality, in turn gave new energy to the impulse toward realism.").

tool for social progress rather than as a passive actor.

Freed from custom and the despair occasioned by pre-determined inevitable or perhaps cyclical progress,[131] law for many then became an instrument for change, affected by the subjective judgment of the actor—the judge—and guided, if at all, by reason and informal institutional constraints. The anti-formalist jurists viewed the process of judging, and thus the common law, as much more subjective than a search for universal truths. Throughout his writings, Justice Holmes underscored this point: Judges effectively make law, whether when interpreting the spoken or written word. He strongly chastised the formalism and its accompanying acceptance of natural law: "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[132] Mirroring aspects of historical jurisprudence,[133] Holmes emphasized that

---

131. "If historicism meant that the past could no longer be linked unequivocally to the present and future, it could no longer serve as the basis for action." *Id.* at 286. This altered the idea of progress, away from one tied inextricably to the inevitable cyclical rise and decline of civilizations. Stephen Feldman explains that, following the Civil War,

> American legal thought entered its modernist period with the onset of positivism: for the most part, jurisprudents repudiated natural law. Consequently, the idea of progress was unleashed from the natural law limits that inhered during the premodern era. Progress came to be seen as potentially endless, dependent solely on human ingenuity.

STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 188 (2000). But many scholars could not break cleanly from the past, and still viewed the past as capable of revealing universal truths, a view that waned more dramatically by the 1920s. ROSS, *supra* note 130, at 286–87, 292–93, 315–17. Ross adds that, from 1912 to 1920, "[t]he combination of progressivism and war worked in a number of ways to distance Americans from their past and to strengthen the call for sciences of social control." *Id*. at 319.

132. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

133. The historical jurisprudence school emerged during the republic's nascent years. Although Perry Miller suggests that few colonists were aware of this movement, *see* MILLER, LIFE MIND, *supra* note 71, at 259, this school of thought embraced the notion that law was not ahistorical; rather it reflected the experience of the people, at a particular time and place in history. Baron de Montesquieu, for instance, although perhaps underemphasizing any temporal component, wrote that laws are peculiar to a society, affected by such variables as climate or geography. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 316 (Thomas Nugent, trans., London, J. Nourse & P. Vaillant 1752) (1748). Julius Stone explains that historical jurisprudence, led by Friedrich Karl von Savigny, "appeared on the Continent early in the nineteenth century as a part of the romanticist revival and in reaction from the universalist and creative juristic thought of the preceding natural law period." JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE, AND

law embraced experience over logic, social goals over adherence to tradition.[134] Portraying the sociological aspect of law, Roscoe Pound added:

> [w]e do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs. . . . We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological legal science.[135]

And the legal realists, an eclectic amalgamation of disparate scholars but utterly enthralled with the possibilities of empirically based science and committed to reducing uncertainty,[136] underscored law's dynamic

---

SOCIAL CONTROL 35 (1950). It provided a temporal component to law, although tying it to the rise and ultimate decay of a nation's life. *See* PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 59 (1980). Others such as Rudolph von Jhering added that legal development is a product of conscious choices by legal actors attempting to resolve "the problems of social life." *Id.* at 67. Maine's classic *Ancient Law* is a product of this appreciation, and so too is Holmes's *The Common Law*. OLIVER WENDELL HOLMES, THE COMMON LAW (Bos., Little, Brown, & Co. 1881); HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (London, John Murray 1861). And while the late nineteenth century society looked materially different than the antebellum period, the adherents to some or all aspects of historical jurisprudence championed the vitality of the common law, particularly over those who favored codification, as a system for allowing law to mirror changing human behavior. A prominent opponent to the late nineteenth century codification movement explained:

> The system . . . rests upon an original, but ever growing, body of custom, and the rules thus established have been, through a long succession of centuries, expounded, applied, enlarged, modified and administered by a class of experts—lawyers and judges—who are supposed to devote their lives to the study of the system and to the work of adapting it to the ever shifting phases which human affairs assume.

James C. Carter, *The Proposed Codification of Our Common Law* (1884), *reprinted in* SPENCER L. KIMBALL, THE HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 377, 377 (1966). Quite possibly one of the best syntheses of this era is David Rabban's new book. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013).

134. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 148–224 (1993) [hereinafter G. EDWARD WHITE, HOLMES].

135. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908).

136. "Legal realism is a name for pragmatic and empirical thinking about the law; its confusions are due to an uncritical acceptance of the dogmas of raw empiricism and pragmatism without any consideration of the philosophical issues which these dogmas raise, but certainly do not resolve." K.N. Llewellyn et al., *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 91 (1931) (Adler comments on JEROME FRANK, LAW AND THE MODERN MIND (1930)); *see also* Brian Leiter, *Rethinking Legal Realism: Toward a*

and malleable qualities.

> A particular emphasis of the legal realists, in a decade of rapid and dramatic technological change, was upon the need for a dynamic law. They stressed the inability of old rules to provide clear guidance for the unprecedented situation characteristic of a world in flux and the need for judges to confront present reality.[137]

Whether individually or collectively, the historical jurisprudents, the sociological jurisprudents, and the legal realists, laid barren the preexisting intellectual foundations for a federal common law—and quite possibly left the common law itself naked amidst claims of unbridled discretion. If, after all, law is an instrument for social engineering by those with power,[138] and the common law, in the words of Pound, is malleable to adapt according to a judge's appreciation for "social progress," how and on what basis could a federal court divine some nationally uniform customary rule to prescribe individual societal relations? It is no wonder that President Theodore Roosevelt spoke so plainly about the power of judges in his 1908 State of the Union Address.[139]

Naturalized Jurisprudence, 76 TEX. L. REV. 267, 271–72 (1997). *See generally* N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997); LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979).

137. PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918–1969, at 75 (1972).

138. *See* ROSCOE POUND, THE FOUNDATION OF LAW 11 (1961); *see also* DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 118 (1974) (Pound emphasized "the need for men to use law as an instrument for securing changing social interests").

139. President Theodore Roosevelt, State of the Union Address (Dec. 8, 1903). Roosevelt remarked:

> The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy, and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.

Id.

Against this background, that *Swift v. Tyson* lasted so long, or that *Erie Railroad Co. v. Tompkins* was decided at the height of the evolving dialogue about the nature and function of the judicial process, is not surprising.[140] One of the nation's foremost legal historians of this period, Edward Purcell, aptly describes *Swift* as "one of the most famous cases in American law."[141] And he explains how legal positivism and Justice Holmes' rejection of any transcendental higher, natural law made "*Swift* . . . an irresistible target."[142] Purcell observes that "[t]he idea that the federal courts could make an 'independent judgment' about abstract

---

140. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937). Freyer chronicles the expansion of the *Swift* doctrine beyond its original application to general commercial law. FREYER, *supra* note 111, at 45, 74. The doctrine's growth became entangled with federal and state relations, and "by the 1890s this notion was developed into an argument for the existence of a national common law—extending beyond general commercial jurisprudence—and including a whole corpus of federal judge-made decisions." *Id*. at 72. By the "late nineteenth century, searching criticism of [the] *Swift* doctrine and its application by federal judges emerged in legal periodicals and law school classrooms." *Id.* at 84; *see also id*. at 92 ("By the 1890s the *Swift* doctrine had become a center of controversy."). In *Baltimore & Ohio Railroad Co. v. Baugh*, for example, Justice Brewer wrote that in a fellow-servant rule case,

> [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."

Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 378 (1893). This provoked Justice Field to write,

> I cannot assent to the doctrine that there is an atmosphere of general law floating about all the States, not belonging to any of them, and of which the Federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.

Id. at 399 (Field, J., dissenting). For a survey of the cases between *Swift* and *Erie*, as well as a few post *Erie* cases, see MITCHELL WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS 113–247 (1949).

141. Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21 (2d ed. Kevin M. Clermont, ed. 2008) [hereinafter Purcell, *Story of* Erie]; *see also* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA 95–133 (2000) [hereinafter PURCELL, PROGRESSIVE CONSTITUTION].

142. Purcell, *Story of* Erie, *supra* note 141, at 33. *But cf*. Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998) (suggesting that legal positivism does not necessarily undermine *Swift*).

legal principles and thereby identify a 'true' common-law rule struck [Holmes] as absurd."[143] Holmes wrote to Frederick Pollock that *Swift* was "indefensible but did not much harm when confined to what he was thinking of."[144]

Erie involved the accident to Harry Tompkins, whose left arm was severed by a passing train when a swinging door from the train knocked him to the ground alongside the railroad tracks.[145] Because Harry had been walking beside the tracks, local law treated him as a trespasser and unable to recover for negligence.[146] To avoid this problem, Tompkins filed suit in federal district under the court's diversity jurisdiction, and also invoked *Swift* to justify applying a *general law* that would allow him to prevail.[147] Tompkins won at both the district court and appellate level, with both courts applying *general law*.[148] Erie's lawyers argued to the Supreme Court that *Swift* only applied when the local law had not been settled.[149] But the Court appeared intent on the larger question of *Swift's* lingering vitality.[150] And when the 6-2 majority of the Court decided to "bury" *Swift*, it needed to do so on constitutional grounds to avoid having it rise again.[151] Justice Brandeis' majority opinion is "spare and abstract," and focused on the mischief the doctrine facilitated in diversity cases.[152] He acknowledged the criticism both of the doctrine and Story's interpretation of the Judiciary Act of 1789,[153] and then held "[t]here is no federal general common law."[154] Brandeis endorsed

143. Purcell, *Story of* Erie, *supra* note 141, at 33.

144. 2 MARK DEWOLFE HOWE, HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 219 (1941).

145. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938); Purcell, *Story of* Erie, *supra* note 141, at 38.

146. *Erie*, 304 U.S. at 70.

147. *Id.*

148. *Id.*

149. Purcell, *Story of* Erie, *supra* note 141, at 45.

150. *Id*. at 47.

151. *Id*. at 51–53. Purcell explains how the Justices debated whether to limit the decision to constitutional or statutory grounds, and that Justice Brandeis prevailed in his effort to secure a constitutional justification. *Id.*

152. *Id*. at 55–59.

153. *Erie*, 304 U.S. at 72–78. Brandeis acknowledged supporters of the doctrine, as well. *Id*. at 77 n.22.

154. *Id.* at 78 ("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. There is no federal general common law.").

Holmes' rejection of a body of law floating aimlessly in the sky untethered to "some definite authority behind it."[155] Although somewhat opaque, the opinion suggested that the Constitution demanded as much, because the Congress could not legislate the common law of the states and, derivatively, the federal courts could not perform a function that even Congress lacked.[156]

But despite *Erie*, remnants of an ostensible federal common law remain.[157] Indeed, on the same day that Justice Brandeis announced *Erie*, the Justice in *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., offered in *dicta* that a *federal common law* still existed in interstate disputes.[158] Later, in *Clearfield Trust Co. v. United States*, the Court applied federal law for a claim involving commercial paper issued by the United States.[159] One prominent vestige is the Court's post-*Erie* reliance on pre-*Erie* interstate litigation over boundaries, water, and then pollution.[160] These cases are often mistakenly assumed as evidence of a persistence of some federal common law, even after jurists long discarded the idea of *ex ante* legal rules capable of being crystallized from uniform principles. Yet, as explained in Part III, these cases are instead a product of the Court's effort to explore the scope of its original

---

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

156. *Id.* at 78; *see also* Purcell, *Story of* Erie, *supra* note 141, at 60–63. Brandeis' principal biographer refers to this opinion as "uncharacteristically obtuse." MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 747 (2009).

157. *Erie* arguably has been muted by having it primarily used against forum shopping in diversity cases. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). But the debate surrounding *Erie's* domain has far from subsided. Abbe Gluck, for instance, suggests that *Erie* does not resolve whether state methodologies for statutory interpretation constitute *law* that federal courts ought to follow. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1901–05 (2011). Michael Green posits that *Erie* ignores the possible scenario that state courts might prefer having federal courts craft independent rules of decision, although explaining how that result is problematic. Michael Steven Green, Erie's *Suppressed Premise*, 95 MINN. L. REV. 1111, 1112–13 (2011).

158. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); *see infra* note 266 and accompanying text.

159. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Writing for the Court, Justice Douglas not only suggested that federal law would apply because the case involved rights emanating from a federal source, he oddly observed that the general commercial law under *Swift* based on the law merchant "stands as a convenient source of reference for fashioning federal rules applicable to these federal questions." *Id*. at 367.

160. *See, e.g.*, Kansas v. Colorado, 185 U.S. 125 (1902) (water); *Missouri I*, 180 U.S. 208 (1901) (pollution).

jurisdiction and less about federal common law.

III. INTERSTATE DISPUTES: FEDERAL *JURISDICTION* OR FEDERAL *COMMON LAW*?

This mosaic of issues shadowing the federal common law during our first century and a half signals that we should be cautious before simply accepting that aspects of a federal common law remain, particularly in interstate disputes. While many of the Court's pre-*Erie* decisions might appear to involve federal common law claims, they do not.[161] The cases involving interstate disputes are no exception; these were not federal common law cases, but rather they collectively represent the Court's exploration into the scope of its original jurisdiction, and the application of "equity" jurisprudence. The early cases, in particular, illustrate the Court's emphasis on the scope of its original jurisdiction,[162] including the scope of a federal court's equity jurisdiction, as well as the corollary incipient theory of *parens patriae*.[163] *Florida v. Anderson* is illustrative.[164]

---

161. A good example is *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 551 (1892), where the state initiated litigation in state court to restrain a company from mining in the Coosaw river, only to have the matter removed to federal court with an allegation that the state's action violated the Constitution's Contract Clause. *Id.* In *New Hampshire v. Louisiana*, New Hampshire and New York passed laws allowing private citizens to assign to the state their claims against another state for the express purpose of allowing New Hampshire or New York to sue the other state in the Supreme Court. 108 U.S. 76, 88–90 (1883). After recounting the history surrounding *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the passage of the Eleventh Amendment, the Court held that such manufactured suits, where the citizens were using the name of the state to secure jurisdiction, could not be allowed under either the letter or spirit of the Constitution. *New Hampshire*, 108 U.S. at 86–91. The Court further indicated that nothing in the *law of nations* permitted a state to sue on behalf of its citizens (in effect, as *parens patriae*). *Id.* at 91. Later, in *Hans v. Louisiana*, the Court held that federal courts lacked jurisdiction to hear cases between a state and one of its citizens. 134 U.S. 1, 21 (1890). In so doing, the Court observed that "[s]ome things, undoubtedly, were made justiciable which were not known as such at the common law, such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution." *Id.* at 15.

162. *See supra* notes 106–10 and accompanying text.

163. In *Mayor of Georgetown v. Alexandria Canal Co.*, for example, the Court applied common law public nuisance principles when exploring whether it could exercise equity jurisdiction to enjoin a bridge construction authorized by Congress. 37 U.S. (12 Pet.) 91, 97 (1838). The Court held that the Town of Georgetown, as a corporation, could not sue on behalf of its residents for a public nuisance. *Id.* at 99–100. Other cases later in the century grappled with how to approach state-sanctioned obstructions to interstate commerce. *See generally* Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417, 424–50 (1988). In *Willamette Iron Bridge Co. v. Hatch*, for instance, the Court expressly rejected a "common law of the United States which prohibits obstructions

The case involved a bill in equity filed by Florida on its own behalf and on behalf of the State's internal improvement fund, against citizens of Georgia.[165] Pursuant to the Judiciary Act of 1789, Congress gave the Court exclusive original jurisdiction in cases between two states, and concurrent jurisdiction in cases involving a state and citizens of another state.[166] The Court initially inquired whether Florida was a proper party, whether its interests were sufficiently direct to invoke the Court's original jurisdiction; once the Court decided affirmatively, it then addressed whether *equity* warranted an injunction—the part of its opinion lacking any discussion of "law."[167]

Similar issues surfaced in state boundary disputes.[168] Early in his legal career, Alexander Hamilton represented states in boundary fights.[169] He and others naturally anticipated the need for an impartial forum for resolving such disputes, one better suited than the process required by the Articles of Confederation.[170] Initially the framers

---

and nuisances in navigable rivers." 125 U.S. 1, 8 (1888). It distinguished *Pennsylvania v. Wheeling Bridge*, 54 U.S. (13 How.) 518 (1851), noting that in *Wheeling Bridge* the Court had held that the State of Pennsylvania was a proper party to invoke the Court's original jurisdiction, and once invoked the Court "had power to apply, any law applicable to the case, whether state law, federal law, or international law." *Willamette*, 125 U.S. at 15. In *Wheeling Bridge*, counsel for Pennsylvania argued that free flowing navigation along the Ohio River was protected by the Constitution and pre-existing state compacts. *See* ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY 106 (1992); Elizabeth B. Monroe, *Spanning the Commerce Clause: The Wheeling Bridge Case, 1850–1856*, 32 AM. J. LEGAL HIST. 265, 280 (1988). A similar economic fight occurred between Superior City, Wisconsin, and Duluth, Minnesota, with citizens of the former city concerned that their commerce would be adversely affected by Duluth's canal construction and water diversion. Wisconsin v. Duluth, 96 U.S. 379 (1877). The Court avoided any serious inquiry, by concluding that Congress authorized Duluth's activities and the Court could not enjoin a legitimately authorized federal program. *Id.* at 387–88.

164. Florida v. Anderson, 91 U.S. 667 (1875).

165. *Id.* at 669–70.

166. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (codified at 28 U.S.C. § 1251 (2006)) (providing that the Court may exercise exclusive original jurisdiction only when both parties are states, otherwise concurrent jurisdiction obtains). For a thorough summary of many original jurisdiction cases, see Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959).

167. *Anderson*, 91 U.S. at 675–81.

168. *E.g.*, Iowa v. Illinois, 151 U.S. 238 (1894).

169. *See* 1 JULIUS GOEBEL, JR., THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 544–684 (1964).

170. Julius Goebel explains that the boundary disputes were delayed during the revolution, but "[f]uture settlement of such interstate problems had been anticipated,

contemplated that the Constitution would mirror the old process for boundary disputes: The Articles provided for a specially developed forum under the direction of the Senate.[171] The Committee of Detail recommended a similar process, with "[c]ontroversies between states respecting jurisdiction or territory, and controversies concerning lands claimed under grants of different states, . . . tried by the Senate."[172] And yet Hamilton, who would serve on the Committee of Style, had written in the *Federalist Papers* that a forum was essential for states to resolve their disputes, and that state dignity warranted other than an "inferior tribunal."[173] After the Committee on Detail submitted draft language to the convention on August 6, 1787, including language granting the Court original jurisdiction in any case involving a state,[174] the convention debated how to address controversies between states and voted to have such matters decided by the Supreme Court.[175]

One of the early boundary skirmishes occurred between Connecticut

---

however, in the framing of the Articles of the Confederation, and the machinery had been devised for their solution." *Id.* at 563; *see also id.* at 564 (explaining boundary dispute resolution process under the Articles of Confederation).

171. *Id.* at 662–63. *See* J. Franklin Jameson, *The Predecessor of the Supreme Court*, *in* ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1775–1789, at 1–2 (Franklin Jameson ed., Da Capo Press 1970) (1889) (on file with author) (noting that Article IX, paragraphs two and three of the Articles of Confederation "provided an especial process by which Congress was to determine . . . these disputes"). For a discussion of state land disputes, see RICHARD B. MORRIS, THE FORGING OF THE UNION 1781–1789, at 220–25 (1987).

172. 1 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES: FROM THE DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR 586 (N.Y.C. & London, Harper & Brothers Publishers 1889).

173. In *Federalist No. 81*, Hamilton wrote "it would ill suit" a state's dignity should a lawsuit to which it is a party "be turned over to an inferior tribunal." THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And in *Federalist No. 80*, Hamilton refers to territorial disputes and other "bickerings and animosities," as well as the need for an impartial arbiter. THE FEDERALIST NO. 80, at 477–78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

174. Randolph's original draft would have left to the legislature the authority to decide when disputes between two states would be in the jurisdiction of the "Supreme Tribunal." CHARLES WARREN, THE MAKING OF THE CONSTITUTION 534 (1928). The Committee of Detail proposed that the Court's jurisdiction would extend to controversies between two states, and between state and citizens of another state, and the language produced little debate. *Id*. at 535–36.

175. *Id.* at 544. On August 24, 1787, the Convention debated and, over the objection of North Carolina and Georgia, voted to have disputes between two states included in the Court's original jurisdiction. The draft language presented by the Committee on Style on September 12, 1787, included such language. *Id.*

and New York, where each state purported to convey the same property to different grantees.[176] The grantees from each state sought to have the dispute heard in their own state courts, or at the least before the federal courts in their states, and the question was whether the Supreme Court would intervene.[177] Justice Patterson observed that the Court owed a "duty . . . to declare, and not to make, the law," and because the case did not involve a controversy between two states, the Court lacked jurisdiction.[178] Justice Cushing added that the issue had to be determined by the "constitution," not one governed by any analogy from "English practice," and that absent the states' presence as parties and fighting over jurisdiction, no jurisdiction existed.[179] The Court subsequently refused New York's request for an injunction (a bill in equity) and, as such, allowed a lawsuit between the two state grantees to continue in circuit court.[180] In *New York v. Connecticut*, Justice Patterson observed, "[i]t is difficult and painful to conjecture, unless this court can, under the constitution, lay hold of the case to decide the question of boundary, which will be a decision of all the appendages and consequences."[181] Justices Chase, Washington and Ellsworth rejected as sufficient the State's asserted jurisdiction over—rather than any direct interest in—the property.[182]

But *Rhode Island v. Massachusetts*[183] became the seminal precedent

176. Fowler v. Lindsey, 3 U.S. (3 Dall.) 411, 411 (1799).

177. *Id.* at 412.

178. *Id.* at 414.

179. *Id*.

180. New York v. Connecticut, 4 U.S. (4 Dall.) 3, 3 n.1 (1799).

181. *Id.* at 4 & n.3.

182. *Id.* at 3. These early cases explored what procedure the court should follow. In "Grayson v. Virginia . . . the court . . . adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable." Florida v. Georgia, 58 U.S. (17 How.) 478, 492 (1854) (discussing Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1796)). In *Florida v. Georgia*, Chief Justice Taney would later emphasize that chancery practice furnishes the most apt analogy, although the Court may deviate from that practice when justice so requires. *Id*. at 492–93. And there he rejected English chancery practice and allowed the United States attorney general to intervene in a state boundary dispute, as a matter of justice. *Id.* at 496.

183. Rhode Island v. Massachusetts (*Massachusetts V*), 45 U.S. (4 How.) 591, 639–40 (1846) (merits, with Chief Justice Taney again objecting to the Court's assertion of jurisdiction); Rhode Island v. Massachusetts (*Massachusetts IV*), 40 U.S. (15 Pet.) 233 (1841) (merits); Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210 (1840); Rhode Island v. Massachusetts (*Massachusetts II*), 37 U.S. (12 Pet.) 657 (1838) (initial decision on

for future interstate cases, with the Court confirming both its jurisdiction over "States" when sued by other "States," and that the claims in these cases did not otherwise bar the Court from exercising jurisdiction.[184] Rhode Island initiated the action under the Court's equity jurisdiction, not under the common law, seeking to have the Court settle a boundary dispute between Rhode Island and Massachusetts.[185] Rhode Island claimed a sovereign right to exercise jurisdiction over approximately 80 to 100 square miles, based upon pre-Constitution arrangements.[186] For Massachusetts, Daniel Webster and the State's Attorney General argued that the pre-Constitution agreements afforded Massachusetts with title to the disputed land, and that the Court lacked jurisdiction to hear the case.[187] The Constitution, they argued, only allowed the Court to hear controversies between states that arose out of their capacity as states following the Constitution, and that absent any positive law the Court would lack any law to apply.[188] Rhode Island's counsel countered that the Constitution's terms afforded jurisdiction over inter-state disputes, and that nothing limited the clause to disputes over post-Constitution agreements.[189] Rhode Island further argued that the dispute was judicial, not political in character—as suggested by Massachusetts.[190] And when responding to Massachusetts' argument that no "law" existed that would admit judicial inquiry, Rhode Island replied that the Constitution conferred jurisdiction and what law applies once jurisdiction exists is dependent

jurisdiction); Massachusetts v. Rhode Island, 36 U.S. (11 Pet.) 226, 226, 228 (1837) (case filed in 1832, and continued due to illness of senior counsel). For a discussion of the case, see Carl B. Swisher, *The Taney Period, 1836–64*, *in* 5 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 514–16 (Paul A. Freund ed. 1974).

184. The case occurred shortly after Chief Justice Marshall had indicated, almost in passing, that the Constitution (and indirectly the Judiciary Act of 1789) provided exclusive jurisdiction in the Court for suits between two states. New Jersey v. New York, 30 U.S. (5 Pet.) 284, 290 (1831).

185. *Massachusetts II*, 37 U.S. at 714–15.

186. *Id.* at 714–17.

187. *Id.* at 718.

188. Massachusetts Attorney General Austin argued "[t]here are no principles of law, meaning the common law, or the statutes of the states, or of congress, that embrace a sovereign state. There is no usage in such cases." *Id.* at 685.

189. *Id.* at 688–90. He added that the matter was addressed specifically during the constitutional convention and in the state conventions, permitting jurisdiction. *Id*. at 690–91.

190. *Id*. at 691–92.

upon "principles and rules of justice, equity and good conscience."[191]

Over the objection of Chief Justice Taney,[192] Justice Baldwin's majority opinion held that these boundary dispute cases were properly brought under the Court's original jurisdiction.[193] He noted that the framers were well aware of the many existing boundary disputes.[194] No other apparent route existed to settle these disputes, neither war nor treaty, and the Constitution further provided that the states could only settle disputes through compact, if approved by Congress.[195] "There can be but two tribunals under the constitution who can act on the boundaries of states,"[196] he observed,

> the legislative or the judicial power; the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this Court, when a state is a party, the power is here, or it cannot exist.[197]

He next determined that the case did not necessarily involve a political question, but rather one capable of being decided by a court of law or equity.[198] "If we cannot 'establish justice' between these litigant states, as the tribunal to which they have both submitted the adjudication of their respective controversies,"[199] Baldwin reasoned,

> it will be a source of deep regret to all who are desirous that each department of the government of the Union should have the

191. *Id*. at 697. Rhode Island emphasized that the matter involved equity, and that many cases involved disputes unrelated to state common law. *Id*.

192. Carl Swisher explains that Massachusetts' Attorney General Austin argued that the relief requested was neither legal nor equitable, but rather political and not capable of being resolved by the judiciary. Swisher, *supra* note 183, at 513. Taney agreed, noting that the state sought a declaration of sovereignty. *Massachusetts II*, 37 U.S. at 752–53. Oddly, Taney decided the next phase in the litigation, emphasizing the role of a chancery court to consider equitable principles and, as such, ordered that Massachusetts respond to Rhode Island's bill of complaint. *Massachusetts IV*, 40 U.S. (15 Pet.) 233, 269–74 (1841). Rhode Island ultimately lost, at which point Taney again reaffirmed his belief that the Court lacked jurisdiction. *Massachusetts V*, 45 U.S. (4 How.) 591, 639 (1846).

193. *Massachusetts II*, 37 U.S. at 720.

194. *Id.* at 723–24.

195. *Id.* at 724–25.

196. *Id*. at 726.

197. *Id*. at 726–27.

198. *Id*. at 737.

199. *Id*. at 731.

> capacity of acting within its appropriate orbit, as the instrument appointed by the constitution, so to execute its agency as to make this bond of union between the states more perfect, and thereby enforce the domestic tranquility of each and all.[200]

With that, Justice Baldwin then proceeded to examine the merits as one for a bill in equity according to the usages of equity.[201]

Not until late nineteenth century did the boundary cases emerge as precedent for other interstate disputes.[202] The principal case was *Missouri v. Illinois*.[203] There, Missouri filed a *bill* in the Supreme Court to "enjoin" Illinois and the City of Chicago Sanitary District "from discharging the undefecated sewage and noxious filth of the city of Chicago into the Mississippi river by artificial methods."[204] Chicago at the turn of the century had approximately 1.5 million residents, and little doubt existed that many downstream cities and towns along the Mississippi river relied upon the river water for drinking as well as domestic, manufacturing, agricultural, and stock watering uses; and the Sanitary District of Chicago, created in 1889,[205] did not dispute the importance of the water, but instead denied "that the carrying out its plans will destroy the flow and adaptability of the waters of the Mississippi River, along the territory of [Missouri], for domestic or other

---

200. *Id*. Justice Baldwin referenced a long history of deciding such disputes, reaffirming that the issues were judicial not political. *Id*. at 742–48.

201. *Id*. at 744; *see also id*. at 742 ("From this view of the law in England, the results are clear, that the settlement of boundaries by the king in council, is by his prerogative; which is political power acting on a political question between dependent corporations or proprietaries, in his dominions without the realm. When it is done in chancery, it is by its judicial power . . . and necessarily a judicial question . . . .").

202. The Court continued to decide boundary disputes. *E.g*., Iowa v. Illinois, 151 U.S. 238 (1894).

203. *Missouri I*, 180 U.S. 208 (1901). For a thoughtful treatment of the dispute, see PERCIVAL ET AL., *supra* note 8, at 76–82.

204. Suggestions in Support of Motion for Leave to File Bill at 1, *Missouri I*, 180 U.S. 208 (1901) (No. 5).

205. In 1822, Congress granted Illinois the authority to build a canal connecting Lake Michigan and the Illinois River, Act of Mar. 30, 1822, ch. 14, 3 Stat. 659, further aided by an 1827 Act that transferred land to the State for purposes of the canal, Act of Mar. 2, 1827, ch. 51, 4 Stat. 234. In 1865, Illinois authorized Chicago to deepen the canal for the express purpose of disposing of sewage. *See* An Act to Create Sanitary Districts, and to Remove Obstructions in the Des Plaines and Rivers, May 29, 1889; *Missouri I*, 180 U.S. at 210, 241–42. In *City of St. Louis v. Rutz*, the Court held that the two states exercised concurrent jurisdiction over the river, with each state exercising exclusive jurisdiction over the lands adjacent to their own shores. 138 U.S. 226 (1891).

uses."[206]

Justice Shiras' *Missouri* opinion tracks the parties' arguments. Neither state argued that public nuisance was a federal common law, and therefore "laws" of the United States for purposes of jurisdiction; instead, they both focused first on the "nature of the parties" and whether that gave the Court original jurisdiction, and second on the nature of equity jurisprudence and ability of courts to issue injunctive relief.[207] Missouri referenced several lead cases that "sufficiently establish the right of the State, in its character as such, to present to a court of equity a bill for the abatement of a public nuisance. *The matter is one which concerns the State itself*."[208] Missouri also invoked the Federalist Papers and argued that the Court had jurisdiction to settle disputes between two states, noting that it lacked any other means of protecting its citizens, such as waging war or invading Illinois.[209] Missouri, therefore, asked the Court to decide whether it had "surrendered or given up so completely her sovereignty as will prevent her, at least in a court of the United States, from suing to protect the waters and streams over which she has jurisdiction, in order to protect the lives and health of her citizens against the unlawful acts of another State or the citizens of another State?"[210] Illinois' principal retort was to

---

206. Separate Answer of The State of Illinois to the Bill of Complaint of the Said State of Missouri at 18, *Missouri I*, 180 U.S. 208 (No. 5).

207. Brief and Argument in Support of the Demurrer to the Bill of Complaint at 3, *Missouri I*, 180 U.S. 208 (No. 5). The Constitution extends the federal judiciary's authority to hear cases in both law and equity. U.S. CONST. art. III, § 2, cl. 1; *see* STORY, *supra* note 77, at 608 ("Courts of Equity however maintain a concurrent jurisdiction in all cases . . . where the remedy at law is not adequate or complete.").

208. Brief and Argument of Complainant In Opposition to Joint Demurrer of Defendants to Bill of Complaint at 35, *Missouri I*, 180 U.S. 208 (No. 5). Missouri argued that Illinois' reliance on *Louisiana v. Texas* ignored that, there, the State of Louisiana was not itself engaged in interstate commerce, but instead was lending its name to Louisiana citizens engaged in interstate commerce who allegedly were being harmed by Texas. *Id.* at 34–38 (discussing Louisiana v. Texas, 176 U.S. 1 (1900)). Missouri instead relied on *Florida v. Anderson*, where Justice Bradley held that Florida had a sufficient interest in the subject matter of the suit to afford it "standing" to sue in equity. *Id.* at 38–39 (relying on Florida v. Anderson, 91 U.S. 667, 675–76 (1875).

209. Suggestions in Support of Motion for Leave to File Bill, *supra* note 204, at 3–5. Missouri initially referenced *Georgia v. Braislford*, 2 U.S. (2 Dall.) 402 (1792), then *Oswald v. Georgia*; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Pennsylvania v. Wheeling Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *Wisconsin v. Duluth*, 96 U.S. 379 (1877), and *Massachusetts II*, 37 U.S. (12 Pet.) 657 (1838). Suggestions in Support of Motion for Leave to File Bill, *supra* note 204, at 5–7.

210. Suggestions in Support of Motion for Leave to File Bill at 7, *Missouri I*, 180 U.S.

ask the Court to focus less on the character of the case and more on the parties.[211] And here Illinois attempted to persuade the Court that Missouri was not a legitimate party, that the dispute really was between the Sanitation District and certain cities and towns, as well as persons in Missouri, and that Missouri was not alleging any harm to its own property.[212]

In rejecting Illinois' argument, the Court examined the framers' understanding of the original jurisdiction clause.[213] Both this history as well as earlier cases confirmed that Missouri's complaint fell within the ambit of the Court's original jurisdiction. Justice Shiras observed,

> The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and *for which the Constitution has provided a remedy*; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.[214]

And the Court concluded that Missouri could seek to protect the health and comfort of its residents, particularly when the issues could affect the entire State.[215] When the case subsequently proceeded on the merits, Justice Holmes expressed caution before the Court would intervene and award equitable relief, and concluded the facts before the Court did not warrant relief.[216] It would be a mistake, therefore, to suggest that the Court in *Missouri v. Illinois* consciously recognized the

---

208.

211. Brief and Argument in Support of the Demurrer to the Bill of Complaint, *supra* note 207, at 3.

212. *Id*. at 3–7.

213. *Missouri I*, 180 U.S. at 220–24, 239, 249.

214. *Id.* at 240–41 (emphasis added).

215. *Id*. at 241. The Court further determined that the Sanitation District effectively operated under the auspices of the State and that Illinois, therefore, was a proper state defendant. *Id.* at 242. The final part of the Court's opinion addressed Missouri's requested equitable remedy, with the Court supporting the use of public nuisance as a valid equitable remedy. *Id*. at 248. Justices Fuller, Harlan and White dissented, concluding that no "direct antagonism" existed between the two states and further that the Bill failed to establish sufficient elements to warrant proceeding under a nuisance theory. *Id.* at 249.

216. Missouri v. Illinois (*Missouri II*), 200 U.S. 496 (1906).

availability of any federal common *law* cause of action for interstate pollution.[217]

And when the Court shortly thereafter confirmed its jurisdiction to resolve interstate water disputes and, again, interstate pollution, it had ample precedent, particularly with *Missouri v. Illinois* and *Rhode Island v. Massachusetts*. When Kansas sued Colorado for Colorado's diversion of water from the Arkansas River, depriving Kansas's farmers of irrigation water, Colorado argued that the Court lacked original jurisdiction because Kansas was suing to protect its residents, not its own property.[218] Chief Justice Fuller, although having dissented in *Missouri v. Illinois*, wrote that states could maintain suits on behalf of its citizens as "*parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens."[219] And responding to Kansas' merits argument that Colorado was depriving the residents of Kansas of

217. *Missouri II*, moreover, cannot be understood from a modern lawyer's perspective. Along with the scope of the Court's original jurisdiction, two other doctrines emerged during this period, infecting both the tenor of the arguments and the Court's decision: the scope of federal equity jurisprudence and a tort-based concept of public nuisance. To begin with, modern tort law only began to emerge during this era. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 20–62 (1980). Contemporary treatises on torts focused primarily on the law of negligence. *See* GEORGE CHASE, LEADING CASES UPON THE LAW OF TORTS (St. Paul, West Publ'g Co. 1892); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS (Chi., Callaghan & Co. 1878); THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (N.Y.C., Baker, Voorhis & Co. 4th ed. 1888); SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE (1901); FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE (Phila., Law Booksellers, 2d ed. 1878). And lawyers often compartmentalized public nuisance as part of criminal law or equity jurisprudence. Indeed, Illinois's argument emphasized that a public nuisance was enforced through indictments, not through equitable injunctions. And much of the Missouri's brief relies heavily on then prevailing principles of equity jurisprudence, as well as Wood On Nuisances. *Cf.* Austin Abbott, *The Co-Operation of "Law" and "Equity;" and the Engrafting of Equitable Remedies upon Common-Law Proceedings*, 7 HARV. L. REV. 76 (1893–1894). Second, the expansion of federal courts' injunctive power became one of the more important late nineteenth century developments. MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 361 (1977). The railroad strikes in the 1880s prompted the federal courts to issue injunctions against the boycotts on several different theories. *Id*. at 405–06. The most infamous case is *In re Debbs*. 158 U.S. 564 (1895). And "courts at midcentury remained quite willing to issue injunctions, grant damages, and throw people in prison for fouling community health and environment." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 221 (1996).

218. Kansas v. Colorado, 185 U.S. 125, 142–43 (1902).

219. *Id*. at 142. The Chief Justice invoked the phrase from *Missouri II* that states could seek to protect the "health" and "comfort" of their citizens. *Id*. Indeed, Fuller added that the case presented little difficulty. *Id*. at 144.

riparian flows, Fuller avoided the issue by observing that when the Court sits "as an international, as well as a domestic tribunal," it applies "Federal law, state law, and international law, as the exigencies of the particular case may demand," but such matters were premature.[220]

Such was the precedent when Holmes wrote his succinct opinion in *Georgia v. Tennessee Copper Co*.[221] The case involved Georgia's original jurisdiction suit against the Tennessee Copper Company, seeking to restrain the facility from continuing to emit pollutants and injuring state forests and citizens.[222] The reported Tennessee Copper case is the second case filed by Georgia against the neighboring copper plants. Georgia noted in its brief that, because the Court had allowed jurisdiction in the first case, it did not believe that the jurisdictional issue needed to be argued again.[223] Holmes' opinion focuses on the unique role of a state in a suit in equity, to protect its earth and air within its borders, and the need to approach the Court's equitable role differently than if the case involved private parties.[224] On the evidence, he then concludes that an injunction would be warranted if the defendant failed to restrain the fumes.[225] The case reflects what G. Edward White

---

220. *Id*. at 146–47. The parties debated the applicable law, whether Colorado law or some *ex ante* law that would have applied prior to statehood, or riparian common law, as had been recently expressed in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702 (1899). *See generally* Carman F. Randolph, *Notes on Suits Between States:* Kansas v. Colorado, 2 COLUM. L. REV. 364 (1902). Kansas agued that the common law would apply, discussing the march of the common law in the region, as if to evidence a uniform common law (not a separate federal common law). Brief of Complainant for Hearing on the Demurrer of Defendant at 9–10, Kansas v. Colorado, 185 U.S. 125 (No. 10). The state nevertheless acknowledged uncertainty surrounding what law applies. *Id.* at 72 ("Are the states of the American union, in their conduct towards each other, to be governed by theories of international law, which each nation, itself indifferent, wishes every other nation to fully observe . . . ."). But it then suggested that "[i]t seems to us that there exists an American *jus gentium* as between states, based upon the common law, as just and as fair as the common law, and as rigid in its requirements." *Id*. The Court subsequently parroted the *Kansas v. Colorado* language, referring to it collectively as an "interstate common law." Connecticut v. Massachusetts, 282 U.S. 660, 671 (1931).

221. Georgia v. Tennessee Copper Co., 206 U.S. 230, 236–39 (1907). *See generally* DUNCAN MAYSILLES, DUCKTOWN SMOKE: THE FIGHT OVER ONE OF THE SOUTH'S GREATEST ENVIRONMENTAL DISASTERS (2011).

222. *Tennessee Copper Co.*, 206 U.S. at 236.

223. Replication of the Complainant, The State of Georgia, to the Answer of the Defendant, The Ducktown Sulphur, Corporation and Iron Company at 15, *Tennessee Copper Co.*, 206 U.S. 230.

224. *Tennessee Copper Co.*, 206 U.S. at 236–39.

225. *Id.* at 239.

explains is Holmes' style of "letting his language" announce the applicable rule, rather than any extended use of logic, and often leaving "out many of the steps in his reasoning."[226]

The Court continued to hear interstate disputes, generally focusing on the merits of any injunctive relief rather than the role of the Court or the scope of its jurisdiction.[227] The Court seemingly struggled with when it would exercise its discretionary original jurisdiction involving only one state as a party.[228] In *Georgia v. Pennsylvania Railroad Co.*, for example,

---

226. G. EDWARD WHITE, HOLMES, *supra* note 134, at 480 (biography).

227. *See* New Jersey v. New York, 289 U.S. 712 (1933); New Jersey v. New York, 284 U.S. 585 (1931); New Jersey v. New York, 283 U.S. 473 (1931); New Jersey v. New York, 280 U.S. 514 (1929); New Jersey v. New York, 279 U.S. 823 (1929); *see also* Nebraska v. Wyoming, 325 U.S. 589 (1945) (Platte river); Connecticut v. Massachusetts, 282 U.S. 660 (1931) (concluding that federal, state, and international law govern disputes over diversions of the Ware and Swift rivers); Wisconsin v. Illinois, 278 U.S. 367 (1929) (Lake Michigan diversions); Wyoming v. Colorado, 259 U.S. 419 (1922) (diversions of the Laramie river); Minnesota v. Wisconsin, 252 U.S. 273 (1920) (boundary dispute). In *North Dakota v. Minnesota*, for instance, when North Dakota sued for flooding of farm lands by activities in Minnesota, the Court noted that the "comfort, health, and prosperity of its farm owners that resort may be had to this court for relief. It is the creation of a public nuisance of simple type for which a state may properly ask an injunction." 263 U.S. 365, 374 (1923).

228. The Court, in *Massachusetts v. Missouri*, for instance, noted that it would, in appropriate cases, apply "accepted principles of the common law or equity systems of jurisprudence," but in that case it already signaled that the Court would not exercise its original jurisdiction, and the attendant burden on the Court, when other avenues of relief might be available. 308 U.S. 1, 15 (1939). Only a few years earlier, the Court had been willing to decide a dispute involving one state's effort to collect a judgment against an out-of-state entity. Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439 (1933). Yet, in another instance involving two states, Justice Frankfurter expressed difficulty with the Court's original jurisdiction:

> [T]here are practical limits to the efficacy of the adjudicatory process in the adjustment of interstate controversies. The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution. Considerations such as these have from time to time led this Court or some of its most distinguished members either to deprecate resort to this Court by states for settlement of their controversies, or to oppose assumption of jurisdiction.

Texas v. Florida, 306 U.S. 398, 428 (1939) (citation omitted); *see also* Louisiana v. Cummins, 314 U.S. 580 (1941) (contract action); Massachusetts v. Missouri, 308 U.S. 1, 20 (1939) (another forum better suited multi-state taxation claim). These decisions arguably reflect the Court's nascent efforts to restrict discretionary acceptance of original jurisdiction when concurrent jurisdiction exists. *E.g.*, Arizona v. New Mexico, 425 U.S. 794, 797 (1976) (declining jurisdiction in lieu of another forum); *cf.* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 587–88 (1985) (suggesting an appropriate exercise of the

Justice Douglas' majority opinion allowed Georgia, acting in a *parens patriae* capacity, to sue railroad companies for federal antitrust violations.[229] Douglas's opinion suggests that the Court accepted original jurisdiction due to the gravity of the issues.[230]

But when the interstate pollution cases emerged in the post-New Deal, modernist legal environment, the Court subtly began to lay the foundations for a broader environmentally based federal common law. It did so, however, ironically in a series of cases that effectively constricted the use of the Court's original jurisdiction. In *Ohio v. Wyandotte Chemicals Corp*.,[231] the Court rebuffed Ohio's concern that mercury from plants in Michigan was killing fish in Lake Erie.[232] *Wyandotte* is a slightly different case from many of the earlier ones because it involved a suit between a state and citizens of an adjoining state, not between two states.[233] Justice Harlan, writing for his colleagues other than Justice Douglas, expressed reservations about the practically of the Court hearing such cases involving "no serious issue of federal law," and further indicating that little suggested the need for the Supreme Court to hear these cases under its original jurisdiction.[234]

Court's discretion). *See generally* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 (1993). The Court already had limited its role in hearing cases involving consuls, by permitting concurrent lower federal court jurisdiction. Börs v. Preston, 111 U.S. 252, 256–57 (1884). Although suggesting that Congress can restrict the Court's original jurisdiction in cases involving state parties, Professor Amar observes "virtually no modern scholars or judges have argued that Congress can tamper with the Court's irreducible core of original jurisdiction over ambassador cases." Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1523 (1990).

229. Georgia v. Penn. R.R. Co., 324 U.S. 439, 450 (1945).

230. *Id*. at 450–51. The Court distinguished a prior case where it had rejected a state claim against railroad rates. *Id.* at 452; Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co., 220 U.S. 277, 289 (1911).

231. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971). *See generally* Bruce W. Ficken, *Wyandotte and its Progeny: The Quest for Environmental Protection Through the Original Jurisdiction of the Supreme Court*, 78 DICK. L. REV. 429, 432–37 (1973–1974).

232. *Wyandotte*, 401 U.S. at 494, 499.

233. *Id.* at 494–96.

234. PERCIVAL ET AL., *supra* note 8, at 747–52. Percival suggests that *Wyandotte* marks a "fundamental shift" in the Court's jurisprudence. *Id*. at 751. The issue, however, is more complicated. The case ought to be viewed as part of the Court's evolving approach toward its jurisdiction, starting first with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and then with *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *Marbury* concludes that Congress may not enlarge the scope of the Court's original jurisdiction, reasoning that the affirmative grant implies a negative prohibition against enlargement. *Marbury*, 5 U.S. at 175. But in *Cohens*, Chief Justice Marshall opined that "[i]f a state be a party, the jurisdiction of this

Although unnecessary to its decision, the Court added that the case presented no federal question—implicitly rejecting any suggestion of a federal common law.[235] One contemporary commentary on the case suggested that the "opinion is laden with dicta and gratuitous observation that it will be the source of great jurisdictional controversy in the future."[236] A comparable fate befell the plaintiffs in *Washington v. General Motors Corp.*:[237] although factually similar to *Georgia v. Pennsylvania Railroad Co*., the Court in *General Motors Corp.* rejected hearing a case involving an alleged conspiracy by automobile manufacturers to "impede the research and development of automotive air pollution control devices."[238] And then in *Vermont v. New York*,[239]

---

court is original" rather than appellate. *Cohens*, 19 U.S. 264 at 393. But, Marshall later added that cases arising under the Constitution or laws of the United States fall within the Court's appellate jurisdiction. *Id.* The former jurisdiction focuses on the character of the parties and the nature of the case is irrelevant, while the latter focuses on the nature of the case and renders the character of the parties irrelevant. *Id*. When both grounds are satisfied, Marshall explained, the Court's appellate jurisdiction is not obviated merely because a State is party in the lower courts. The Court's original jurisdiction, therefore, is not exclusive merely because a state is a party. *Id.* at 395–98. The affirmative grant of original jurisdiction does not, Marshall reasons, carry a corollary negative operation. *Id.* at 398. However, in the later case, *Texas v. White*, the Court announced "[i]t is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States . . . ." 74 U.S. (7 Wall.) 700, 719 (1868); *cf.* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866) (holding that the Court does not have original jurisdiction over litigation in which a state sues a sitting President).

235. *Wyandotte*, 401 U.S. at 498 n.3. Of course, the Tenth Circuit held on February 8, 1971, that a federal common law would apply in interstate pollution cases. Texas v. Pankey, 441 F.2d 236, 242 (10th Cir. 1971) (involving the spraying of pesticides to combat New Mexico range caterpillar, and adverse effects in Texas). Justice Douglas would later rely heavily upon the *Pankey* case. *See infra* note 250. And Justice Douglas later prevailed by overruling this statement in *Wyandotte* in *Milwaukee I*. *See Milwaukee I*, 406 U.S. 91, 102 (1972); 327 n.19 (1981) (noting that the *Wyandotte* statement had been overruled).

236. Winton D. Woods, Jr. & Kenneth R. Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 ARIZ. L. REV. 691, 691 (1970). The authors favored, in the then emerging "environmental decade," a federal forum for interstate and international environmental disputes, and worried that *Wyandotte* inappropriately removed the possibility for federal district court jurisdiction. *Id*. at 701–02. Dissenting in *Wyandotte*, Justice Douglas wrote that the issues warranted the Court's attention and that a special master could handle the factual complexity. *Wyandotte*, 401 U.S. at 506, 511 (Douglas, J., dissenting). Justice Douglas addressed this concern in *Milwaukee I*, 406 U.S. at 102. *See infra* note 250–53 and accompanying text.

237. Washington v. General Motors Corp., 406 U.S. 109 (1972). *See generally* Ficken, *supra* note 228, at 438.

238. *General Motors Corp.*, 406 U.S. at 112.

239. Vermont v. New York, 419 U.S. 961 (1974); Vermont v. New York, 409 U.S. 1103 (1973); Vermont v. New York (*Vermont II*), 408 U.S. 917 (1972); Vermont v. New York (*Vermont I*), 406 U.S. 186 (1972). *See generally* Ficken, *supra* note 231, at 447.

the Court, in a case somewhat similar to *Wyandotte,* accepted jurisdiction but decided that the Special Master's approach for resolving an alleged public nuisance from the discharge of sludge into certain waters did not present enough of a judicial question.[240] In doing so, however, the Court observed "[o]ur original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a 'common law' formulated over the decades by this Court."[241]

When, therefore, Illinois filed at the Court a bill to restrain Wisconsin cities and sewerage commissions from polluting Lake Michigan,[242] the case appeared quite ordinary. The Court until then had not held that a general federal common law of public nuisance existed.[243] It had established, instead, that the Court would exercise its exclusive original jurisdiction when two states were legitimate parties, and in doing so it would apply whatever law it deemed appropriate.[244] And the Court triggered a discussion about what law would apply, when it asked the parties to brief specifically the question of whether state or federal law would apply.[245] Illinois responded that federal common law operated in disputes between two states.[246] The State relied principally upon the boundary dispute and interstate water allocation cases to assert that the Court "has repeatedly recognized the existence of a body of 'interstate common law,' made up of a number of components."[247] Only in passing did the State inadvertently capture the Court's past jurisprudence when it added that the Court could fashion its own authority in instances where the Court was exercising its constitutionally

240. *Vermont II*, 408 U.S. at 917; *Vermont I*, 406 U.S. at 186.

241. Vermont v. New York, 417 U.S. 270, 277 (1974). That cavalier language about the common law lacked precision, because the Court applied whatever *ex ante* "law" it deemed appropriate if it concluded that it had original jurisdiction. *Id.* at 278.

242. *Milwaukee I*, 406 U.S. 91, 93 (1972).

243. *Id.* at 102.

244. In Wyoming v. Colorado, 259 U.S. 419, 258–59, 265 (1922), for instance, where two states applied the same common law doctrine, the Court indicated it would apply that doctrine.

245. Plaintiff's Brief Regarding the Applicable Law at 2, *Milwaukee I*, 406 U.S. 91 (No. 49).

246. *Id.*

247. *Id*. at 5–10. Illinois also referenced a 1921 one-page Harvard Law Review note suggesting that it would appear as if the Supreme Court was establishing a particular type of common law tailored to the unique status of quasi-sovereign states suing each other. *Id.* at 5.

granted jurisdiction.[248] The defendants too informed the Court that "'Interstate Common Law' as expressed in Connecticut vs. Massachusetts" would apply, absent the Court concluding that the newly passed Federal Water Pollution Control Act and a 1968 agreement between the states governed the dispute.[249]

Writing for the Court, Justice Douglas initially reviewed the scope of the Court's original jurisdiction and then concluded that the case fell within the Court's concurrent jurisdiction with the lower federal district courts.[250] His analysis generally follows the contours of the cases discussed in this article, reasoning that the Court's exclusive jurisdiction only covers suits between two or more states, not their political subdivisions.[251] But from there, his opinion arguably takes a herculean leap generated by his apparent desire to ensure that lower courts can exercise concurrent jurisdiction under 28 U.S.C. section 1331 (federal question jurisdiction). He did this first by conflating the Constitution's grant of jurisdiction over maritime and other constitutionally assigned matters with a federal common law, reasoning that, in maritime cases and therefore federal common law cases, federal courts can exercise federal question jurisdiction.[252]

---

248. *Id*. at 11. Illinois distinguished *Ohio v. Wyandotte Chemicals Corp.*, noting that Illinois' case involved a direct clash of competing sovereign interests, unlike in *Wyandotte*. *Id*. at 12.

249. Supplemental Brief of Racine and Kenosha at 12, *Milwaukee I*, 406 U.S. 91 (No. 49); *see also* Brief in Opposition to Plaintiff's Motion for Leave to File the Bill of Compliant at 2–4, *Milwaukee I*, 406 U.S. 91 (No. 49) (arguing that the States had entered into an agreement, obviating need for the original jurisdiction action).

250. *Milwaukee I*, 406 U.S. at 98.

251. *Id*.

252. *Id*. at 99–101. Justice Douglas relied, *inter alia*, on Justice Brennan's opinion in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). There, the Court engaged in an exhaustive review of federal maritime law to illustrate that maritime claims are cognizable in federal district court under 28 U.S.C. § 1331. *Id.* This issue surfaced because the Constitution separately assigns jurisdiction over suits at law and equity arising under the Constitution and laws of the United States and jurisdiction over admiralty and maritime cases. *Id.* at 373–80. Could the latter, therefore, be folded into the former and warrant invoking federal question jurisdiction, and removal from state to federal court? Justice Frankfurter's detailed opinion explores how states and federal courts historically exerted concurrent jurisdiction over maritime matters. And he explains why maritime law, as a general law assigned by the Constitution to the federal courts, is separate from today's federal question jurisdiction. *Id.* Justice Brennan dissented from this aspect of Frankfurter's opinion, which would have allowed the claims to be heard by federal juries in lieu of judges. Moreover, in *Milwaukee I*, Justice Douglas, who had joined in this aspect of Justice Brennan's dissent, *id*. at 389 (Douglas, J., dissenting), lifted one of Justice Brennan's paragraphs slightly out of context. Douglas also quotes two lower court cases suggesting that 28 U.S.C. § 1331

Next, Justice Douglas—through brilliant sleight-of-hand—created the general federal public nuisance common law. With little actual precedent for the broad statement, Douglas proclaimed "When we deal with air and water in their ambient or interstate aspects, there is a federal common law."[253] And then in a footnote, after quoting from *Georgia v. Tennessee Copper* and opining that boundary disputes and interstate water allocations present federal questions, Justice Douglas recasts the Court's history by suggesting that even in the interstate pollution cases "it is not only the character of the parties that requires us to apply federal law."[254] He then proceeds to equate the Court's prior interstate water cases and boundary disputes with claims by parties over interstate pollution.[255] While observing that federal laws might soon preempt "the field of federal common law of nuisance," he wrote for the Court that until then "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."[256] Although the Court concluded the case must proceed in district court,[257] Justice Douglas, a New Deal realist and environmental champion, provided the actual opening salvo for a federal common law public nuisance for interstate pollution divorced from the character of the parties.

---

includes federal common law claims, and from there erroneously concludes that parties can rely on federal question jurisdiction for alleged federal common law claims. *See infra* notes 251–52 and accompanying text. Prior to this case, the Court "had not previously indicated that the federal common law of nuisance provided a basis for federal question jurisdiction under 28 U.S.C. § 1331." *Milwaukee II*, 451 U.S. 304, 337 n.4 (1981) (Blackmun, J., dissenting).

253. *Milwaukee I*, 406 U.S. at 103. Douglas supported his statement with a reference to the Tenth Circuit's decision in *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). For a discussion of *Lincoln Mills* and why Douglas may have misused the case, see *infra* notes 270–71 and accompanying text.

254. *Milwaukee I*, 406 U.S. at 105 n.6.

255. *Id*. at 105–07.

256. *Id*. at 108. In *Milwaukee II*, the Court subsequently held that the Federal Water Pollution Control Act of 1972, Pub. L. 92-500, 86 Stat. 816, displaced the alleged federal common law claim. 451 U.S. 304, 323 (1981). Dissenting, Justice Blackmun, joined by Justices Marshall and Stevens, opined that the Court's earlier cases established a federally created substantive right in instances where there are overriding federal interests warranting a uniform rule, such as in cases involving states and interstate pollution. *Id.* at 332–39 (Blackmun, J., dissenting). These justices further argued that the Congress had not intended to displace the federal common of public nuisance recognized in these earlier cases. *Id*. at 339.

257. *Milwaukee I*, 406 U.S. at 108.

IV. CONSIDERATIONS AFFECTING AN EXPANDED FEDERAL COMMON LAW

Undoubtedly "the prevailing conception of the common law has changed since 1789."[258] And with it the notion of a uniform general common law has dwindled. What seems relatively certain, however, is that the interstate pollution cases are less about any remnant of a federal common law and more about the Court's struggle with the scope of its constitutionally-assigned jurisdiction. Justice Hughes, for instance, discussed these cases not as common law cases but as cases involving the Court's original jurisdiction.[259] Bradford Clark similarly observed,

> Because neither states nor Congress generally possesses unilateral legislative competence to resolve interstate disputes, the Constitution necessarily contemplates that the Supreme Court will resolve such disputes. The rules adopted and applied by the Court in these cases are best understood, not as federal common law, but as rules designed to implement the constitutional structure—specifically, the constitutional equality of the states.[260]

Unfortunately, today's Supreme Court ignores this history. But before merely relegating this history to dusty old books, we should explore whether a federal common law of public nuisance is on a sufficiently related continuum with this past.

Throughout our history, we have witnessed the tension between the past and the present, and between the need for continuity and predictability and the appreciation that law must evolve as part of the fabric of a changing society. This occurred during the antebellum period and the years following the civil war;[261] when the progressive movement

---

258. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

259. *See* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS 118–56 (1928).

260. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1254 (1996).

261. *Compare* William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) (suggesting that judges purposefully decided cases to promote certain economic interests), *and* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) (similar), *with* Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1 (arguing that Nelson has "overstated and oversimplified the pre-Civil War role of instrumentalism through a selective examination of the evidence, and . . . that in the second half of the

navigated between formalism and realism;[262] and it was prominently displayed during the New Deal period.[263] At times, an unwritten customary law merged with higher law principles to support necessary change, as with the fight against slavery.[264] At other times, it retarded social change, as during the formalist era.[265] History, therefore, illustrates that balancing the need for continuity and predictability with an appreciation that a legal system ought to reflect its society, and evolve as society changes, requires more than a normative judgment about the importance of the end being sought. It first requires an acute appreciation for precedent, understanding for instance that previous cases reflected the Court's struggle with its original jurisdiction rather than any inquiry into the legitimacy of a federal common law for public nuisance. And next it suggests the need for a searching analysis into whether that precedent ought to be extended, whether for instance it is appropriate to divorce the character of the parties from the nature of the claims.

When, therefore, we explore the modern concept of a federal common law, we ought to consider carefully the underlying legal, political, social, and practical issues and assumptions animating our

---

nineteenth century, long after what Nelson has represented as the mid-century discrediting of instrumentalism, judges continued to adhere to the instrumental style of reasoning in adjudicating major issues of public policy"). Karl Llewellyn referred to the grand style of the common law, as a way of thought during this period that allowed judges to test whether or how to apply precedent. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36 (1960).

262. *See supra* note 129 and accompanying text.

263. *See generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

264. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 6 (1975) (discussing the role of judges as "the pillars of legal respectability and of their collaboration in a system of oppression—Negro slavery"); PALUDAN, *supra* note 93 (maintaining that formative era legal thinkers "demonstrated the apparent identity between common and natural law"); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977) (analyzing the development of anti-slavery constitutionalism from "nontechnical, popular origins that lay[ed] outside courts and legislatures").

265. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 *passim* (1908) (discussing hostility by common law advocates for legislation promoting social change); *see also* PURCELL, PROGRESSIVE CONSTITUTION, *supra* note 141, at 189–90 (examining how the federal common law, as well as notions of general versus local law, permitted conservative judges to thwart social legislation).

choice to expand or constrict federal common law.[266] The Court now axiomatically parrots that no federal common law exists except in a few instances—where it exists. In *Texas Industries, Inc. v. Radcliff Materials*,[267] for instance, the Court observed:

> Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the *rights and obligations of the United States*, interstate and international disputes implicating the *conflicting rights of States* or our relations with foreign nations, and admiralty cases. In these instances, our *federal system does not permit the controversy to be resolved under state law*, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.[268]

The difficulty with the *Texas Industries* language is that the exception arguably swallows the rule: in a mobile society, or because interests other than purely local interests are often at stake, the Court is free to decide what types of disputes are "interstate" whose "nature" makes it "appropriate" to fashion a federal rule, and the only issue then is whether it is limited by the Court's clause addressing "conflicting rights of States." If it were so limited, then cases like *American Electric Power Co. v. Connecticut* would not even present a facially valid cause of action. And merely suggesting a federal common law for "interstate"

---

266. While I agree with most of Martin Redish's comments, it seems too pedantic to suggest as he does that the inquiry is "first and foremost, a matter of statutory construction" of the Rules of Decision Act. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 768 (1989). Redish himself even admits that structural political values are "intertwined" with an interpretation of the Rules of Decision Act. *Id*. And it seems somewhat myopic to elevate the Rules of Decision Act in the debate when the statute is subject to congressional alteration.

267. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

268. *Id.* at 641 (emphasis added). The Court similarly stated:

> There is, of course, "no federal common law." Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." These instances are "few and restricted," and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and those in which Congress has given the courts the power to develop substantive law.

Id. at 640 (citations omitted).

disputes overlooks the considerable history surrounding the relevant cases, discussed in this article, where the Court principally focused on the scope of its original jurisdiction rather than on establishing a theory for a federal common law. Also, a few years after *Texas Industries*, the Court in *Boyle v. United Technologies Corp.* observed that federal common law would displace state law whenever *unique federal interests* are at stake.[269] But again, unless *uniquely federal interests* are limited to "the rights and obligations of the United States,"[270] the concept arguably lacks *ex ante* discernable limits. Locating those limits remains clouded by vague language and a meager dialogue on when a federal court can create a federally enforceable cause of action.[271]

At the outset, we should distinguish truly federal common law causes of action from the judiciary's role of filling in the interstices of federal statutes, or of establishing procedural rules.[272] When courts interpret or imply rights or remedies not expressly contained in federal or constitutional provisions, they are not purporting to create a federal common law *per se*.[273] They are deciding that the legislature or founders

269. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("[A] few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" (citation omitted)).

270. *Texas Indus., Inc.*, 451 U.S. at 641.

271. Justice Brandeis' curious language in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, decided the same term as *Erie*, is illustrative. 304 U.S. 92 (1938). The issue in *Hinderlider* involved the scope of the Compact Clause, and the states' ability to use the clause to allocate a common resource; in dicta, unnecessary to any of the issues in the case, Brandies suggests toward the end of the opinion that interstate water disputes are governed by a "federal common law," referring oddly to *Kansas v. Colorado* and other cases where the Court was more careful in its language. *Id*. at 110.

272. *See* Redish, *supra* note 266, at 788–89 (describing how statutory interpretation is fundamentally different than common law creation). Some academics, however, have suggested that there is little difference between interpreting statutes and creating a common law. Field, *supra* note 11, at 890–94. Caleb Nelson comprehensively reviews the cases to illustrate how the courts apply a cabined general law, informed by *ex ante* general rules. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

273. Some of the 1970's scholarship unfortunately conflated "truly" federal common law power with the ability of the Court to formulate pre-emptive federal rules of decision, when the Court otherwise unquestionably had jurisdiction to decide the controversy. *E.g.*, Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1, 12–13 (1975). Professor Monaghan, for instance, treated interpreting the Constitution as somehow equivalent to interpreting statutes, and then described the resulting process as a constitutional common law. *Id*. at 13. That Monaghan embraced an overly expansive understanding of "common law" is evident when he asserts that the Court's gloss on administrative agencies

intended or would have intended that the provision be applied in a certain fashion.[274] When courts interpret statutes, or even add judicially created elements to statutory regimes, the process and sources the court invokes as authority to legitimize its decision are quite different from the process and sources that surface when creating a "common law" obligation or right.[275] Too much commentary unfortunately overlooks this simple point and the concomitant fact that our judicial process is an adversary one; when we talk about a federal common law we necessarily are talking about opposing parties arguing about the merits of creating a cause of action, not interpreting existing sources.

Next, we should separately identify circumstances where courts *must* develop a federal *rule* (whether incorporating a state rule or not) because of some federal involvement in a case. For the most part, these instances reflect what Judge Friendly praised as the new federal common law.[276] For example, when the United States enters the

---

under the Administrative Procedure Act constitutes a "limited common law." *Id*. at 35 n.179. These are all incidents of the judiciary's recognition that the language of any particular text (constitutional or statutory) often requires interpretation, or application in specific contexts, and the result Monaghan labels perhaps too cavalierly as federal common law. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (interpreting the Constitution as applying implicit federal rules governing foreign affairs). Field shares an equally broad view of the concept. Field, *supra* note 11, at 893–95. Others since appear to acknowledge the difference, but with little significance. *E.g.*, Clark, *supra* note 260, at 1248.

274. *Texas Indus., Inc.*, 451 U.S. at 639 ("Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress."). In the antitrust arena, for instance, courts are not creating federal common law, but rather implementing Congress' direction for the judiciary to fashion rules of decision. *E.g.*, *id.* (declining to permit contribution actions under antitrust laws); *see* Redish, *supra* note 266, at 789–90; *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) (delegating to federal courts authority in the labor arena). The same is true for the Court's use of the common law to help fashion the broadly worded Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et. seq* (2006). *See* Burlington Northern & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613 (2009) (incorporating joint and several liability from the common law); United States v. Bestfoods, 524 U.S. 51 (1998) (incorporating general principles of corporate law). And even in *County of Oneida v. Oneida Indian Nation*, where the Court held that the tribe could pursue a federal common law claim for loss of aboriginal rights, the reason is not because of the presence of federal common law, but rather because federal Indian relations are governed by federal law under the Constitution and aboriginal land rights originate from federal law. 470 U.S. 226, 234–36 (1985); *see* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974).

275. *See* Monaghan, *supra* note 273, at 12 (noting inquiry into congressional purpose and sources being explored).

276. *See* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405–22 (1964). Bradford Clark's structural approach to federal common law essentially represents a modern application of Judge Friendly, with Clark suggesting that

economic marketplace by engaging in commercial transactions, including with its contractors, these transactions occur pursuant to federal law and policy. By necessity, federal courts then must explore whether the United States' interest warrants developing federal doctrines ancillary to these transactions or whether to apply *ex ante* state doctrines. Many of the post-*Erie* allegedly federal common law cases fall into this category. The seminal case of *Clearfield Trust Co. v. United States*, for instance, concluded that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."[277] In *United States v. Kimbell Foods, Inc.*, the Court held that a federal rule (albeit then incorporating a state rule) applies to liens in connection with federal loan programs.[278] In *Howard v. Lyons*, the Court crafted a federal privilege in a defamation action against a federal officer.[279] And similarly, in *Boyle v. United Technologies Corp.*, the Court created a federal military contractor's defense in state tort claims.[280]

---

certain areas, including foreign affairs, are acutely federal issues under our constitutional structure. Clark, *supra* note 260, at 1252. The same is true with Martha Field's analysis, with most of her examples instances of the judiciary employing a federally derived rule of decision when applying some *ex ante* statutory or constitutional directive. Field, *supra* note 11, at 942 (invoking *Lincoln Mills*). Another normative "theory is that in certain areas, states have such a strong self-interest in a controversy or have erected such high barriers to political participation by some groups that state law cannot be expected to provide a sufficiently detached, reliable, and neutral rule of decision for a controversy." Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 588 (2006).

277. Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). The Court emphasized that "[t]he authority to issue the check had its origin in the Constitution and statutes of the United States . . . ." *Id.* "The *Clearfield* doctrine has spread into many other types of litigation over obligations by or to the United States." Friendly, *supra* note 276, at 409.

278. United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–40 (1979).

279. Howard v. Lyons, 360 U.S. 593, 597 (1959). "The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government." *Id.*

280. Boyle v. United Techs. Corp., 487 U.S. 500, 512–13 (1988); *see also* Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 531 (1959); Deitrick v. Greaney, 309 U.S. 190 (1940); Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). Even when courts must fill the interstices of federal statutory programs, Philip Weiser advocates that "federal courts should treat pleas for a rule of federal common law to advance the interests of uniformity with care and skepticism, doing so only where the requested effort relates closely to a clearly articulated statutory or constitutional policy." Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1711 (2001).

These and other similar cases are all tethered somehow to the Constitution, statutes, or federal activities. Even had the ardent Federalists been successful in securing a federal common law for crimes, it too would have been as a consequence of an expanded understanding of protecting constitutionally assigned federal interests. Consequently, further exploration is necessary to decide whether the types of claims in *Michigan v. Corps* or *American Electric Power Co. v. Connecticut* ought to be permitted.

A. Claims Against the United States

Although this article's principal objective is to elevate the conversation about the role, nature, and function of a federal common law—particularly in the environmental context—in lieu of advocating for any particular outcome, a federal common law claim against the United States seems particularly troublesome. To begin with, as the Seventh Circuit noted, no modern court has examined sufficiently the viability of such a claim.[281] And while the Seventh Circuit indicated that the parties—and derivatively the court—had only given the issue "cursory exposition," the court proceeded to suggest that a "federal common law of public nuisance" exists and that "respectable arguments" support applying it to the federal agencies.[282] But the court's analysis overlooks the interplay of modern federal environmental laws and the APA. And it overlooks that, in complex environmental cases, courts emphasize that they should respect "the strengths of agency processes on which Congress has placed its imprimatur."[283]

Cases against federal agencies seeking non-monetary relief occur routinely in the environmental and natural resource arena.[284] When an agency's action affects the environment, as the Corps did with allegedly allowing the transport of Asian carp, the agency must ensure that it has

281. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 773 (7th Cir. 2011).

282. *Id.* at 773–74. The court further concluded that Congress had not displaced the area by specifically addressing the precise issue of the interstate transport of Asian carp. *Id.* at 776–80.

283. North Carolina v. Tenn. Valley Auth., 615 F.3d 291, 305–06 (4th Cir. 2010).

284. Cases seeking monetary relief are permissible under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–80 (2006); one prominent case involves deliberate agency decisions that parties claim precipitated environmentally destructive consequences. *See generally* Edward Richards, *The Hurricane Katrina Levee Breach Litigation: Getting the First Geoengineering Liability Case Right*, 160 U. PA. L. REV. PENNUMBRA 267 (2012), http://www.pennumbra.com/essays/2-2010/Richards.pdf (discussing tort litigation against the United States for the levee breach from Hurricane Katrina).

complied with the National Environmental Policy Act ("NEPA")[285] and the Clean Water Act (CWA), and that its actions are not otherwise arbitrary, capricious, or an abuse of discretion.[286] The goal of NEPA and these other programs is to ensure that agencies adequately examine the environmental consequences of their decisions, and otherwise do not act arbitrarily or capriciously based on the information before them.[287] If an agency fails to act affirmatively to address environmental threats and Congress has required action, parties can force that agency's hand.[288] And any federal action that likely constitutes a public nuisance can be measured against that standard, and the principal difference is that parties in a public nuisance suit can ignore the administrative process and record and try the case as if it were a regular civil lawsuit.[289] Indeed, in *Michigan v. Corps*, the State challenged the action under the APA but included the common law count apparently because the Corps arguably had yet to complete its analysis and render a reviewable final agency action.[290] Such a concern arguably animated the Court in *American Electric Power Co. v. Connecticut* to note that complex environmental issues requires consideration of competing concerns by the expert agencies, in the first instance, and then review by the judiciary.[291]

The possibility that such claims against the United States could intrude into the administrative process is illustrated by the effort to create a federal common law public trust doctrine. The plaintiffs in *Alec L. v. Jackson*[292] argued that a federal common law "public trust" requires the government to undertake the necessary steps to reduce greenhouse gas emissions.[293] In lieu of any significant debate about the presence of a

285. 42 U.S.C. §§ 4321–70f (2006).

286. *See* 5 U.S.C. § 706 (2006).

287. *See* 42 U.S.C. § 4321 ("The purposes . . . are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and . . . enrich the understanding of the ecological systems and natural resources important to the Nation . . . .").

288. *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 532 (2007). But absent an affirmative statutory directive, plaintiffs may confront the limits of Administrative Procedure Act review. *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61 (2004).

289. *See supra* notes 21–22 and accompanying text.

290. *See supra* notes 49–51 and accompanying text.

291. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539 (2011).

292. Alec L. v. Jackson, No. 1:11-CV-02235, 2012 WL 1951969, at *2 (D.D.C. May 31, 2012).

293. In seeking a preliminary injunction, the plaintiffs argued:

federal common law,[294] the plaintiffs instead marshaled a considerable array of sources that, for the most part, address the public trust doctrine at the state level.[295] And while the plaintiffs professed that their claim did not ask the court to make policy, one is hard-pressed to read their complaint and pleadings without concluding otherwise. The court recognized as much in dismissing the case, observing that the lawsuit would require determinations better suited to federal agencies and that "if Plaintiffs allege a public trust claim that could be construed as sounding in federal common law, the Court finds that the cause of action is displaced by the Clean Air Act."[296]

> Under the Public Trust Doctrine, our federal government has an unalienable duty to protect essential natural resources as a public trust. An atmospheric emergency threatens these natural resources. Because of the urgent need for action, and consistent with its obligation under the Public Trust Doctrine, our federal government must protect our Country's natural resources by developing a Climate Recovery Plan setting forth the means to implement the necessary emissions reductions by *January 1, 2013*.

Plaintiffs' Notice of Motion and Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support Thereof at 1, Alec L. v. Jackson, 2012 WL 1951969 (D.D.C. 2012) (No. 11-CV-02235).

294. Indeed, as the United States notes, plaintiffs only invoked the court's jurisdiction under 28 U.S.C. § 1331, Complaint for Declaratory and Injunctive Relief para. 21, Alec L. v. Jackson, 2012 WL 1951969 (D.D.C. May 31, 2012) (No. 11-CV-002235), and failed to pair federal question jurisdiction with a waiver of sovereign immunity under the APA. Memorandum in Support of Defendants' Motion to Dismiss at 11, Alec L. v. Jackson, 2012 WL 1951969 (D.D.C. May 31, 2012) (No. 11-CV-02235). But the United States perhaps inappropriately argued that this is an appropriate 12(b)(1) motion aimed at lack of subject matter jurisdiction. *See* Sierra Club v. Jackson, 648 F.3d 848 (D.C. Cir. 2011) (noting that an appropriate argument is failure to state a claim under 12(b)(6) rather than lack of subject matter jurisdiction under 12(b)(1)). The atypical nature of the Complaint is illustrated by its early passage that it "seeks to investigate the effectiveness of federal authorities in planning and managing our nation's response to human-induced global energy imbalance." Complaint for Declaratory and Injunctive Relief, *supra*, para 16.

295. Plaintiffs' Notice of Motion and Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support Thereof, *supra* note 293, at 11–12 (citing Robert Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in* Glass v. Geockel, 40 U. MICH. J.L. REF. 861 (2007); Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849 (2001); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980); Wood, *supra* note 21). The plaintiffs relied upon three cases, *City of Alameda v. Todd Shipyards*, 635 F. Supp. 1447 (N.D. Cal. 1986); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981); and *In re Complaint of Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980).

296. Alec L. v. Jackson, 2012 WL 1951969, at *5.

B. Claims Against Non-Governmental Entities

The suggestion that federal courts are institutionally and constitutionally capable of developing federal common law torts for interstate pollution presents an array of unresolved issues. My primary objective here is to identify these issues and prompt a critical dialogue about how the law in this area ought to evolve, not necessarily to suggest definitively any recommended resolution. But preliminarily, before academics encourage or courts adopt laudable *ends* in particular cases, considerably more attention must be paid to the jurisdictional and jurisprudential consequences of employing the federal judiciary as an acceptable *means*. Jurisdiction is perhaps the most natural initial inquiry. Unless plaintiffs can establish diversity jurisdiction,[297] they must rely upon federal question jurisdiction.[298] Should, however, a federal common law tort qualify for federal question jurisdiction? This seems problematic. To date, the issue has been averted in most of the cases, because jurisdiction otherwise existed.[299] The interstate pollution cases, as noted in Part III, focused on the character of the parties, rather than the claims.[300] Indeed, in today's parlance, unless an alleged claim involves a matter equivalent to a constitutional tort (or right) or implicates a constitutional penumbra, during the antebellum period it generally would have been insufficient to confer on a federal court

297. 28 U.S.C. § 1332 (2006).

298. *Id*. § 1331.

299. A vital difference exists between (a) a court's decision to create a common law claim and employ that as a basis for asserting jurisdiction; and (b) Congress' decision conferring jurisdiction on the federal courts and an explicit or implied authority to employ common law principles. The majority of modern purportedly federal common law claims involve the latter, not the former. *See, e.g.*, Howard v. Lyons, 360 U.S. 593, 597 (1959); Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 531 (1959) (federal common law immunity to protect a federal policy as expressed by congress); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) (a federal question, because the statute granted federal court jurisdiction, and federal corporation brought suit under the statute). One area specifically assigned to the federal judiciary is admiralty jurisdiction. *See* David Currie, *Federalism and Admiralty: "The Devil's Own Mess*," 1960 SUP. CT. REV. 158 (1960). And while the *Radcliff* Court referenced admiralty as a federal common law area, 451 U.S. at 642, that is perhaps misleading because the Constitution assigns the area exclusively to the federal judiciary; therefore, by default the federal judiciary must employ principles that the federal judiciary itself creates, unless otherwise directed by Congress. *See* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920); *cf.* Amar, *supra* note 228, at 1525 (noting the differences between admiralty and common law); Redish, *supra* note 266, at 795 ("It is interesting to note, however, the many examples of existing 'federal common law' doctrine" cases are not true common law cases).

300. *See supra* note 234 and accompanying text.

federal question jurisdiction.[301] And Justice Douglas' lone abbreviated analysis in *Illinois v. City of Milwaukee* simply declared that jurisdiction exists without any real support or meaningful inquiry into its consequences.[302]

Several practical problems surface if one allows a federal common law claim to serve as the basis for jurisdiction, and the Supremacy Clause possibly preempts any otherwise inconsistent state law claims. To begin with, such claims are likely to provoke both a 12(b)(1) and 12(b)(6) motion to dismiss.[303] A court will be forced to decide, in advance of discovery, whether abstractly the complaint presents sufficient facts warranting the development of an inchoate federal common law tort. The court might search for uniform principles permeating modern tort (nuisance) law, as embodied in the Restatement, much like Justice Story believed in a uniform general commercial law.[304] Or, the court might focus exclusively on the Court's interstate pollution cases, but those cases reflected the Court's struggle with its original jurisdiction and exercise of its constitutionally assigned "equity" power to resolve disputes assigned to the Court.[305] And, if those cases are expanded and applied to private disputes, is that sufficient continuity with the past, or is an abrupt departure and expansion appropriate? And, if instead, the court delays deciding until after discovery and on a motion for summary judgment, is that fair to either party and how will they know what facts to adduce that might sway the court either way?

Coupled with these pragmatic concerns are important jurisprudential considerations. Federalism, for instance, oddly enough

---

301. Jay indicates that "[i]t was well established that an issue of general common law presented no federal question for purposes of the Supreme Court's jurisdiction," at least until the later part of the 1800s. Jay, *supra* note 74, at 1274 n.220, 1282. But Jay overlooks that the opinions in the late 1800s were not premised on a general common law, but rather on a constitutional right to engage in interstate commerce, a federal question that undoubtedly arises under the Constitution. *See* Kalen, *supra* note 163, at 456. Field suggests that federal question jurisdiction may exist, but she barely mentions the issue and overlooks that the cases involving a constitutional issue are necessarily federal questions, quite a different issue than a true federal common law claim. Field, *supra* note 11, at 898–99.

302. *See supra* notes 253–56 and accompany discussion.

303. Fed. R. Civ. P. 12(b)(1), 12(b)(6).

304. *See supra* notes 113–24 and accompanying text. Nelson suggests that courts do precisely that, by canvassing a "multitude of jurisdictions" to distill general or almost uniform rules. Nelson, *supra* note 269, at 505. But his analysis generally explores areas where either the Constitution or Congress requires federal court adjudication without sufficient guidance.

305. *See supra* notes 227–28 and accompanying text.

not only serves as the most commonly expressed justification for a federal common law, it surfaces equally as a dominant rationale for limiting the doctrine. The republic's early advocates for a federal common law for crimes emphasized the national (or Federal) interest in protecting the new Federal government; states in the new federal system could not be trusted to protect the national rather than local interest.[306] This fear of local interests trumping national interests surfaced in *Swift*, it infected the Court's treatment of the Commerce Clause throughout the nineteenth century, and today it arguably influences preemption analyses.

But federalism conversely suggests caution before expanding the federal common law.[307] *Erie* itself "plainly rests on federalism" and preserving the prerogatives of the states rather than on any other consideration.[308] George Brown warns that an expansion of federal common law could vastly transform "the allocation of lawmaking roles between state and nation," by having federal common law operate under the supremacy clause as binding on states.[309] That is true, but only to a point. It is unlikely that federal common law will ever become too pervasive.

Separation of powers is yet another salient consideration when federal courts are asked to *craft* rules defining the rights and obligations of parties, rather than to apply *ex ante* rules. With that said, any "general theory of separation of powers," in the words of Professor Jack Beermann, "has proven elusive."[310] The doctrine embodies the

306. *See supra* notes 100–05 and accompanying text.

307. *See* Redish, *supra* note 266, at 792.

308. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 893 (1991); *see also* Clark, *supra* note 260, at 1259, 1273 (noting that judicial federalism operates stronger than congressional federalism due to the absence of political safeguards for the federal judiciary).

309. George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New)* Erie *Problem?*, 12 PACE L. REV. 229, 235 (1992). Clark responds to Brown by noting that certain areas of the federal common law are necessarily federal rules derived from our constitutional structure, and as such do not raise federalism concerns. Clark, *supra* note 260, at 1253.

310. Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 472 (2011). Others question how a separation of powers analysis has any force if the doctrine failed to inhibit the development of state common law. *See* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 279 (1992). Kramer suggests "we must formulate our own solution to the problem of federal common law and separation of powers," and decide whether it will improve the quality of government—he suggests if it can be tied to a federal statute. *Id*. at 285–86.

structural and procedural safeguards in the Constitution, assigning certain functions to particular branches and creating a system of checks and balances. "When the Constitution assigns a function to a particular branch of government, only that official may perform that function."[311] Although recognizing that what constitutes "legislative power" is ambiguous, Thomas Merrill argues that federal courts lack the "power to 'make law' in a discretionary fashion."[312] He acknowledges that the framers of the Constitution provided little gloss on whether the judicial power included the power to decide cases under the common law.[313] This, after all, is reflected by the early debate over a federal common law of crime.[314] But the various constitutional provisions aggregated, coupled with the strong language in *Marbury v. Madison*[315] that ours is a government based upon written law, all suggest to Merrill that federal courts lack law-making power.[316] He bolsters this analysis by observing that many of the early colonies specifically delegated to the state courts the power to employ the common law, and similarly federal statutes delegated to the federal courts the authority to decide and—by implication—create rules of decision for maritime and admiralty matters.[317] Yet, Professor Louis Weinberg counters that at least two of the three spheres are co-extensive, such that the judiciary possesses the scope of authority vested in the legislative branch—at least until the legislative branch affirmatively acts.[318] Professor Martha Field shares an equally expansive view, at least as long as the judiciary is left with sufficient discretion and can rely upon some authorization for its exercise of that discretion.[319] This dialogue unfortunately conflates *law*

311. Beermann, *supra* note 310, at 510.

312. Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 335 (1992).

313. *Id.* at 336.

314. *See supra* notes 100–05 and accompanying text.

315. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

316. Merrill, *supra* note 312, at 338–39.

317. *Id*. at 346–48.

318. *See* Weinberg, *Federal Common Law*, *supra* note 11; Weinberg, *Rules of Decision Act*, *supra* note 11; *cf*. Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974) (disagreeing "that any time Congress could validly displace state law, the federal courts are constitutionally equally empowered to do so"). The Court rejects this co-extensive theory. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) ("[T]he Court remains mindful that it does not have creative power akin to that vested in Congress").

319. Field, *supra* note 11, at 887, 911–12. Field's canvass of then existing scholarship suggested "little analysis of the boundaries of courts' power to make federal common law. Commentators typically simply list areas in which federal common law is acceptable without

with *legislation* and overlooks that judges simply cannot "legislate."[320]

Also, any meaningful separation-of-powers analysis is influenced by what political theory one endorses. After all, attempting to apply any mechanistic legal theory about whether judges "legislate" or "find" the law harkens back to a bygone era. At the state level, where separation of powers issues surface as well, judges unquestioningly have made—that is judicially pronounced—law for over two centuries. Whether today, in our age of statutes,[321] federal judges may announce legal norms necessitates exploring how one perceives the respective capacity of the legislative or judicial branches to develop rules governing the rights and obligations of parties.[322] Public choice theory, for instance, portrays the

---

providing any animating principle to unify the categories." *Id.* at 886. Although Clark uses judicial federalism to explain *Erie*, he adds that when federal courts overstep their bounds they violate the Constitution's separation of powers structure. Clark, *supra* note 260, at 1262.

320. Judges undoubtedly can render first order, legally effective and even binding statements, which constitute law. *See* George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 977 (1981) (discussing positivist legal theory). But that is quite different than legislation. Brian Simpson aptly writes:

> The notion that the common law consists of rules which are the product of a series of acts of legislation (most untraceable) by judges (most of whose names are forgotten) cannot be made to work, if taken seriously, because common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception. Of course it is true that judges are voluntary agents, and the way in which they decide cases and the views they express in their opinions are what they choose to decide and express. Their actions create precedents, but creating a precedent is not the same thing as laying down the law. The opinions they express possess in varying and uncertain degree authority, as do opinions expressed by learned writers: that is not to say the quality of being viewed as a good reason for saying that what they assert is correct. But to express an authoritative opinion is not the same thing as to legislate, and there exists no context in which a judicial statement to the effect that this or that is law confers the status of law on the words uttered. It is merely misleading to speak of judicial legislation.

Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 14 (William Twining ed., 1986). In his lucid account of the role of judges, Justice Cardozo arguably conflates the ability to "make law" with "legislation," but he does so in part to draw analogies regarding the establishment of rules. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98–141 (1949).

321. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

322. Professors Farber and Frickey pioneered this type of exploration in their scholarship. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Farber & Frickey, *supra* note 308, at 893; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 874–75 (1987); *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276–77 (1988). *But cf.* Abner J. Mikva, *Foreword to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 169

legislative process as a rent-seeking forum with a myriad of self-interested, greedy, rent-seekers that often produces either incoherent or corrupt decisions. If so, the judiciary with distinctly opposing rent seekers battling for a particular decision might produce a more coherent or at least less corrupt decision. Similarly, those (if any are left) who ascribe to modern *civic republicanism* might favor an expanded judicial function, with judges capable of discerning normative societal values.[323] But civic republicans conversely might favor a limited judicial role. They could perceive the legislative process as a legitimate and deliberate forum for producing winners and losers, with the winners somehow reflecting shared societal values. Others suggest that legislative choices, including arguably even inaction, reflect a society's moral fabric.[324] The judiciary, then, must be cautious and circumscribed when deciding when to intercede and somehow stretch that fabric in a slightly new direction. Each of these considerations is prominently on display in dialogues involving constitutional principles, but they are absent from the present conversation about expanding the federal common law.

And this dialogue ought to address whether the public at large will consider an expanded federal common law as being *legitimate*.[325] Legitimacy encompasses many facets. Two of which are continuity with

(1988) (questioning whether public choice theory relies on over generalizations). Jim Rossi too has pioneered the accuracy of public choice theory in the energy area. *See* Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 397–401, 404–28 (2009); *see also* Mathew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 139 (2008) (arguing for civic republicanism over public choice theory at the local level).

323. *See* Redish, *supra* note 266, at 777, 783. Richard Stewart's classic article notes law might embody common social values. Richard B. Stewart, *The Reformation of American Administrative La*w, 88 HARV. L. REV. 1667, 1670–71 (1975); *see also* Hope M. Babcock, *Civic Republicanism Provides Theoretical Support for Making Individuals More Environmentally Responsible*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 515, 519–20 (2009) ("Civic republicans see the practice of politics as a 'process in which private-regarding 'men' become public-regarding citizens and thus members of a people.' [It is about] the capacity of citizens to share in the act of governing, which requires citizens who can 'transcend[] narrow self-interest' and think and act with a view toward the common good of their larger community."). *See generally* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993) (surveying modern civic republicanism and illustrating its problems); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

324. *See generally* Farber & Frickey, *supra* note 308.

325. *See* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 132 (1985) (discussing aspects of legitimacy).

the past and competence to decide when to depart from that past. The common law of today holds no mystical value, and merely repeating the past because it somehow reflects a "higher law" is untenable.[326] So too, it is a mistake to repeat past refrains without an appreciation for the process and surrounding "baggage" of that past.[327] Stewart Jay aptly observes, "[e]very judicial opinion is itself a political act, an exercise of power. A process of justification is involved, and the use of the past is always directed toward the resolution of a current controversy."[328] But the past as a justification for resolving a seemingly different present controversy requires not only deciding whether past precedent creates expectations for parties in adjusting their behavior, but it also engenders a critical inquiry into the rationale underlying past decisions. Law, after all, in the words of Lon Fuller is "the enterprise of subjecting human conduct to the governance of rules."[329] For rules to garner legitimacy, they ostensibly should be clear, not fluctuate too quickly, be accessible to the public, and except in unusual instances be prospective.[330] Only through sufficient continuity with past precedent, then, can that occur with the common law.[331] And whether that is true today as litigants press the courts with federal common law public nuisance claims requires careful scrutiny and possibly a normative judgment.

---

326. *See supra* notes 74–75 and accompanying text.

327. *See* Jay, *supra* note 74, at 1302, 1305, 1323.

328. *Id.* at 1302.

329. LON L. FULLER, THE MORALITY OF LAW 106 (rev. ed. 1969).

330. *Id*. at 39, 46–90; *see also* Jeremy Waldron, *Why Law—Efficacy, Freedom or Fidelity?*, 13 LAW & PHIL. 259 (1994). And if law merely directs human behavior and must be obeyed because of that, then the law must afford sufficient notice to influence conduct. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 213–18 (1979).

331. Llewellyn, *supra* note 136, at 106.

> The absolutely new, either in law or in science, is the absolutely anarchic and inscrutable. Cases are new only as they deviate, in some respects but not all, from prior cases. In terms of law as official action, every case is new. Every judicial decision is the decision of an individual case, different from all others. But the rule of law which the judicial decision expresses is always general; it applies to a class of cases whose fact-categories are identical. Many different judicial decisions may express one and the same rule of law. . . . The law in discourse grows as new fact situations (existential) in individual cases require the judge to define new fact-classes (conceptual) and to assimilate these new fact-categories to old legal formulations in order to express the rule of his decision of the case at hand. A new proposition of law is new only in the sense that it has been discovered for the first time, but it must always be and have been the logical consequence of one or another legal doctrine.

Id.

Perceived or actual competence also plays a significant role in deciding whether a particular forum is institutionally capable of developing policy. Often, the political question doctrine mistakenly is conflated with competence, and unfortunately the doctrine emerged inappropriately in the GHG public nuisance litigation.[332] A group of law professors from around the country made this point in their amicus brief to the Supreme Court in *American Electric Power Co. v. Connecticut*.[333] The political question doctrine bars the judiciary from adjudicating certain disputes.[334] It can do so, in certain instances, when the Constitution assigns responsibility to another branch, when judicial interference might create conflicting directives with other branches, when the judiciary cannot "discover" manageable standards for resolving the dispute, when resolution requires initially some non-judicial policy determination, or when respect to some prior political

---

332. *See generally* Nathan Howe, *The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties*?, 40 ENVTL. L. REP. 11229 (2010) (questioning application of the doctrine); Philip Weinberg, *"Political Questions": An Invasive Species Infecting the Courts*, 19 DUKE ENVTL. L. & POL'Y F. 155 (2008) (same). *But see* Theodore J. Boutrous, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance*," 35 ECOLOGY L. CURRENTS 80 (2008) (arguing that political question doctrine is applicable in global warming cases). Others suggest that doctrines such as political question, along with standing, provide jurists with principled grounds for avoiding decisions in these cases. *E.g.*, Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201 (2011) (arguing that public litigation model ill-suited for complex tort-based cases).

333. Brief of Law Professors as Amici Curiae in Support of Respondents at 1, 4, 8–9, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174).

334. *E.g.*, Vieth v. Jubelirer, 541 U.S. 267, 277 (2004); Nixon v. United States, 506 U.S. 224, 228–29 (1993); Baker v. Carr, 369 U.S. 186, 210–11 (1962). *See generally* PHILIPPA STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION (1974); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1461–63 (2005); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Martin H. Redish, *Judicial Review and the "Political Question*," 79 NW. U. L. REV. 1031 (1985); Fritz W. Scharpf, *Judicial Review and the Political Question Doctrine: A Functional Analysis*, 75 YALE L.J. 517 (1966); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002). The doctrine's roots emanate from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (noting certain questions are political), and then more significantly from resolution of the Dorr Rebellion and the ability of the Court to apply the Guarantee Clause in the Constitution, in *Luther v. Borden*, 48 U.S. 1, 42 (1849). *See* MARVIN E. GETTLEMAN, THE DORR REBELLION, A STUDY IN AMERICAN RADICALISM: 1833–1849 (1973).

decision counsels against judicial interference.[335] These all might serve as legitimate considerations that a court can weigh when deciding whether to establish a federal liability scheme, but it would be a mistake to have these considerations obfuscated under the rubric of the political question doctrine. The idea of "discovering" manageable standards is anachronistic: Whether to create a liability regime cannot be answered by a circular inquiry into whether an *ex ante* standard exists. Whether, also, the Constitution assigns the issue to another coordinate political branch is the ultimate separation of powers question, not something capable of being decided abstractly. Perhaps the only meaningful political question inquiry is whether judicial intervention intrudes into the political process, by interfering with another branches' decision or the need for another branch to render an initial policy decision. But that issue effectively is whether the issue has been displaced by another coordinate branch.[336] And that is how the Court decided *American Electric Power Co. v. Connecticut*.[337]

The critical challenge for proponents of an expanded federal common law might be the perceived competence of having the judiciary develop doctrinal rules governing the rights and obligations of parties in a complex area such as greenhouse gas emissions. After all, the judicial process operates within an adversarial structure, where the goal is neither "truth" nor "objective fact."[338] A while ago, in the well-known case of *Boomer v. Atlantic Cement Co.*,[339] Judge Bergan commented that

> A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is

335. *Baker*, 369 U.S. at 217.

336. This approach suggests that courts can consider such disputes until the issues become displaced. *See* Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563, 1576 (2007).

337. *See supra* note 33 and accompanying text. A number of law professors argued to the contrary in their amicus brief to the Court. Brief of Law Professors as Amici Curiae In Support of Respondents, *supra* note 333. In reaching its judgment, the Court declined to address whether this displacement theory suggested that state common law claims might be preempted. For an excellent analysis of the issue in the context of the Clean Water Act, see Glicksman, *supra* note 325.

338. *See* Sidney Ulmer, *Scientific Method and the Judicial Process*, AM. BEHAV. SCIENTIST, Dec. 1963, at 21, 22.

339. Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y.1970).

> decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.[340]

The GHG public nuisance litigation illustrates his point. To the extent that plaintiffs in such cases seek some form of injunctive relief,[341] the ability of the court to fashion legitimate relief is constrained by the adversarial process. The adversarial process shields the court from the complex modern regulatory state. The court is insulated from state public utility commissions and their desire to ensure that utilities have sufficient capacity and reserve capacity for their loads; it is shielded from the contracts for the delivery of fuel to the facilities, from the power purchase agreements, from the role of the Federal Energy Regulatory Commission, from the regional transmission organizations and how removing the capacity of some generation facilities might affect reliability of the transmission grid. In short, the court's ability to appreciate and respond to the multi-faceted, interconnected, highly regulated energy grid is circumscribed.

This is not to suggest that we should abandon an expanded federal common law. An enlarged federal common law might serve an important jurisprudential function, particularly when the type of harm being caused by a defendant's conduct is one that society generally recognizes is a tort, and it is a tort whose recognition and elements ought to be defined by the federal rather than state judiciary. But whether we are at that stage with GHG emissions, invasive species, or potentially other interstate environmental threats, requires more than simply promoting the legitimacy of the ends. It necessitates, in short, critically exploring the means. And that requires balancing the continuity with the past and the societal demand for change. That balance has yet to occur.

V. CONCLUSION

Strikingly, the evolution of American law displays the inherent

340. *Id.* at 871.

341. If plaintiffs seek damages, that presents the same problem in *Boomer*: Private litigation typically addresses individual harms, not the overall public good: And judicial relief often accepts compensated environmental damage—to the extent plaintiffs can even trace the particular conduct to specific individual harm.

difficulty of resorting to the past while ensuring enough flexibility to adapt to new circumstances. "It is," therefore, "the duty of the student of political habits and customs to trace the elements of continuity in those customs that appear to be new, and the elements of change beneath the appearance of their continuity."[342] The revolutionary period witnessed the tension between the need for change, while preserving aspects of a past, customary heritage that protected *ex ante* expectations and basic liberties. Just as during the clash between Blackstone and Bentham, with the latter denouncing the former "as an enemy of reform whose sophistry was so perverse as to be almost a crime,"[343] we today still confront historic moments that test whether to weave *change* into the fabric of our customary, unwritten law. "If," as J.G.A. Pocock wrote when discussing historical English legal thought, "the idea that law is custom implies anything, it is that law is in constant change and adaptation, altered to meet each new experience in the life of the people . . . ."[344] Yet law's amenability for change is hindered by the conservative nature of the legal tradition; it typically looks backward rather than ahead; it often becomes disassociated from present societal values; and it generally is molded by a society's legal elite.[345] But, as Sir Frederick Pollock championed so long ago, the common law is where modern experience can reflect modern values.[346]

The question, then, is whether we are at that point.

342. RODICK, *supra* note 2, at 132.

343. FREDERICK POLLOCK, AN INTRODUCTION TO THE HISTORY OF THE SCIENCE OF POLITICS 102 (Rev'd & Repub. ed. 1960) (1890).

344. J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF THE HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 36 (1957).

345. ALAN WATSON, THE EVOLUTION OF LAW 116–19 (1985).

346. *See* COSGROVE, *supra* note 125, at 151.