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

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Erie is by no means simply a case.

—John Hart Ely[1]

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

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

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

2 304 U.S. 64 (1938).

3 *Id.* at 78.

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

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

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

making has been extensively circumvented by unfettered executive lawmaking[7] and expansive theories of federal common law.[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 *See, e.g.*, PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *State Governments Viewed Favorably as Federal Rating Hits New Low* (April 15, 2013), http://www.people-press.org/2013/04/15/state-govermnents-viewed-favorably-as-federal-rating-hits-new-low/ ("Even as public views of the federal government in Washington have fallen to another new low, the public continues to see their state and local governments in a favorable light. . . . 57% express a favorable view of

rogatives in the absence of a federal legislative consensus takes on renewed importance.

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

I believe they can. My defense of *Erie* proceeds in four parts. Part I offers a refresher on the *Erie* decision and its rationale, as well as on the case that *Erie* overruled—Justice Joseph Story's landmark decision in *Swift v. Tyson*.[19] Part II considers *Erie*'s statutory and pragmatic arguments, rehabilitating *Erie*'s interpretation of the Rules of Decision Act[20] without insisting that Justice Story got that statute wrong at the time *Swift* was decided. Part III turns to the main event—*Erie*'s constitutional rationale. That rationale, I submit, correctly wove together notions of federalism and separation of powers by insisting that Congress, not the federal courts, must act in order to displace state law. Finally, Part IV situates *Erie* within the broader context of contemporary federalism doctrine. *Erie* is far from an anachronism, as some critics have suggested; rather, I argue that, federalism-wise, we are living in the Age of *Erie*.

I. THE *ERIE* AND *SWIFT* DECISIONS

On a "dark night" in Pennsylvania, an Erie Railroad Company freight train struck Harry Tompkins, a twenty-seven-year-old factory worker who

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

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

19 41 U.S. (16 Pet.) 1 (1842).

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

was walking on a footpath alongside the train tracks.[21] The impact severed Tompkins's arm, and when he had recovered he filed a personal injury suit against the railroad. Because Tompkins was a citizen of Pennsylvania and the railroad was incorporated in New York, he had access to federal court on account of diversity of citizenship. Edward Purcell has explained that Tompkins's choice of federal rather than state court was in order "to avoid what appeared to be a settled and highly unfavorable rule of Pennsylvania common law," which held that Tompkins was a trespasser on the railroad's right-of-way and, as a result, the railroad owed him no duty of care.[22] Similarly, Tompkins filed in the United States District Court for the Southern District of New York—rather than in a federal district court sitting in Pennsylvania—in order to take advantage of the Second Circuit Court of Appeals' tendency to readily apply general common law rather than state law in diversity cases.[23] Tompkins was, in a word, forum-shopping.

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

Justice Louis Brandeis's majority opinion opened by framing the "question for decision" as "whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[28] *Erie* thus cannot be understood apart from *Swift*, decided by Justice Story in 1842.[29] That case arose out of a complicated series of credit transactions involving a shady land speculation

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

22 PURCELL, *supra* note 9, at 96.

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

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

25 *Id.*

26 *See id.*

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

28 *Id.* at 69.

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

in Maine and some businessmen in New York City.[30] Basically, Norton owed Swift some money on a previous debt. Norton paid Swift by signing over to him a bill of exchange that Norton had received from Tyson in payment for some land.[31] When Swift tried to collect the bill from Tyson, Tyson refused to pay on the ground that Norton defrauded him; it turned out that Norton didn't really own the land he had purported to sell to Tyson. The substantive issue in the case boiled down to whether there was any consideration when Norton gave Swift the bill. If there were, then Swift would be a *bona fide* holder and therefore not subject to any fraud defense that Tyson might raise.[32]

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

Justice Story denied that the Rule of Decision Act applied "to questions of a more general nature . . . as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions

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30 Tony Freyer has attempted to untangle the transactions in some detail in his extremely helpful book, *see* TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 4–6 (1981). Herbert Hovenkamp has similarly undertaken to explain the significance of bills of exchange in antebellum commercial law, *see* Hovenkamp, *supra* note 12, at 216–23. One of the unpleasant realities confronting constitutional scholars drawn to the subject of Federal Jurisdiction is that the merits of a disconcerting proportion of the critical cases turn on dizzying questions of commercial law.

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

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

33 *Id.* at 16–18.

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

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

of general commercial law."[36] On these more general questions, the federal court's obligation was "to ascertain, upon general reasoning and legal analogie, . . . the just rule furnished by the principles of commercial law."[37] Although "the decisions of the local tribunals upon such subjects are entitled to . . . the most deliberate attention and respect of this court," the federal courts were not bound to follow them.[38] Having determined that the federal court was free "to express [its] own opinion of the true result of the commercial law," Justice Story had "no hesitation in saying, that a pre-existing debt does constitute a valuable consideration" so that Tyson could not assert Norton's fraud as a ground for not paying Swift.[39]

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

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

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36 *Id.* at 18–19.

37 *Id.* at 19.

38 *Id.*

39 *Id.*

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

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

42 *Erie*, 304 U.S. at 72.

43 *Id.* at 74.

44 *Id.* at 77–78, 80.

II. THE STATUTORY AND PRAGMATIC ARGUMENTS

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

A. *The Rules of Decision Act*

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

1. The Text of Section 34

Section 34 of the 1789 Judiciary Act provided:

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

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

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

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

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

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

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

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

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

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

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

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

51 *Id.*

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

53 *See id.* at 86–88.

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

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

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

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

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

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

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

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

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

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

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

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in certain instances, those instances are driven by a specific interpretation of underlying federal constitutional or statutory norms. *See, e.g.*, Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398 (1964) (inferring federal common lawmaking powers in foreign affairs cases from particularly strong federal interests and separation of powers principles unique to that context); Young, *Federal Common Law*, *supra* note 8, at 1674–78 (questioning inferences of lawmaking power from mere "interests" but pointing out that those interests are limited to particular contexts). These instances, to the extent that they are legitimate at all, are exceptions to the Rules of Decision Act's mandate.

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

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

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

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

62 *Id.*

63 *See, e.g.*, RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 107 (1977) ("[T]here has been much misunderstanding generated by commentators who have

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

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

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suggested that *Swift* provided for binding weight to be given by federal courts only to state cases construing state statutes. This, of course, was not true. . . ."); Nelson, *Erie*, *supra* note 6, at 925–26 (noting that, in *Swift*, "Justice Story took for granted that not only 'the positive statutes of the state' but also 'local customs having the force of laws' supplied rules of decision for federal courts").

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

65 *Id.* at 955–56.

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

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

68 *Id.* at 167.

69 *Id.* (emphasis added).

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

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

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

2. General and Local Law in the Nineteenth Century

The "general law" applied in *Swift* raises conceptual difficulties for contemporary lawyers on two distinct grounds. First, it was often thought to be *customary* law, which differs not only from statute law but also from common law as modern lawyers conceive it.[73] Second, it was neither state nor federal in nature, and thus it raises conceptual difficulties for contemporary lawyers accustomed to thinking that those are the only two choices.[74] Both these qualities eroded by the end of the nineteenth century, and that erosion set the stage for *Erie*. But so long as they each held true, it is pos-

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included both its *written* laws (such as the state constitution and statutes enacted by the state legislature) and at least a portion of its *unwritten* law (such as rules grounded in peculiar local customs and rules about the status of land and other things with a fixed locality in the state)").

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

72 *Swift*, 41 U.S. (16 Pet.) at 19.

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

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

sible to say that *Swift* was entirely consistent with the Rules of Decision Act—and with the Constitution as well.[75]

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

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

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

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

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

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

79 FREYER, *supra* note 30, at 23–25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

90 *See, e.g.*, William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521–25 (1984); FREYER, *supra* note 30, at 137–43; HART & WECHSLER, *supra* note 66, at 554–56, 655; Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1292-93 (2007) [hereinafter Clark, *Erie*'s *Source*]; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832–33 (1989); *see also* Sosa v. Alvarez–Machain, 542 U.S. 692, 740 (2004) (Scalia, J., concurring in part and in the judgment) ("General common law was not federal law under the Supremacy Clause."). Chief Justice Roberts and Justice Thomas joined Justice Scalia's opinion, and although the majority opinion did not address this point directly, it did not appear to disagree.

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

92 33 U.S. (8 Pet.) 591, 658 (1834).

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

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

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

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93 *Id.*

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

95 41 U. S. (16 Pet.) 1, 19 (1842).

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

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

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

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

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

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

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

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

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

103 *Id.*

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

105 Herbert Hovenkamp has suggested a more mandatory view of *Swift*. He argues that

> [t]he theory that Justice Story developed . . . contained an implicit constitutional limitation on the state's power to impose its law on a transaction that exceeded the geographic boundaries of the state. Such a limit was essential to the creation of a unified American economy out of balkanized and self-interested sovereigns.

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

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

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

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

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

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

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

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

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

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

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

111 *Id.*

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

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

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

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

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

114 *Id.* at 99.

115 *See id.* at 129.

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

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

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

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

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

> [T]he question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the "common law." There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country.[120]

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

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

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

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

119 Lessig, *supra* note 78, at 1792.

120 149 U.S. at 378.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In any event, Professor Ritz's claims about eighteenth century usage—even if true—do not support the inferences he draws from them. Ritz says that in the Judiciary Act, "'several' is used to refer to a fungible group, or

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

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

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

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

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

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

The common law that the several states received and adopted by positive acts or judicial decisions was avowedly English, and although it became American upon reception it did so as the law of each particular state.[144] The noncommercial common law varied considerably from state to state, which suggests there was no unified body of "American" common law principles available for federal courts to apply under Section 34.[145] Moreover, as Stewart Jay has recounted, the delegates at Philadelphia debated whether to include in the Constitution a general reception similar to those adopted by the states, but decided not to do so.[146] When the federal courts—and state courts, too—*did* apply legal principles not tied to the law of particular states, that general law was not distinctively American at all.[147]

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141 RITZ, *supra* note 124, at 87.

142 *Id.* at 148.

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

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

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

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

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

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

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

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

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

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

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

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

152 *See* sources cited in *supra* note 90.

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

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

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

In view of all this, it is frankly surprising how many scholars seem to rely on Professor Ritz without considering the obvious weaknesses of his position.[156] Once we set aside the revisionist Ritz/Sherry view, I suggest that the most plausible reading of the Rules of Decision Act is that it requires federal courts to follow state law, including state choice-of-law rules that mandate application of general law, as in *Swift*, but also state rules mandating a departure from general law in favor of local policy, as in *Erie*.[157] This argument will not persuade those who, like my friend Louise Weinberg, believe that "the [Rules of Decision] Act comes down to us as a relic of a prepositivist, prerealist time, with scant relevance for us today."[158]

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

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

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

156 *See, e.g.*, Borchers, *supra* note 129, at 98 n.142, 105–06 (praising Ritz's "brilliant new book" and repeating his conclusions about the meaning of "several" without any critical probing of the underlying evidence or reasoning); *see also* sources cited in note 129, *supra*. None of these scholars appears to have taken even a peek under the hood of Professor Ritz's argument. Would they agree, for instance, with Ritz's contention that Section 34's reference to "trials at common law" means only "that part of a judicial proceeding that was held in open court and when witnesses were examined and their testimony taken"? RITZ, *supra* note 124, at 143. How exactly would that work? Would federal courts apply a *different* law at summary judgment or on appeal? At the end of the day, Ritz's close textual analysis simply unravels the statute into an unworkable mess. But those scholars who have adopted part of his reasoning need to provide some rationale for why they leave other implications aside. Otherwise, it is in for a penny, in for a pound.

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

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

But unless we are to engage in some sort of neo-Calabresian "sunsetting" of obsolescent statutes,[159] we must find a way to make sense of the Act.

B. *Uniformity and Discrimination*

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

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

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

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

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

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

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

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

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

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

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

> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the

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

The first alternative emphasizes the importance of uniform choice of law rules that, in principle, would guarantee that the same law would govern a case regardless of which state it was brought in. The editors of the *Hart & Wechsler* casebook, for example, laid blame for the horizontal disuniformity problem not at *Erie*'s door, but rather at the door of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[168] which the Court decided three years later.[169] *Klaxon* held that a federal court sitting in diversity must apply the choice of law rules of the state in which it sits.[170] The argument is that *Klaxon* facilitates horizontal forum-shopping because litigants can get different choice of law rules by suing in federal courts sitting in different states, and those different choice of law rules will presumably yield different *substantive* law.[171] The critics contend that, if federal courts applied a uniform set of federal choice of law principles, then any federal court would end up applying the same state's substantive law to a dispute, regardless of the federal court's location.[172] The disuniformities resulting from *Klaxon*, moreover, are often not party-neutral: as Michael Greve has explained, "*Erie* guaranteed plaintiffs their choice of *a* state law, to the exclusion of federal general common law. *Klaxon* effectively guaranteed them the state law of their chosen forum" and thus "reinforces *Erie*'s proplaintiff orientation."[173]

> Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.

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

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

168 313 U.S. 487 (1941).

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

170 313 U.S. at 496–97.

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

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

173 GREVE, *supra* note 4, at 233. There is, as Professor Greve points out, another important piece of the puzzle—that is, expansive rules of personal jurisdiction that allow plaintiffs to choose among a wide variety of states in which to bring suit against defendants operating in interstate commerce. *See,*

An important premise of the anti-*Klaxon* argument is that, although federal courts generally lack constitutional power to make substantive law, they do *not* lack such power to formulate federal choice of law rules.[174] That seems right. If there is any constitutionally acceptable scope for federal common law, it would include the unavoidable task of reconciling the claims of different jurisdictions' substantive law within a federal system.[175] And there may be certain benefits to allowing the federal courts to do so.[176] But there is no guarantee that federal choice of law rules would solve the horizontal disuniformity problem. Much would depend on the content of the choice of law rules that the federal courts adopted. Under current doctrine, the Constitution would have relatively little to say about what precise sorts of conflicts rules the federal courts could adopt.[177] But if the federal courts followed the general tendency of the state jurisprudence, as they often do, then it is likely that they would adopt some form of interest analysis. And under interest analysis, courts are more likely than not to apply forum law.[178]

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e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that the Due Process Clause requires only that a defendant have "minimum contacts" with a particular jurisdiction). Greve argues that "[t]he rules of *Klaxon* and *International Shoe*, operating in tandem, expose parties in interstate commerce to suit virtually anywhere, in a forum and under a state law of the plaintiff's choosing." GREVE, *supra* note 4, at 234. Of course, Greve's point also raises the possibility that the deleterious impact on interstate business that he laments could be redressed by rethinking *International Shoe* rather than *Erie* or *Klaxon*.

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

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

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

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

178 There are three primary options in contemporary choice of law: interest analysis, the Restatement (Second) approach, and a more old-fashioned reliance on territorial rules. *See* Laycock, *supra* note 175, at 252–59. Interest analysis seeks to balance the claims of each potentially-interested state in applying its own law to the dispute in question. In practice, however, this approach heavily favors allowing the forum to apply its own law. *See, e.g.*, John B. Corr, *The Frailty of Interest Analysis*, 11

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

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

This fact does tend to mitigate the vertical disuniformity that the *Klaxon* Court feared from applying different choice of law rules in federal and

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GEO. MASON L. REV. 299, 301 (2002) (noting that, despite scholarly criticism, "the strong bias in favor of forum law remains a fact of life in courts applying the various forms of interest analysis"); Aaron D. Twerski, Neumeier v. Kuehner*: Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 121 (1973) (concluding that interest analysis generally results in the application of forum law). The Restatement has been criticized for attempting to be all things to all people, and it tried to pair a general incorporation of interest analysis with more specific territory-based presumptions for particular kinds of cases. *See* Laycock, *supra* note 175, at 253. Much of the time, analysis under the Restatement collapses back into interest analysis. *See* Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 362 (1997) (noting that, "in reading opinions purporting to follow the second Restatement, one cannot help but be struck by how often the courts shift into undiluted interest analysis"); *see generally* Corr, *supra*, at 299 ("[I]n the area of conflict of laws, interest analysis is now the predominant approach."). Hence, a new federal choice of law regime would lack a strong preference for forum law only if it followed the minority of states that have clung to a territory-based regime.

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

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

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

One can see what this might look like by turning to maritime law, where the Supreme Court confronted an issue similar to *Erie*'s two decades earlier and came out the opposite way. It is settled that "early Americans understood admiralty and maritime law to be of the same genus of 'general

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

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

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

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

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

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

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

Although *Jensen*'s solution may seem attractive to *Erie*'s critics, there are several reasons to treat it as a cautionary tale.[191] First, the *Jensen* rule has never been clean, and "courts have faced vexing questions in trying to define what matters are governed by uniform federal admiralty law and in

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

186 244 U.S. 205, 207 (1917).

187 *Id.* at 216.

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

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

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

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

what areas state law remains free to operate"[192]—a dilemma that David Currie aptly described as the "Devil's Own Mess."[193] Extending *Jensen*'s rule to the much broader class of cases implicated in *Erie* would exacerbate these problems beyond all measure; indeed, it is difficult even to define the class of cases that would have to be federalized. The category could not be confined to the commercial law cases contemplated by *Swift*, because the general law overflowed those banks by the end of the nineteenth century; similarly, it could not be limited to common law cases, because a truly federal general common law would trump state statutes as well.[194] Federal maritime law works, to the extent that it does, because the jurisdictional scope of maritime law is narrow and comparatively well-defined, the instances of conflict with state policy are relatively few, and the critical issues of admiralty law tend now to be governed by federal statutes.[195] None of those things are true in the broader world of *Erie* itself.

In any event, federalizing the law applied in diversity cases would cut the general common law loose from its historical moorings, which have always treated that law as non-federal in nature.[196] One may doubt, moreover, whether horizontal uniformity would be fully achieved even under such a draconian solution. After all, how uniform is federal law, really? We have thirteen circuits with open and notorious differences in the law that each applies, and it seems doubtful that the Supreme Court would expand its docket sufficiently to unify federal law on the vastly broader set of federal questions that *Jensen*-izing *Erie* would entail.[197] Moreover, one signifi-

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

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

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

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

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

197 *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1572 (2008) (concluding that "standardizing federal law is no longer possible as a practical matter"); John Harrison, *Federal Appellate Jurisdiction over Questions of State Law in State Courts*, 7 GREEN BAG 2D 353, 357 (2004) ("Fed-

cant unifying force in federal statutory interpretation—construction of those statutes by federal agencies—would not exist for this new class of federal questions. For all these reasons, I suspect that the horizontal uniformity envisioned by contemporary advocates of a general federal common law is largely a mirage.

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

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

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

> [t]he question [in this case] . . . is . . . one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State . . . .[202]

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eral law is notoriously non-uniform among the different circuits, and the Supreme Court is apparently sufficiently indifferent to this fact that it leaves many inter-circuit conflicts unresolved.").

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

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

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

201 169 U.S. 133 (1898).

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

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

If we take the common law under *Swift* to be state law, then the distinction between *Swift* and *Erie* lies in the degree of deference that federal courts owe to state courts on the proper construction of state law.[208] *Erie* rejected the notion that there is any category of cases in which federal courts may exercise independent judgment as to state law (although later cases restricted *Erie*'s mandate of deference to decisions of the state's highest court).[209] This notion turns out to lie at the heart of *Erie*'s *constitutional* argument, and I will thus return to it in Part III. The present section asks whether there is anything to be said for the no-deference rule from a pragmatic standpoint.

The problem is that, if the concession that *state* law is being applied is to mean anything, then the boundary between local and general law must itself be a question of state law—and a question, moreover, of the *local*

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

204 Hill, *supra* note 102, at 444.

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

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

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

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

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

kind. It might be possible—although doubtful—to interpret the statutory grant of diversity jurisdiction to imply a mandate to apply the general commercial law, much as the admiralty grant was long interpreted as a mandate to apply the general maritime law.[210] But if the law involved is really state law, then it is surely up to the state to determine its content and scope of application.

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

One can imagine situations in which federal courts could plausibly answer this question without deference to state courts. If, for example, the legislature adopted the general law by statute in certain areas, such as transactions involving commercial paper, then federal courts could conceivably make an independent judgment about the text of the statute. But even under *Swift*, the federal courts deferred to state constructions of state statutes,[214] and in any event, state legislatures generally do not legislate such rules so explicitly. The question then is, whether federal courts should defer to state courts in the murkier setting in which the issue actually arises.

I submit that they should, for reasons similar to those that undergird the federal rule mandating judicial deference to administrative agencies' constructions of the federal statutes they administer. In *Chevron U.S.A.*,

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

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

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

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

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

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

First, state courts have superior experience and expertise concerning state law, much as federal agencies have expertise with respect to the statutes they administer. To be sure, our federal system does not draw any essential link between the source of law and the court that interprets; in other words, state courts are presumptively appropriate fora for interpreting federal law,[219] and federal courts similarly may, and frequently do, interpret state law. But state courts surely have a comparative advantage in construing state law, based on the frequency with which it is litigated in state court.[220] This advantage may be particularly pronounced on the sort of state law questions I have been considering, which require a court to assess the overall shape of state law in an area and assess the degree to which the state as decided to go its own way and depart from the "general" jurisprudence.

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215 467 U.S. 837, 843–44 (1984).

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

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

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

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

220 *See, e.g.*, R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 499–500 (1941) (acknowledging the superior expertise and authority of the state courts to construe state law). This is likely to be true even on issues where a state had, by hypothesis, chosen to follow the drift of "general" jurisprudence. Chances are that the states will see more of those cases than the federal courts and therefore develop greater expertise.

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

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

Even if we could somehow *fiat* the states' adoption of a system of general law in these areas, the Supreme Court would lack the appellate jurisdiction (or the inclination) to unify conflicts among the state supreme courts and the federal circuits on these matters.[225] It seems likely we would be trading one patchwork for another. As *Swift*'s most prominent contemporary defender acknowledges, "[t]he fact remains that the *Swift* regime

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

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

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

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

225 *See* Fletcher, *supra* note 90, at 1561–62 (noting the Supreme Court's lack of appellate jurisdiction over state court decisions on matters of general law). The sharp decline in Supreme Court review of state court decisions on questions of *federal* law since Congress expanded the Court's *certiorari* discretion in 1988, *see* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335 (2002), suggests that the Court would probably not review many state court decisions on general law matters even if it had jurisdiction to do so.

proved unstable even in the nineteenth century and is unlikely to fare any better under modern circumstances."[226]

III. THE CONSTITUTIONAL ARGUMENT

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

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

A. *Erie and Positivism*

Much of Justice Brandeis's constitutional discussion in *Erie* suggests that the case turns on a basic disagreement, not just about the Constitution,

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226 GREVE, *supra* note 4, at 373.

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

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

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

but rather about the nature of law and judicial decision making. "The fallacy underlying the rule declared in *Swift v. Tyson*," he said,

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

This was wrong, Holmes had written, because

> law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[231]

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

Many subsequent courts and commentators accepted the description of *Swift* by Justices Holmes and Brandeis. Justice Frankfurter, for example,

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230 *Erie*, 304 U.S. at 77 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); *see also* FREYER, *supra* note 30, at 131–53 (documenting the influence of the positivist critique of *Swift* on Justice Brandeis's opinion in *Erie*). Justice Holmes was hardly the only positivist critic of *Swift*. *See, e.g.*, William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 908 (1988) ("In the late nineteenth century, the Field brothers, David and Stephen, launched devastating positivist attacks on *Swift*, and their self-evident criticism was vigorously reiterated by Professor [John Chipman] Gray, Justice Holmes, and others."); *see also id.* at 922–24 (outlining these attacks).

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

232 *Id.* at 535.

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

> *Erie*'s narrow positivism was grounded ultimately not in any distinctively Holmesian or realist jurisprudence, or any other general legal philosophy, but in Brandeis's practical understanding of the structural and operational requirements of American constitutional federalism in an age of burgeoning multistate activities.

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

portrayed the *Swift* regime as one in which "[l]aw was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law."[234] Similarly, William Casto has written that "[u]nder *Swift* . . . judges were considered the living oracles of a preexisting natural law."[235] This model "pictured common-law judges as oracles who discovered preexisting metaphysical legal principles and declared the principles' applicability in particular cases. Under this view, the metaphysical principles were the law, and judicial precedents were merely evidence of the law."[236]

When *Swift* is seen in this light, "*Erie* is often regarded as a victory of legal positivism over natural law."[237] As Professor Casto put it, "The general acceptance of positivism in this century virtually dictated the overruling of *Swift v. Tyson* and the creation of the *Erie* doctrine in 1938."[238] This positivist reading has become highly controversial in recent years, however. The debate has to do both with the logic of Justice Brandeis's argument and the accuracy of his portrayal of *Swift*.[239] With respect to the former, Craig Green points out that "[e]ven if Holmes's argument were true, *Swift*'s alleged 'fallacy' did not violate the Constitution. Positivism was popular in the early twentieth century and remains so today. Yet the Constitution re-

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

235 Casto, *supra* note 230, at 908.

236 *Id.* at 911.

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

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

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

quires no more adherence to trendy legal theory than to Spencer's sociology."[240]

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

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

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

It is not clear, however, that Joseph Story would have denied any of this. As Susan Bandes points out, "neither Justice Story nor subsequent Justices who expanded the reach of *Swift* experienced themselves as communing with a brooding omnipresence."[245] Two critical aspects of Story's analysis in *Swift* rendered that decision completely consistent with the positivist theory that law must be grounded in social facts. First, the general commercial law was customary in its origin.[246] Its rules were derived from

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

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

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

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

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

245 Bandes, *supra* note 237, at 855.

246 Or at least it was viewed that way. *See supra* note 78. My friend Emily Kadens has argued that, in the Middle Ages, the law merchant was not, in fact, customary—rather, it arose from contract and statute. *See* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012). But even if that finding were to call into question the actual nature of the law merchant in

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

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

Under *Swift*, federal and state courts decided a relatively narrow range of commercial cases under a shared body of "general" principles. For a variety of reasons, American courts were able to maintain a remarkable degree of uniformity in this area notwithstanding the lack of a single sovereign or court with authority to unify the law in cases of divergence.[250] In particular, commercial law was an area that affected primarily sophisticated merchants, for whom it was often more important that the rules be settled than that they be settled *right*.[251] Moreover, any state choosing to *depart* from general law principles in the commercial field would have placed it-

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nineteenth century America, the important point for present purposes is how courts and commentators perceived that law in thinking about the sources of law in diversity cases.

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

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

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

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

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

self at a potentially disastrous disadvantage in an increasingly competitive national market.[252]

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

This expansion of the general law seems to have been driven—or at least accompanied—by a shift in *Swift*'s underlying rationale.[259] Although *Swift* and other early decisions had emphasized the customary nature of the general commercial law and the importance of the parties' expectations in interstate commercial transactions, later decisions relied on a more expan-

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

253 FREYER, *supra* note 30, at 45.

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

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

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

257 68 U.S. 175, 206–07 (1863).

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

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

sive need for national uniformity.[260] This shift did not render the later decisions antipositivist; *Swift*'s late-century defenders relied on indubitably positivist sources—typically the Diversity Clause of Article III.[261] But the shift away from customary law to normative lawmaking put the question of legislative authority front and center.

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

Although there is fairly widespread agreement today that *Erie*'s positivism requires courts "to identify the sovereign source for every rule of decision,"[264] disagreement persists about the available options. Professors Bradley and Goldsmith maintain that "[b]ecause the appropriate 'sovereigns' under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law."[265] Similarly, Louise Weinberg has written that "[a]t the heart of [*Erie*] was the positivistic insight that American law must be either federal or state law. There could be no overarching or hybrid third option."[266] I have criticized this view at greater length elsewhere,[267] and a number of

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

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

262 FREYER, *supra* note 30, at 71.

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

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

265 *Id.*

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

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

recent commentators have noted the role that "general" law continues to play in our legal system.[268] Nothing in *Erie* or in legal positivism generally would preclude state or federal courts from continuing to follow the general law in diversity cases, so long as state law mandated that choice as it did under *Swift*.[269] The reason that federal courts generally may *not* apply the general law presently is simply that states generally do not make that choice.

B. *Erie and Federalism*

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

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

1. Legislative Power and Dual Federalism

Misinterpretation of *Erie*'s constitutional rationale stems from two statements: one at the beginning and one at the end of Justice Brandeis's constitutional discussion. Brandeis opened with the canonical statement of *Erie*'s holding: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."[270] He then made a somewhat confusing reference to *Congress*'s power, despite the fact that no federal statute purported to govern the merits of the case: "Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[271] Brandeis compounded the confusion when he added, at the end of the section, "that in applying the doctrine [of *Swift*]

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

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

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

271 *Id.*

this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."[272]

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

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

If this were the rationale, then *Erie*'s critics would be right to criticize it. As Professor Sherry notes, "[i]t is doubtful that *Erie*'s federalism limitation on congressional power was correct when it was decided, and doctrinal developments have made it even less valid."[278] As the critics read it, *Erie* is a relic of "dual federalism"—the regime of federalism doctrine that dominated the Court's jurisprudence for the first century and a half of our history.[279] Dual federalism contemplated "two mutually exclusive, reciprocally

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

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

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

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

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

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

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

279 *See* Green, *Repressing*, *supra* note 5, at 607–09. Even Professor Purcell's reading takes *Erie* into this territory. *See* PURCELL, *supra* note 9, at 168 ("The federal common law was illegitimate, Brandeis believed, because it was base on the fallacy that the scope of congressional power had no

limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."[280] Consistent with this model, the critics interpret *Erie* to hold that matters like the tort duty at issue in that case fell within an exclusive zone of state authority.[281]

The problem, of course, is that this view of federalism has become untenable.[282] The Court rejected dual federalism as part of its New Deal revolution, which largely abandoned the notion of judicially enforced limits on the Commerce Clause.[283] *Erie* was decided in 1938, a year after the Court's 1937 "switch in time." But even before the Court switched, it had made clear that Congress had extensive power to regulate even intrastate matters pertaining to the railroads as instrumentalities of interstate commerce.[284] It is thus difficult to say that Congress would have lacked constitutional power to specify by statute a duty of care for railroads towards persons walking along their rights-of-way. Indeed, Michael Greve seems right to contend "that Congress could reenact, and could have reenacted even in 1938, the entire corpus juris of general common law that was declared unconstitutional in *Erie*."[285] This, for *Erie*'s critics, is enough to dispose of *Erie*'s federalism rationale.[286]

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relevance to the reach of the federal judicial power."); *id.* at 173 ("[Congress's lack] of power . . . turned on the absence of congressional authority as determined by reference to the constitutional grant of powers to the national government.").

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

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

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

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

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

285 GREVE, *supra* note 4, at 227. Interestingly, then-Solicitor General Robert Jackson did cite this sort of federalism problem as a reason for getting rid of *Swift*. Writing in 1938, Jackson argued that *Swift* created an anomaly because questions like insurance contracts or torts were "held to be within Federal judicial power, but not within Federal congressional power." Jackson, *supra* note 198, at 614. If contemporary observers thought that all or most of the realm covered by general common law had come within Congress's legislative power as a result of the Court's expansive reading of the Commerce

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

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

Contemporary federalism doctrine—and most contemporary federalism *theory* as well—largely accepts that Congress shares broad, largely concurrent regulatory powers with the States.[289] The principal limits on national authority thus arise from the difficulty of enacting federal legislation and the states' political representation in that process.[290] From this standpoint, it is critical that "the states, and their interests as such, are represented in the Congress but not in the federal courts,"[291] and no less significant that the federal courts may formulate rules of decision far more readily

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Clause in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), one would have expected Jackson, of all people, to note that fact.

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

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

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

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

290 *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (emphasizing the political representation of the states in Congress); Clark, *Separation of Powers*, *supra* note 15, at 1339–42 (emphasizing the procedural difficulty of enacting federal law).

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

than Congress can enact laws.[292] Hence the principle of judicial federalism. As Paul Mishkin put it,

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

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

This judicial federalism theory of *Erie* fits well into a broader vision of federalism commonly associated with the Legal Process school of jurisprudence.[296] That vision, articulated in the first edition of the famous *Hart & Wechsler* casebook, portrayed federal law as broad in its potential scope but interstitial in its actual manifestation:

> Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in

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

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

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

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

296 On the Legal Process school, *see generally* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964–67 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li–cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205–99 (1995).

> the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.[297]

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

Erie's constitutional holding—that federal judicial lawmaking authority is not coextensive with Congress's, and that in fact federal courts generally lack common lawmaking powers—fits comfortably within this framework. Indeed, I argue in Part IV that *Erie* is the paradigm case of contemporary federalism doctrine. What is "reserved" to the States, on the Legal Process view, is regulatory authority over matters upon which Congress has been unwilling or unable to legislate.[300] In that sense, the late nineteenth century expansion of the *Swift* doctrine had indeed "invaded rights . . . reserved by the Constitution to the several States"[301]—in particular, the right to govern matters not preempted by federal legislation. Similarly, Justice Brandeis's statement that "Congress has no power to declare substantive rules of common law applicable in a State" is best read as a somewhat inartful way of saying that Congress may not confer a general common lawmaking power on the federal courts.[302] Congress can declare only *statute* law, made through the Article I lawmaking process. As Professor Clark has explained,

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

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

299 *Id.*

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

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

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

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

The Legal Process vision of federal law as interstitial has several important implications for federalism doctrine. The primary limits on federal authority, on this view, arise from the political representation of the states in Congress and the procedural difficulty of making federal law. Herbert Wechsler, a key expositor of the Legal Process approach, emphasized the former in his work on the "political safeguards of federalism,"[304] and the Supreme Court adopted that notion—for some purposes, at least—in the *Garcia* case.[305] Brad Clark's more recent work has emphasized the latter, more procedural checks.[306] Both political and procedural limits on federal authority militate in favor of judicial doctrines that channel federal lawmaking to Congress, rather than administrative agencies and federal courts. Agencies and courts, after all, lack built-in state representation and can make federal law considerably more easily than Congress can.[307] The polit-

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

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

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

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

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

ical/procedural perspective likewise favors doctrines that raise the salience and political costs of measures that encroach on state authority, such as the presumption against preemption and the various clear statement rules.[308]

To be sure, the notion that Congress must always make federal law is often honored in the breach. In particular, Congress has delegated—and the courts have *allowed* it to delegate[309]—broad lawmaking authority to administrative agencies.[310] One might contend that Congress has likewise delegated broad lawmaking powers to the federal courts, either in the statutory grant of diversity jurisdiction or (if one buys the Sherry/Ritz reading discussed earlier[311]) in the Rules of Decision Act itself. Against such a reading, Aaron Nielson has argued *Erie* should be read to rest on the nondelegation doctrine.[312] "In light of the broad, unchanneled power exercised by federal courts under *Swift v. Tyson*'s interpretation of the Rules of Decision Act," he insists, "*Erie* . . . can and should be understood as a nondelegation case."[313]

The nondelegation reading of *Erie* is best read to make two distinct claims: Congress *can't* delegate a general lawmaking power to the federal courts, and in any event Congress *hasn't* delegated such a power. One obvious rejoinder to the first claim is that the nondelegation doctrine is dead; the Supreme Court has not struck down a federal statute on nondelegation grounds since 1935.[314] But although the Court has proven extremely reluc-

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

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

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

311 *See supra* Part II.A.3.

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

313 *Id.* at 241–42.

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

tant to draw firm lines fixing the outer limits of permissible delegations, it has always treated the underlying constitutional principle as sound.[315] As my colleague Margaret Lemos has observed, "the basic notion that the Constitution imposes some restrictions on Congress's ability to delegate lawmaking authority is deeply entrenched in constitutional law and widely accepted in constitutional commentary."[316]

Moreover, "the constitutional principles underlying the [nondelegation] doctrine apply with full force to delegations to courts."[317] In fact, they ought to apply with *greater* force. Federal courts lack even the minimal democratic accountability of executive agencies, and the usual legislative checks on agency action—such as oversight hearings, funding control, and judicial review for compliance with statutory mandates—are attenuated or absent when Congress delegates to courts.[318] Moreover, as Professor Neilson points out, one of the Court's earliest nondelegation cases concerned a judicial delegation.[319] In *Wayman v. Southard*,[320] the Court upheld the Process Act, which required federal courts to apply state procedural rules in common law actions but authorized them to make "such alterations and additions as the said courts . . . shall in their discretion seem expedient."[321] But Chief Justice Marshall firmly observed that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[322]

A general delegation of federal common lawmaking power—even if confined to diversity cases—would fail any conceivable notion of nondele-

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

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

317 Lemos, *supra* note 310, at 405.

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

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

320 23 U.S. (10 Wheat.) 1 (1825).

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

322 23 U.S. (10 Wheat.) at 42–43.

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

Even if Congress *could* delegate such broad authority, moreover, it plainly has not done so.[326] I have already explained why the Rules of Decision Act cannot be read as such a delegation, and that forecloses any such reading of the diversity statute as well; after all, why would the Rules of Decision Act prescribe state law in diversity cases if Congress intended to delegate federal common lawmaking power in those cases?[327] Contemporary nondelegation jurisprudence adds considerable force to this conclusion. Although the Court has not struck down a delegation as unconstitutional in nearly eighty years, it not infrequently invokes delegation concerns in the context of statutory construction.[328] Given this strong presumption against inferring broad statutory delegations from ambiguous text—not to mention the breadth of the delegation that would have to be inferred—neither the Rules of Decision Act nor the diversity statute should be construed as authorizing federal courts to make federal common law.[329]

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

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

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

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

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

328 *See, e.g.*, Indus. Union Dept. v. Am. Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion); Nat'l Cable Television Assn. v. United States, 415 U.S. 336, 341–43 (1974); Sunstein, *Nondelegation Canons*, *supra* note 314, at 322. It is probably fair to say that the modern nondelegation doctrine is enforced *entirely* through statutory construction—particularly through clear statement rules that disfavor broad delegations and delegations of authority to tread upon constitutional rights. *See* Bressman, *supra* note 315, at 1409 ("The Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine."); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1603–06 (2000) (arguing that clear statement rules supply the best method of enforcing certain constitutional values and that nondelegation is an example).

329 In *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981), the Court read *Erie* as making clear that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give

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

> It makes no difference . . . whether the core of *Erie* be perceived as 'Constitutional' in the sense that Congress could not validly enact a statute entirely contrary to the Rules of Decision Act, or merely 'constitutional' in the sense that it rests upon premises related to the basic nature of our federal system which are presupposed to govern in the absence of clear congressional determination to change and reallocate power within that system.[330]

Our Constitution leaves much to be worked out by statute, practice, and convention, and the result is that much of our government structure is "constituted" by law that is not constitutionally entrenched.[331] Both sorts of

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

330 Mishkin, *supra* note 284, at 1686; *see also id.* ("It is true in fact that Congress generally does not ignore such principles; in any event, it is sound policy not to take constitutional principles as likely undercut by Congress (even if it should have ultimate power to do so) when Congress has not squarely and unmistakably taken the decision to do so."); Field, *Sources of Law*, *supra* note 55, at 920 ("stating that even if *Erie* did not rest on strictly constitutional grounds, the scheme we have inherited from *Erie* and developed since has become such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it, so that *Erie*, together with *Murdock v. Memphis*, has "created our current view of what 'state law' is").

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

law, moreover, serve fundamental constitutional values of federalism and separation of powers.[332] This is particularly true of the nondelegation principle. In modern administrative law, the relatively strict judicial enforcement of statutory boundaries to delegated authority has largely come to stand in for judicial enforcement of limits on excessive delegation grounded in Article I.[333] Given that evolution, Congress's decision not to delegate broad federal common lawmaking authority to the federal courts has constitutional significance; it means, after all, that it would be *unconstitutional* for the courts to assert such unbounded authority on their own.[334]

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

The most important implication of this judicial federalism reading of *Erie* is that federal common law is always constitutionally problematic.[337] "Problematic" is not the same thing as "unconstitutional"; as Judge Friendly famously pointed out, *Erie* cleared the way for legitimate forms of federal common law.[338] But federal judge-made law always requires special justifi-

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

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

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

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

336 *Id.*

337 Craig Green asserts that "Brandeis's conclusion, '[t]here is no federal general common law' . . . had nothing to do with separation of powers or new-myth aversion to federal common law." Green, *Repressing*, *supra* note 5, at 616. But this, like much of Professor Green's argument, is badly overstated. It is true that "'[f]ederal general common law' is different from 'federal common law,'" *id.*, in the sense that the former would be a subset of the latter. But *Erie*'s statement—that except for cases governed by statutes and constitutional provisions state law applies—pertains to both. It means that judicial lawmaking must be tied to constitutional meaning or Congress's intent, as Judge Friendly—upon whom Green relies—acknowledged. *See* Friendly, *supra* note 57, at 407. Calling the separation of powers argument against federal common law "wordplay" and a "mistake," as Green does, Green, *Repressing*, *supra* note 5, at 617, is not an argument.

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

cation under *Erie*.[339] It must be tied to the specific forms of federal law that *Erie* mentioned—federal statutes or constitutional provisions, and we might reasonably add treaties in respect of the Supremacy Clause's clear command. If a federal common law rule cannot be connected to some source in federal positive law, then it is unconstitutional.[340] And it is no answer to say that Congress can override federal common law rules if it likes. Our federalism protects state authority in large part through placing burdens of overcoming inertia on federal actors, which ordinarily may act with the force of supreme federal law only when those burdens have been overcome.[341]

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

C. *Objections*

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

1. *Erie*'s Original Meaning

Erie's critics have generally acknowledged that the most plausible constitutional rationale incorporates not only federalism but also separation

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

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

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

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

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

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

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

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

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

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

347 U.S. CONST. art. VI, cl. 2. Of course, the Supremacy Clause also includes in this list "all treaties made, or which shall be made, under the authority of the United States." *Id.* International law scholars have long suggested that the Court never meant to apply *Erie* to foreign relations matters. *See, e.g.*, Phillip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) ("Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum."); *see also* Koh, *supra* note 276, at 1832–38 (endorsing Professor Jessup's view). I have argued against this suggestion at length elsewhere. *See* Young, *CIL*, *supra* note 84, at 404–34. The contemporary Court has made clear that *Erie* remains relevant in foreign relations cases even while disagreeing as to its precise import. *See* Sosa v. Alvarez–Machain, 542 U.S. 692, 726-27 (2004) (holding that, in light of *Erie*, federal courts should recognize an implied right of action to enforce customary international law only in relatively narrow circumstances); *id.* at 740–43 (Scalia, J., concurring in part and in the judgment) (arguing that *Erie* forbids recognition of *any* implied right to enforce customary international law); *see generally* Bradley, Goldsmith & Moore, *supra* note 16 (discussing *Erie*'s continuing importance to foreign relations cases).

presumptive authority of the states. Brandeis built his opinion around that principle.[348]

Although Justice Brandeis's opinion did not anticipate the analytic terms of contemporary process federalism, his constitutional analysis put the focus squarely where that theory suggests it belongs: on the way that supreme federal law is made. "[N]o clause in the Constitution," he wrote, "purports to confer such a power ["to declare substantive rules of common law applicable in a State"] upon the federal courts."[349] I have already argued, moreover, that Justice Brandeis's Legal Positivist argument—which makes up the bulk of the Court's constitutional analysis—is also directed to the issue of lawmaking authority. Brandeis needed to deflate the notion that *Swift* entailed the mere application by federal courts of a "transcenden-

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

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

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

tal body of law outside of any particular State,"[350] rather than lawmaking. This was because if *Swift* required federal lawmaking and depended on a federal sovereign source, it could stand only if it were somehow reconcilable with the institutional mechanisms for supplanting state law specified in the Constitution.[351]

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

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

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

It is unclear how much this distinction between prudential and constitutional separation of powers matters.[355] The ordinary import of the distinction in other doctrinal areas is that Congress may override prudential rules but not constitutional ones.[356] But where the rule in question is itself one that judicial authority to displace state law depends on action by Congress, it matters considerably less whether we call that rule constitutional or not. In any event, one searches the *Erie* opinion in vain for language indicating

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

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

352 PURCELL, *supra* note 9, at 172.

353 *Id.*

354 *Id.* at 165.

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

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

that its restriction on judicial power is prudential. Even Professor Purcell describes the separation of powers aspect of Brandeis's as "essential" and "critical,"[357] and the reasons he gives for that conclusion strongly suggest that the principle is in fact constitutional.[358] In particular, Purcell notes that Brandeis believed in a fundamental principle of "legislative primacy," such that "congressional abstention in any area within its authority represented a political judgment by the representative branch that states should exercise control in that area, and courts should defer to that judgment."[359] This principle fits comfortably with accounts of *Erie* grounded in *constitutional* principles of judicial federalism—that is, that *Erie* "enforce[d] federal lawmaking procedures and the political safeguards of federalism they incorporate."[360]

Professor Purcell also voices a broader criticism of the judicial federalism rationale when he says that *Erie* "was not designed primarily to protect 'federalism' or special enclaves of state law. Rather, its more vital concern lay in broader ideas about judicial lawmaking and separation of powers."[361] This is a problem, however, only if we assume—as many of *Erie*'s critics do[362]—that federalism and separation of powers have little to do with one another. Not only does Purcell equate "federalism" generally with the specific dual federalist model of "special enclaves of state law," but he also seems to think that "broader ideas about judicial lawmaking and separation of powers" is a wholly separate rationale from concerns about federalism.[363] These concerns have been linked from the beginning. The Constitution protects federalism primarily by limiting federal lawmaking.[364] And Madison tied federalism and separation of powers together in Federalist 51 as

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

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

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

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

361 PURCELL, *supra* note 9, at 3.

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

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

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

part of the Constitution's "double security" for the rights of its citizens.[365] Brandeis broke no new ground by intertwining these concerns in *Erie*.[366]

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

It is no doubt true, as Professor Purcell contends, that subsequent interpreters—including subsequent courts as well as Legal Process thinkers like Henry Hart and Paul Mishkin—altered the meaning of *Erie* in ways that departed from Justice Brandeis's specific early-twentieth-century Progressive vision.[370] But, as Purcell recognizes, that is inevitable in a judicial system that proceeds by common law elaboration of relatively open-ended constitutional and statutory texts.[371] If our understanding of *Erie*—and in

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

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

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

368 *Id.* at 30.

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

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

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

particular, its notion of judicial federalism—has evolved over time, that is part of the genius of our system of precedent. But what is remarkable, given the chorus of criticism, is how much support the judicial federalism reading finds in *Erie*'s text, the extent to which the separation of powers concerns undergirding that reading predated *Erie* itself, and the ability of *Erie*'s principles to cohere with the contemporary structure of constitutional doctrine.

2. *Erie* and the Legal Process School

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

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

Part of the problem with this line of argument is its heavy reliance on critical characterizations of the Legal Process scholars' views rather than letting those scholars speak for themselves. Professor Bandes does not actually quote Legal Process scholars "advocat[ing] an insularity that sought to exclude a whole host of influences and contingencies."[375] It is rare for

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

373 Bandes, *supra* note 237, at 830.

374 *Id.* at 869.

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

scholars to actually argue for insularity, and it is unsurprising that she is unable to catch Henry Hart or Herbert Wechsler doing so—in word or even in practical effect. It is equally hard to find Legal Process scholars actually arguing for "an abstract and timeless logic of federalism."[376] Bandes would do better to focus on the positions that the Legal Process school actually took.[377]

Professor Bandes's rather tendentious characterization of the Legal Process jurisprudence is at odds with the role those scholars played in the development of American jurisprudence. Any defense—as well as any critique—of the Legal Process school must begin by recognizing that that the label encompasses a variety of strands, emphases, and tendencies. As Neil Duxbury has shown, "[p]rocess jurisprudence was never packaged as a discrete theory"; it lacked a single "grand, initiating text"; and it constituted less a theory than "a particular attitude towards law."[378] Although process jurisprudence originated more or less at the same time as Legal Realism,[379] it remains fair to say that it embodied a response to the Realist critique of law as political and indeterminate. One aspect of that response, which Bandes seems to emphasize, was a reaffirmation of the primary role of reason in the law.[380] But at least the strands of Legal Process thinking that I—and many contemporary Federal Courts scholars—take to be most important was neither as formalist nor as rationalistic as Bandes suggests.[381]

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

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

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

379 *See id.* at 205.

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

381 Far from slavish devotion to formalism and abstract theory, process jurisprudence injected a strong emphasis on prudence. *See, e.g.*, DUXBURY, *supra* note 296, at 278–86 (describing Alexander

Critically, process reasoning was directed to a functional analysis of the most promising allocation of institutional authority.[382]

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

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

Hence the principle of "institutional settlement," which lies at the heart of the Legal Process vision.[384] Modern, pluralistic society gives rise both to disputes and to differing ideas about how those disputes should come out. Under these conditions, "[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision."[385] The principle of institutional settlement reflects the respect that members of the society owe to the outcome of these agreed-upon procedures; as Henry Hart and Albert Sacks put it, institutional settlement "expresses the judgment that decisions which are the duly arrived-at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."[386]

Legal Process thinkers urged that institutional settlement of authority to make decisions should be undertaken based on judgments about comparative institutional competence.[387] These judgements were highly functional

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Bickel's contributions to process jurisprudence); Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (same). Nor was process jurisprudence indifferent to substantive justice. As Professor Duxbury explains, "it [was] Hart and Sacks's belief that, so long as judges respect the principle of institutional competence, they ought to engage in the reasoned elaboration of principles as actively as possible in order to achieve substantive justice for the parties to any particular dispute." DUXBURY, *supra* note 296, at 264.

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

383 Fallon, *supra* note 296, at 964.

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

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

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

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

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

When politically progressive scholars like Professor Bandes insist that "federalism" involves a value choice, they generally seem to mean that federalism is going entrench antiprogressive notions against nationally driven reform.[391] "Federalism," Bandes writes, "is a term that serves as an indelible reminder of the dangers of jurisdictional principle deployed as a socially acceptable cover for the insulation of unacceptable substantive ends."[392] But a Legal Process-style emphasis on allocation of legitimate decisionmaking can also advance progressive causes. Just last term, for example, in *United States v. Windsor*,[393] principles of federalism played a critical role in protecting individual states' recognition of same-sex marriage from the national government's effort to impose a more socially conservative solution.[394] As *Windsor* and other cases have shown, we have little reason to assume that federalism will undermine substantive justice, even from a progressive perspective.[395] Federalism protects minorities' rights both to

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

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

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

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

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

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

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

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

exit from oppressive regimes and to implement their own norms in smaller communities where they may constitute a majority; in this way, it may systematically promote reform.[396]

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

A more on-point criticism of the Legal Process vision of federalism might be that the world of intergovernmental relations has changed to the point that this vision no longer can provide effective protection for state autonomy. For example, to the extent that federal law is no longer interstitial and federal bureaucracies now dominate the regulatory landscape, the judicial federalism model of *Erie* might be largely beside the point.[398] We might do better to focus on approaches like Heather Gerken's and Jessica Bulman-Pozen's model of "uncooperative federalism," in which the implementing role (and resulting "agency slack") of state officials operating within federal bureaucratic structures provides a primary safeguard of state autonomy.[399] But this model, too, fits comfortably within the Legal Process tradition: it brackets substantive policy disagreements and focuses on the institutional settlement of authority to decide in particular officials and processes, and it does presuppose that limiting national authority is a legitimate

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criminal defendant. *See generally* Baker & Young, *supra* note 305, at 152–153 (contesting the view that federalism is inherently anti-progressive).

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

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

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

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

constitutional value. In any event, the imperative to develop alternative models that fit certain aspects of the current regulatory environment hardly denies the importance of judicial federalism in those areas where state law still has a central role to play.

3. Are Judicial and Legislative Powers Coextensive?

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

At the outset, it is worth noting that the Constitution itself says nothing about coextensive powers. Its basic structure belies the notion, carefully denoting the powers of each branch largely without reference to the others. They are coextensive in a sense, in that action by each branch may provide the occasion for action by the others. Whenever Congress passes a law on any subject, for example, the Executive acquires the responsibility to execute that law,[403] and the Judiciary may hear cases arising under it.[404] But even in this sense, the coextensivity is imperfect and not automatic. The federal courts cannot even hear cases—much less make law—without statutory jurisdiction, and for much of our history both the lower federal courts and the Supreme Court have lacked jurisdiction over important classes of federal question cases.[405] The rules of standing, political questions, and limits on judicial review abroad[406] all create situations in which judicial power is not coextensive with the powers of the legislative and political branches.

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

401 *Id.*

402 PURCELL, *supra* note 9, at 172.

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

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

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

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

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

As Madison's position makes clear, the coextensivity argument was often used to say that *Congress* could legislate wherever the courts could adjudicate. So, for instance, many maritime statutes were justified on the ground that Congress's legislative jurisdiction piggybacked on the federal *courts*' ability to decide cases under general maritime law.[412] As the admiralty example makes clear, however, we need to be careful about the inferences we draw from that notion of coextensivity. At the Founding and throughout the nineteenth century, prior to *Jensen*, the federal courts did not treat judge-made maritime law as federal law within the meaning of the Supremacy Clause,[413] and even thereafter the Court held that admiralty cases did *not* fall within the federal question jurisdiction.[414] Most important, it does not follow, as Louise Weinberg has suggested, that "[t]he judiciary

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

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

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

410 11 U.S. (7 Cranch) 32, 34 (1812).

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

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

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

414 *See Romero*, 358 U.S. at 363–68.

must have presumptive power to adjudicate whatever the legislature and the executive can act upon."[415] The originalist assumption that courts can act wherever the political branches can act could sensibly be taken to mean simply that the federal courts always have the presumptive authority to review, interpret, and apply any federal legislation or order promulgated by those branches.[416] But nothing in that assumption implies the further proposition that federal courts have the authority to *go first* and act in an area where the national political branches potentially *could* act, but have not.[417]

Edward Purcell imputes an assumption of coextensive powers not to the Founders but rather to Justice Brandeis himself. As I have already discussed, coextensivity of legislative and judicial powers was one of the "two related principles" upon which, in Purcell's view, Brandeis rested *Erie*.[418] Purcell's account is ambiguous, however, as to what Brandeis meant by coextensivity or what constitutional authority he rested that assumption upon. Purcell suggests that Brandeis developed his views on coextensive powers from his pre-*Erie* experience with state legislative jurisdiction.[419] But that issue, which involved constitutional issues on state choice of law, establishes only that Brandeis believed *state* legislative and judicial powers must be considered coextensive. That view would reflect the widespread assumption that state courts share lawmaking authority with legislatures[420] but it hardly translates without controversy to *federal* courts.[421] Similarly, Brandeis's correspondence with Justice Reed during the deliberations in *Erie* relied on the coextensive powers of *state* legislatures and courts: "Since [the *Swift* doctrine] admits that the state rule must be followed if

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

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

417 *See, e.g.*, Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 61 (1981) ("[N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.").

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

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

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

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

declared in a [state] statute," Brandeis wrote, "it admits that [the state rule] is not a matter within the authority of Congress."[422]

If this is the key point, then it is a very odd one. We cannot, for the reasons already discussed, impute to Justice Brandeis the view that Congress could not have legislated a rule to deal with mishaps along railroad rights-of-way.[423] Professor Purcell seems to think the problem "was not that Congress lacked certain powers but that the federal courts ignored the relevance of whatever those powers were."[424] In other words, *Swift* would support displacing state law even in situations that fell outside Congress's commerce power.[425] But if that is the point, then *Erie* (in which Congress plainly *did* have power to act) was an odd case in which to overrule *Swift*.[426] And Purcell's reading seems flatly inconsistent with Brandeis's statement that "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[427] If Brandeis were concerned about the scope of Congress's legislative jurisdiction, he would hardly choose topics fitting plainly within that jurisdiction—such as commercial law—as examples of unconstitutional federal action.

As I have already suggested, the language just quoted is best read as insisting that Congress actually pass substantive statutes in order to displace state law; it cannot simply order federal courts to apply the common law in disregard of state jurisprudence.[428] And the more natural implication from the coextensivity of *state* legislative and judicial powers would be that state decisional law can be displaced only by the same sorts of federal action that displace state statutes—that is, federal statutes and constitutional provisions. Brandeis himself wrote that "[m]y own opinion had been that it was wise (1) to treat the constitutional power of interstate commerce as very broad and (2) to treat acts of Congress as not invading State power unless it clearly appeared that the federal power was intended to be exercised exclu-

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

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

424 PURCELL, *supra* note 9, at 173.

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

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

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

428 *See supra* text accompanying note 337.

sively."[429] On this reading, Purcell's two principles—the coextensivity principle and its "prudential" corollary—are really the same idea. In any event, as I have already pointed out,[430] the supposedly prudential reasons for that corollary limiting judicial displacement of state law to situations in which Congress has already acted are sufficiently strong to warrant treating it as a *constitutional* principle in its own right—and that is how it *has* been treated by subsequent courts and commentators.[431]

The Sherry/Weinberg position requires a still further and even more radical step—that is, it asserts that the federal courts' supposed authority to adjudicate any issue that the national political branches could act upon also presupposes the power to *make law* on such issues. Beginning with the proposition that when "the national interest so requires, Congress has power to federalize a matter previously governed by state law," Professor Weinberg concluded that it "would seem that that basic power must also inhere in its courts."[432] Even if one assumes that all diversity cases involve interstate commerce and therefore involve matters upon which Congress could potentially legislate,[433] that coextensivity would not itself answer the question of what law the federal courts must apply in such cases, or whether those courts have the power to fashion common law rules of decision with the force of federal law.[434] Coextensivity, at most, establishes the federal courts' power to adjudicate in situations where Congress might legislate, but it begs the most important question: Does power to adjudicate necessarily include the power to make law?[435]

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

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

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

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

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

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

435 For example, Professor Purcell cites the 1969 American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* as relying "most fundamental[ly]" on the principle that "the judicial and legislative powers should be coextensive." PURCELL, *supra* note 9, at 273. But the

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

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

The Court's rejection of the political question argument, moreover, illustrated two important distinctions: (1) between courts "going first" and following action by another branch in a particular area, and (2) between the power to make law and the power to resolve disputes. If Congress had not acted on the question of Jerusalem's status, then it seems likely that the

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ALI relied on that principle to condemn diversity jurisdiction for rendering "the state's judicial power . . . less extensive than its legislative power," and to suggest that "federal courts should be 'concentrated upon the adjudication of rights created by federal substantive law.'" *Id.* (quoting American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, at 99 (1969)). Neither of these points comes close to establishing that federal courts may make substantive rules of decision on any issue upon which Congress could legislate.

436 132 S. Ct. 1421 (2012).

437 116 Stat. 1350, 1366.

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

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

440 *See* 132 S. Ct. at 1428.

Court would have found that status to pose a nonjusticiable political question—after all, the Court seemed to acknowledge that the Constitution may commit the recognition of foreign sovereigns to the political branches and that, in any event, courts lack "judicially discoverable and manageable standards" for resolving recognition questions.[441] But, Chief Justice Roberts noted, "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute," and concerns about a lack of standards "dissipate . . . when the issue is recognized to be the more focused one of the constitutionality of 214(d)."[442] This is thus a case where the judiciary's power to act may well have depended on the fact that Congress had acted first.

Even more obviously, the judiciary's power to resolve a dispute about who had the power to establish the U.S. position on Jerusalem hardly equated with a judicial power to make law itself on that question. The Chief Justice distinguished between two questions: "whether Jerusalem is the capital of Israel," and "whether Zivitofsky may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth."[443] The D.C. Circuit erred, he said, when it "treated the two questions as one and the same."[444] Answering the first would have required the federal courts "to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be"—in other words, it would have invited the courts to make law on their own.[445] But in order to answer the *second* question, "the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise."[446] Adjudication of disputes under preexisting law, whether statutory or constitutional, is distinct from lawmaking, and the judiciary's power to do one is not necessarily coextensive even with its *own* power to do the other.[447]

Professors Sherry and Weinberg assert not simply that legislative and judicial powers are coextensive in scope, but also that they are the *same*

441 *Id.* at 1428.

442 *Id.*

443 *Id.* at 1427.

444 *Id.*

445 *Id.*

446 *Id.*

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

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

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

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

Arguments beginning from a premise along the lines of "Justice Story made an obvious mistake" generally are—and should be—met with considerable skepticism.[451] But that is not my claim. My own view has always been that, under the circumstances that each court faced at the time, *both Swift* and *Erie* were rightly decided.[452] The explanation has to do with changes in the content of both state law and general law over the course of the nineteenth century. The latter began as a narrow category of principles derived from the customary practices of merchants engaged in primarily cross-border transactions.[453] But as the nineteenth century wore on, the

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

449 Greve, *supra* note 4, at 375.

450 *Id.*

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

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

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

Court extended it to the construction of ordinary contracts or other written instruments,[454] tort cases,[455] and even cases involving deeds of land.[456] This radical expansion of *Swift*'s scope coincided with erosion of the strong norm of deference to state courts on construction of state statutes and constitutions.[457]

The result was that the general common law came to apply in areas that not only had a more local flavor, but also that were more strongly normative in character. Justice Story's general commercial law had sought simply to capture the actual practices of merchants and involved issues upon which it was often more important that rules be settled than that they be settled *right*; areas like tort law, by contrast, implicated much sharper conflicts over justice and fairness, upon which local political communities were more likely to insist on their own way.[458] Federal courts could not, as a result, continue to take for granted the state choice of law rule that I have argued was crucial to *Swift*'s reasoning—that is, that the state itself had determined that general law should govern the relevant class of cases.[459] Nor could general law be regarded as customary or "bottom–up" law, based on the actual practices of merchants—instead, it embodied top–down normative commands like any other form of law. Both developments made it imperative to identify the sovereign source of the general law and the federal courts' power to apply it.

Professor Greve is thus right to focus on *why Swift* "got out of hand and eventually prompted [federal] judges to substitute their own views of sound public policy on the states."[460] The answer is that a doctrine that originally *reflected* state policy—New York's own decision to apply the

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See, e.g., Kadens & Young, *supra* note 77 (arguing that customary international law cannot rest on analogy to the customary law merchant).

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

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

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

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

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

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

460 GREVE, *supra* note 4, at 375.

general law merchant to cases like *Swift*—had become a tool by which federal judges *limited* state policy in order to benefit interstate businesses.[461] Professor Greve may or may not be right that such limits are salutary and necessary—what cannot be denied, however, is that they require a different constitutional justification than a decision, like Justice Story's in *Swift*, to follow state preferences. In *Erie*, Justice Brandeis found that this more difficult constitutional case simply could not be made.

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

It does seem to me that it is one thing to admit that we have a massive administrative state and that it is too late in the day to return to a simpler model where Congress makes all the laws, but quite another to say that the administrative state should become our template for reasoning in cases where the burdens of historical inertia do not exist or point in a different direction.[465] Moreover, there are significant differences between administrative agencies and federal courts as lawmaking agents. Agencies are subject to extensive congressional oversight and budgetary controls that, if applied to the federal courts, we would consider a serious threat to judicial independence.[466] Most importantly, one can still argue that although federal agencies plainly "make law" in an important sense, considerably more stringent limits exist on their capacity to displace *state* law. Current doctrine continues to stress that such displacement must be traceable to *Congress*'s intent in an authorizing statute,[467] and the Court has proven willing to limit the preemptive force of agency decisions in a number of important

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

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

463 *Id.*

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

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

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

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

ways.[468] Although no viable doctrinal proposal can avoid taking the administrative state into account, the way remains open to make process federalism arguments against broad administrative preemption analogous to the judicial federalism argument in *Erie*.[469]

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

> By banishing the spurious uniformity of Swift v. Tyson . . . and by leaving to the states what ought to be left to them, Erie led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as its predecessor, more general in subject matter but limited to the federal courts, was not. The clarion yet careful pronouncement of Erie, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law.[471]

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

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

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

470 GREVE, *supra* note 4, at 375.

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

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

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

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

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

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

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

"the structural Supremacy Clause argument runs up hard against well-recognized enclaves of federal common law."[478]

I think it is fair to say, however, that Judge Friendly's "new federal common law" is—as the judge insisted—very much a creature of *Erie*'s world, not *Swift*'s. Notwithstanding revisionist academic theories arguing for a *general* federal common law power in the federal courts,[479] each enclave of federal common lawmaking has been developed and justified as an exception to *Erie*'s rule, with special attention to why a departure from the presumptive rule of congressional primacy is warranted.[480] Reasonable people disagree about whether all the existing instances of federal common lawmaking can be justified in this way. My own view is that filling in the gaps of federal statutes is so close to—and difficult to distinguish from—statutory interpretation as to be relatively unproblematic;[481] that most of the foreign affairs rules can be justified as self-imposed prudential limitations on judicial review;[482] that the *Clearfield* line of cases is not obviously necessary but may be largely assimilated to notions of conflict preemption;[483] that state versus state cases may be a legitimate uses of "general" law where states are not competent to legislate;[484] and that freestanding federal common law in admiralty is unconstitutional.[485] But, the important point is that the new federal common law must be grounded in a plausible interpretation

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478 GREVE, *supra* note 4, at 375.

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

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

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

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

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

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

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

of the Supremacy Clause; no courts, and few scholars, are willing to generalize from these enclaves to a rejection of judicial federalism.

Importantly, these enclaves do not rest on a judgment that they somehow implicate the most important or fundamental aspects of our constitutional scheme. Rather, they generally rest on arguments about congressional authorization[486] or claims that applying state law would thwart particular federal interests that cannot otherwise be easily protected.[487] Professor Greve's argument that the law governing interstate business must necessarily be governed by federal common law because it is a "basic aspect of the constitutional scheme,"[488] thus, misses the mark. That argument also represents a strange inversion of our scheme of government, which was concerned to empower *Congress*—not courts—to deal with the most critical matters for national unity and prosperity. As such, Professor Greve's desire for federal courts to rescue interstate business from the grasping clutches of state law[489] echoes *Erie*'s liberal critics, like Professors Sherry and Green, who seek to empower courts to protect human rights through expansive constitutional interpretation and importation of international law.[490] As I suggest in Part IV, all of these arguments reflect a basic loss of faith in the political branches to solve national problems. Whether or not that loss of faith is warranted by the current performance of our national political branches, it finds little support in the Constitution.

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

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

488 GREVE, *supra* note 4, at 376.

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

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

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

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

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

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

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

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

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

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

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

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

495 *Id.* at 984.

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

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

courts irrespective of the content of state law concerning the role of a particular state's courts.

1. Lawmaking Power and Deference to State Courts

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

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

These critics agree that "if one starts from the premise that state constitutions do indeed allocate authority to prescribe state law in the way that Justice Holmes believed, then one might well arrive at the bottom line that Justice Brandeis reached in *Erie*."[501] As Brandeis pointed out, "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[502] On this view, there could be no federal authority to disregard a state's allocation of lawmaking authority to its courts.[503] Deference to the state court's interpretations of state law would be mandatory on grounds analogous to the strong theory of *Chevron* deference in administrative law, which reads congressional ambiguity in statutory drafting as an outright delegation of lawmak-

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

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

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

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

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

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

ing authority to the agency to fill in the gaps.[504] Deference occurs, in other words, because the primary interpreter—there, the agency; here, the state court—is actually vested with authority to "say what the law is."

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

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

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

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

It may help to be more specific about the different faces of judicial lawmaking. Writing about the lawmaking function of the U.S. Supreme Court, Fred Schauer has distinguished between a "backward looking" and a "forward looking" aspect of judicial decisions.[510] The former concerns "the sources of the norms for making decisions in cases"; "[t]o the extent that its decision is based on norms not already embodied in authoritative legal ma-

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

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

506 *Id.*

507 *Id.* at 984.

508 *Id.* at 982.

509 *Id.* at 984.

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

terials, the Court is accused of, or praised for, making law."[511] State courts are sometimes thought to have lawmaking authority in this sense—for instance, they are often thought to have greater latitude to translate policy or moral views into binding legal norms than do federal courts, which are typically seen as limited to the interpretation of authoritative statutory or constitutional materials. If this view is correct, then state courts would be entitled to the strong form of *Chevron*-style deference described earlier: Having been delegated authority to *make* law, it would not be possible for the state supreme court to be "wrong" about the content of state law, and federal courts should defer accordingly.

We do often think about state courts in this way, particularly when they are operating within the scope of the common law tradition.[512] Although there are no express delegations of lawmaking authority in the state constitutions, most states do have positive enactments—either in their state constitutions or in statutes—"receiving" the common law of England,[513] and it seems fair to interpret those enactments not only as receiving the substantive law but also endorsing the judge-driven method by which it was made.[514] Indeed, a significant subset of those reception statutes explicitly endorse the state courts' role in applying and developing the common

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511 *Id.* at 1.

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

513 *See, e.g.*, CAL. CIV. CODE § 22.2 ("The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."); N.C. GEN. STAT. ANN. § 4-1 ("All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."); *see generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951) (describing the process of reception throughout the country). Those states lacking a positive reception provision have generally adopted the common law by judicial decision. *See, e.g.*, Baldwin v. Walker, 21 Conn. 168, 181 (1851) ("We have, in our judicial practice, adopted so much of the common law as was operative as law, in the father-land, when our ancestors left it, and which was adapted to the new state of things here, under our colonial condition. This was our inheritance.").

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

law.[515] Even those states that have chosen to codify their common law, such as California, continue to accept a leading role for the state courts in the evolutionary development of that law.[516] And in the key area of commercial law, the Uniform Commercial Code—adopted with relatively little formal variation in most states—seems plainly to envision that state court judges will continue to develop the relevant law.[517]

So there is more positive support for backward-looking state court lawmaking authority than Professor Nelson has acknowledged. And I have already discussed the practical arguments for deference to state courts as to the content of state law.[518] Nonetheless, I think he is right to question whether *Erie*'s *constitutional* holding can be rested entirely on this ground. It remains intelligible, as Nelson points out, to insist that a state court is "wrong" about the content of state law, even state common law.[519] If that is

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

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

517 U.C.C. § 1-103 (providing that the UCC "must be liberally construed and applied to promote its underlying purposes and policies, which are . . . to simplify, clarify, and modernize the law governing commercial transactions; . . . to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and . . . to make uniform the law among the various jurisdictions"). Comment 1 to this section then makes clear that the U.C.C. "is intended to be a semi-permanent and infrequently-amended piece of legislation" and to "provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in the light of unforeseen and new circumstances and practices." *See also* Bank of New York v. Amoco Oil Co., 35 F.3d 643, 660 (2d Cir. 1994) (applying this section pursuant to New York state law).

518 *See supra* text accompanying note 215–222.

519 Nelson, *Erie*, *supra* note 6, at 979.

true, then we may need a different argument to support a categorical rule of deference.

On the other hand, it also seems relatively clear that backward-looking lawmaking authority is *not*, in fact, the critical variable in *Swift* or *Erie*. After all, state courts hardly enjoy such authority vis-à-vis state *statutes* or constitutional provisions, and yet even under *Swift* the federal courts had generally considered themselves bound to follow state courts' interpretations of those positive enactments.[520] In other words, the critical point was not whether the state courts were making law as opposed to interpreting some source of law with an objective existence outside their chambers. What the federal courts seem to have deferred to is the state courts' *forward* looking authority—that is, their authority to "set[] forth a standard, or principle, or rule that is to be followed and applied by those to whom it is addressed."[521] This aspect of state lawmaking authority thus focuses on the ability of state courts to settle the meaning of state law going forward.

I submit that once we agree that federal courts sitting in diversity are applying *state* law to any question not governed by federal positive law, then *Erie*'s rule of deference is fully supported by the necessity that *some* court must have final authority to settle the meaning of state law. Ultimate authority to determine that meaning, of course, resides in the state legislature or the people of the state (who may generally intervene through referenda and constitutional amendment more easily than the people of the United States may do so at the federal level).[522] But that is true at the federal level, too, where Congress may ultimately determine the meaning of federal statutes through amendment. That fact has never, however, kept courts and commentators from emphasizing the importance of having one Supreme Court to resolve disputes about the meaning of federal law.[523] A single judicial forum to settle the meaning of *state* law is no less important to the persons who must take that law as a guide to their own conduct. Absent such a forum, persons subject to state law would experience "the debilitating uncertainty in the planning of everyday affairs" that *Erie* was designed to prevent.[524]

That forum has to be the state supreme court. As the Court said long ago in *Murdock v. City of Memphis*, "[t]he State courts are the appropriate tribunals . . . for the decision of questions arising under their local law,

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520 *See supra* text accompanying notes 102–104.

521 Schauer, *supra* note 510, at 2.

522 *See, e.g.*, SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 332-33 (2012) (discussing the high amendment rate of state constitutions).

523 *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (stressing the importance of the U.S. Supreme Court's function in ensuring the uniformity of federal law); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960) (asserting that "maintaining the uniformity and supremacy of federal law" is the "essential constitutional function[]" of the Supreme Court).

524 Ely, *supra* note 1, at 710–11.

whether statutory or otherwise."[525] *Murdock* held that the U.S. Supremes lack jurisdiction to review state supreme court decisions on questions of state law, and the Court suggested that that statutory bar may have constitutional underpinnings.[526] That holding is significant for at least two reasons: First, it means that the federal courts *cannot* unify the meaning of state law, because no federal tribunal has the authority to correct erroneous state interpretations.[527] Second, and more fundamentally, as Martha Field has ex-

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525 87 U.S. (20 Wall.) 590, 626 (1874).

526 *See id.* at 631 (interpreting Section 25 of the Judiciary Act to limit Supreme Court review of state supreme court decisions to federal questions); *see also id.* at 633 (reserving judgment as "whether, if Congress had conferred such authority [to review state law questions], the act would have been constitutional"); *see also* Harrison, *Federal Appellate Jurisdiction*, *supra* note 197, at 355 ("*Murdock* rests in part on constitutional qualms."). John Harrison has argued that "Justice Miller's misgivings, however, almost certainly derived in large part from substantive premises about the federal structure that were dominant at the time but that do not derive straightforwardly from the text and that I think are unfounded." *Id.* In particular, Professor Harrison argues that *Murdock* rested on notions of "dual federalism," but *not* the principle of separate and exclusive fields of regulatory authority that I discussed earlier, *supra* notes 279–280 and accompanying text, but rather a notion that "interactions between the two governments, and especially regulation of one level of government by the other, [are] strongly disfavored." *See* Harrison, *Federal Appellate Jurisdiction*, *supra* note 197, at 355. I am not even sure that this notion is properly viewed as part of "dual federalism," as opposed to simply a postulate of American sovereignty common to most models of federalism doctrine. *See generally* Young, *Puzzling Persistence*, *supra* note 283 (describing the dual federalist model as I understand it). But without regard to taxonomy, it is clear that this non-regulation or non-interference principle has a lot more life in it today than does the model of separate and exclusive spheres of authority to regulate *private* actors. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (striking down the Affordable Care Act's expansion of Medicaid on the ground that it coerced state governments); Medellin v. Texas, 552 U.S. 491 (2008) (striking down an attempt by the President to issue commands to the state courts); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" state executive officials); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that Congress may not subject states to damages liability in suits by individuals pursuant to federal law); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that neither the state nor the federal government presumptively may regulate the relationship between the people and their elected representatives in the other government, except as the Constitution expressly permits); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not require state legislates to enact laws implementing a federal statutory program); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.'") (quoting Taylor v. Beckham, 178 U.S. 548, 570–71 (1900)); *cf.* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (identifying serious constitutional objections to federal regulation of the state courts). In any event, it may not matter whether *Murdock* is constitutionally-grounded. Professor Field points out that, despite *Murdock*'s avowed reliance on statutory construction, its rule has become "such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it." Field, *supra* note 55, at 920. The critical point is that much of our judicial system now rests on a presupposition that the state courts are the last word on state law.

527 Even if there were no such bar, I have already suggested that it is doubtful that the Court would be willing to hear the volume of state law cases that that it would take to unify conflicting interpretations

plained, if the federal Supreme Court were allowed to substitute its own view of state law for that of the highest state court, "it would not be possible to identify any body of law as 'state law.' It is thus because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one."[528]

What I hope to have established is that *Erie*'s rule of deference to state courts on the construction of state law need not rest solely on the supposition that state courts do something fundamentally *different* from federal courts in deciding cases. That rule may also arise from recognizing that the functions of the two judicial systems are fundamentally *similar*. That is, both the U.S. Supreme Court and the state supreme courts share similar responsibilities for settling the meaning of the bodies of law within their respective charges. As I tell my students each year, that is why they call them the state "supreme" courts. It would be hard to identify any good reason to impute this function to the U.S. Supreme Court on the federal side without also allowing it to the state supreme courts on the state side. And to the extent that a state's constitutional regime vests this responsibility in the state courts, a *federal* court's decision to set aside the state courts' interpretation of state law must be construed as an attempted act of federal supremacy and measured by the lawmaking criteria of the Supremacy Clause.[529]

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of state law. *See supra* note 197 and accompanying text. Of course, it is also true that we lack an appellate mechanism for state supreme courts to review federal applications of state law under *Erie*. The U.S. Supremes will occasionally vacate federal circuit court decisions and remand them for reconsideration in light of state precedents, *see, e.g.*, Thomas v. Am. Home Prods., Inc., 519 U.S. 913 (1996), and the Court has also encouraged certification of questions on the meaning of state law to the state courts. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 80 (1997). But this situation seems less chaotic than that which would exist were federal courts disobliged of their obligation to follow state decisions.

528 Field, *supra* note 55, at 922; *see also* Dogan & Young, *supra* note 213, at 119–23 (discussing the significance of the *Murdock* rule). A limited exception to *Murdock* allows the U.S. Supreme Court to review a state court's decision of a state law question for the purpose of ensuring that the state court is not manipulating state law in order to undermine or thwart a federal right. *See, e.g.*, Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (reviewing the Virginia Court of Appeal's construction of state property law in order to ensure that the state courts had not construed that law so as to defeat rights under the federal Treaty of Peace ending the Revolutionary War); HART & WECHSLER, *supra* note 66, at 457–58 (discussing the concept of "antecedent" state law grounds). Most of these cases are explainable by the presence of federal constitutional guarantees that, while not precluding the state from changing its law (even through judicial decision) do prevent *retroactive* changes or require that those changes be compensated. *See, e.g.*, State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) (reviewing state court's decision as to the existence of a contract under state law as a predicate to the plaintiff's federal claim for impairment under the Contracts Clause); Dogan & Young, *supra* note 213, at 120–30 (discussing this exception in the context of claims that a state court's change in state law has effected a judicial taking). In any event, even this exception incorporates a significant degree of deference to the state courts' construction of state law. *See* HART & WECHSLER, *supra* note 66, at 485–86.

529 *See, e.g.*, Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 314 n.199 (1984) (explaining that "there is no general federal judicial power to displace state law").

The Supreme Court adopted this view in *Green v. Neal's Lessee*.[530] As already mentioned, *Green* held that federal courts must defer to state courts' construction of state statutes. The case involved a Tennessee statute of limitations that the U.S. Supreme Court had construed in a prior case; subsequent decisions of the Tennessee Supreme Court, however, had adopted a contrary construction. The *Green* Court explained that it would follow the Tennessee decisions in order to avoid a conflict "arising from two rules of property within the same state" that would be "deeply injurious" to the state's citizens.[531] This rationale is consistent with what Professors Bridwell and Whitten describe as the basic purpose of the diversity jurisdiction itself—that is, to protect the settled expectations of private parties.[532]

On this reading, *Erie* does rest on a premise about state constitutional law. That premise, however, is simply that state constitutions, by vesting the judicial power of the state in the state supreme courts, entrust those courts with the authority to settle the prospective meaning of state law until that meaning is altered by the legislature or other democratic processes of the state. This assumption strikes me as a somewhat safer, or at least less controversial, assumption than the one that Justice Holmes made and that Professor Nelson criticizes.

2. What if State Courts Don't *Want* Federal Deference?

The role of state courts in settling the meaning of state law also responds to Professor Green's objection, which is that we cannot take for granted that state courts *want* to bind the federal courts. Green's argument is not so much a critique of *Erie* as an effort to play out its implications: If *Erie* requires federal courts to follow state courts on matters not governed by positive federal law, he argues, then whether or not to defer to state court interpretations of the common law would seem to depend on whether state courts *want* deference.[533] It is at least logically possible that they do not. If a state should choose to stick with *Swift* and view the common law as "general" law shared by all American jurisdictions, then *Erie* provides no obvious reason why federal courts should defer to the state courts' construction of that law.[534] I think Green's argument, while ingenious, ultimately underrates the reasons compelling federal court deference to state court decisions.

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530 31 U.S. (6 Pet.) 291 (1832); *see also* BRIDWELL & WHITTEN, *supra* note 63, at 111 (discussing this case).

531 *Green*, 31 U.S. (6 Pet.) at 300.

532 *See* BRIDWELL & WHITTEN, *supra* note 63, at 67–68.

533 *See* Green, *Suppressed Premise*, *supra* note 248, at 1135–36.

534 Professor Green ultimately concludes that *Erie* is right, because if a state's supreme court's decisions are binding on the inferior courts of a state (which they are) then a principle of "nondiscrimination" requires that they also be binding on *federal* courts. *See id.* at 1147. I agree that the role of the

As an initial matter, I am not at all convinced that any American jurisdiction continues to view the common law as "general" in nature or to accept the holding of *Swift* that federal diversity courts should not defer to state courts on the meaning of that law. Professor Green points to the Great State of Georgia, and he begins by citing the Georgia Supreme Court's statement reaffirming *Swift* in *Slaton v. Hall*:

> The common law is presumed to be the same in all the American states where it prevails. Though courts in the different states may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction. If all the American states were to construe the same principle of common law incorrectly, the common law would be unchanged.[535]

Green acknowledges, of course, that *Slaton* came down nine years before *Erie*. He points out that such a late reaffirmation of *Swift* sets Georgia apart from the numerous states that had condemned *Swift* by that late date. And it is true that if *Erie* was right about the federal courts' lack of constitutional power to dictate to the states on matters of common law, then Justice Brandeis could hardly impose his views on legal positivism on an unwilling state. But the notion that the general common law retains some sort of Platonic existence irrespective of the decisions of the courts in all fifty states is so far from contemporary understandings of jurisprudence that one would want to see a pretty clear statement from the modern Georgia courts indicating that this remains their view.

Professor Green does not have one.[536] And, aside from the few odd conflicts cases Green cites, Georgia seems to behave pretty much like any

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state supreme court vis-à-vis other state courts is a critical factor, but I think the reasons for federal court deference are more fundamental than a principle of nondiscrimination.

535 148 S.E. 741, 743 (Ga. 1929) (quoted in Green, *Suppressed Premise*, *supra* note 248, at 1123).

536 Green infers the notion that Georgia adheres to *Swift* entirely from some state conflict of laws decisions in which Georgia courts have reached an independent judgment as to the content of a sister state's law. Green, *Suppressed Premise*, *supra* note 248, at 1126–27, n.89 (citing Trs. of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 811 (1940); Calhoun v. Cullum's Lumber Mill, Inc., 545 S.E.2d 41, 45 (Ga. Ct. App. 2001); Leavell v. Bank of Commerce, 314 S.E.2d 678, 678 (Ga. Ct. App. 1984). *Slaton* itself was a case of this type. *See id.* at 1123 ("[S]trictly speaking [*Slaton*] held only that Alabama decisions could be ignored when interpreting the common law of Alabama."). Green reads these cases to say that "if the matter is governed by the common law (including apparently local common law), [Georgia courts] come to their own judgment about what this common law is. This suggests that they do not think that their own common-law decisions bind sister-state—or federal—courts." *Id.* at 1126–27. Green acknowledges a far more likely possibility, however: "One might read these cases as simply applying *Georgia* common law to events in sister states." *Id.* at 1126 n.89. He acknowledges that "[a] few cases do put the matter this way," *id.* (citing White v. Borders, 123 S.E.2d 170, 172 (Ga. Ct. App. 1961)), but he characterizes that possibility as "an inaccurate description of Georgia's approach," *id.* at 1126 n.89. Green's point is simply that ignoring a sister state's tort rules would be inconsistent with Georgia's conflict of laws principles. *Id.* That may be so, but this sort of inconsistency seems far more likely than a covert adherence to *Swift*. After all, the only authority on Georgia conflicts rules that Professor Green cites states the Georgia rule in exactly the way that Green characterizes as

other state with regard to its common law. Georgia has, in fact, adopted the U.C.C. (which would be unnecessary if *Swift*'s general commercial law were still operative), and the state legislature—like other legislatures—continues to tweak its provisions.[537] Scholars have written about the extent to which Georgia has or has not adopted this or that aspect of the U.C.C.,[538] but if *Swift v. Tyson* were still good law in Georgia one would expect to see some mention of that fact in these legislative debates or scholarly discussions. One does not. Likewise, Georgia conflicts of laws cases talk about the state's rejection of the Second Restatement and the applicability of Georgia common law,[539] both of which would be odd things to do if those courts thought a *Swiftian* general law governed conflicts or other common law subjects. It would be a surprising thing indeed if any American state persisted in the view that common law is general, so that other jurisdictions' courts need not defer to that state's courts in interpreting the law of that jurisdiction. What is unsurprising is the lack of any evidence for that phenomenon.

In any event, I do not think that *Erie* leaves the federal courts obligation of deference up to the state courts. I have argued that federal courts should defer to state courts on the meaning of state law for reasons analogous to the grounds of deference in administrative law: state courts have greater expertise with respect to state law;[540] they are more democratically accountable to the state electorate;[541] and state law typically delegates law-*making* authority to state courts.[542] Professor Green's argument questions only the third of these grounds, but the first two are sufficient to provide strong pragmatic justifications for deference.

One might object that, if a state really does view the common law as unitary and general, then the relevant law is not state law at all. On this

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"inaccurate." *See* John B. Rees, Jr., *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 789–90 (1983) ("When no statute is involved, the common law of Georgia controls; the other jurisdiction's decisions construing its own common law will be ignored."). Tellingly, Green cites no language whatsoever from a contemporary Georgia court explicitly endorsing a view that is anything like *Slaton*'s pre-positivist manifesto.

537 *See, e.g.*, Bryan Cave Alert, *Recent Legislative Action Regarding Changes to Article 9 of Georgia's Uniform Commercial Code ("The Georgia UCC")*, April 23, 2013, *available at* http://www.bryancave.com/files/Publication/15bf7345-bfc0-4dd7-8508-680fa4c906a2/Presentation/PublicationAttachment/cf104535-9375-4389-b8f2-76a4f09335e2/Financial%20Services%20Alert_%204.23.13.pdf.

538 *See, e.g.*, Albert H. Conrad, Jr. & Richard P. Kessler, Jr., *Proposed Revisions to the Georgia Uniform Commercial Code: A Status Report*, 43 MERCER L. REV. 887 (1992) (not mentioning it).

539 *See, e.g.*, Convergys Corp. v. Keener, 582 S.E.2d 84 (Ga. 2003) (refusing to follow a contractual law-selection clause "[b]ecause the Restatement (Second) Conflict of Laws has never been adopted in Georgia, and because we continue to refuse to enforce contractual rights which contravene the policy of Georgia").

540 *See supra* notes 216, 219–220 and accompanying text.

541 *See supra* notes 217, 221 and accompanying text.

542 *See supra* notes 501–504 and accompanying text.

view, as the Georgia Supreme Court put it in *Slaton*, "[t]he common law is presumed to be the same in all the American states where it prevails."[543] If that is true, then any given state's courts could claim no special expertise or democratic connection to that general law. But it is *not* true. In the nineteenth century, courts applying the general commercial law could ground that law in a shared body of commercial custom that virtually all jurisdictions had agreed to respect. But outside of commercial law, principles of general law lacked any comparable positive grounding. To the extent that general law exists today, it is a collection of general principles and "best practices"—such as the American Law Institute's "Restatements"—that all agree require positive acts by particular jurisdictions in order to confer on them the force of law.[544] And when individual jurisdictions do adopt those principles, they inevitably do so with particular variations reflecting the fact they have been adopted as *state* law.[545]

There is, however, an even more fundamental reason that the Constitution mandates federal court deference to state court decisions. I have argued that whether or not state courts have a "backward-looking" lawmaking function, they surely have a "forward-looking" one.[546] That is, they have the authority and the obligation to settle the meaning of state law—at least unless and until the legislature intervenes—whether or not they have the authority to "make" that law in the first instance. The federal courts cannot perform that function; for reasons already discussed, it is exclusively delegated to the state courts. And because there is no "mystic over-law"[547] to apply as an alternative, federal courts can only apply the state law administered by the state courts.

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Erie affirms the definitive power and obligation of state courts to settle the meaning of state law, and that is sufficient to answer both Professor Nelson's and Professor Green's objections. But I doubt that this proposition about state law is *all* that *Erie* stands for. If *Erie* simply means that "the nation lacks power to make state law," as Professor Weinberg puts it, then "[n]othing in that holding qualifies national power to make federal law."[548] And yet *Erie* said that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the

543 148 S.E. 741, 743 (Ga. 1929).

544 *See* Nelson, *General Law*, *supra* note 74, at 505 ("In modern times, rules of [general law] are rarely thought to govern legal questions of their own force; they apply only to the extent that custom or positive adoption has incorporated them into the law of a particular sovereign.").

545 *See, e.g.*, Conrad & Kessler, *supra* note 538 (describing the variations in Georgia's adoption of the U.C.C.).

546 *See supra* notes 510–532 and accompanying text.

547 The Western Maid, 257 U.S. 419, 432 (1922) (Holmes, J.).

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

law of the state . . . There is no federal general common law."[549] *Erie* thus spoke not only to how federal courts ascertain the meaning of state law, but also to where state law and federal law respectively apply. It is the latter point that is critical for most of our contemporary debates about *Erie*, because those debates focus on federal courts' power to fashion federal common law or to apply common-law-like norms such as customary international law.[550] The remainder of my discussion focuses on this aspect of *Erie*.

IV. *ERIE*, JUDICIAL ACTIVISM, AND THE NEW DEAL SETTLEMENT

This last part briefly addresses *Erie*'s place in the architecture of contemporary federalism doctrine. That doctrine is largely a child of the New Deal, which put an end to the old dual federalism model and ushered in an era of largely concurrent federal and state regulatory authority.[551] This shift from separate and exclusive spheres of regulatory jurisdiction to largely overlapping ones preceded a parallel shift in the way that federalism is enforced. Under dual federalism, courts had drawn lines between the two regulatory worlds and invalidated measures, state or federal, that overstepped into the other government's territory. Contemporary federalism doctrine, by contrast, emphasizes the political and institutional safeguards of federalism—especially the representation of the states in Congress and the procedural difficulty of making federal law.[552] Although the leading case associated with this latter shift—*Garcia v. San Antonio Metropolitan Transit Authority*[553]—is also associated with judicial abdication,[554] it has become clear since that *Garcia*'s notion of "process federalism" can be enforced with significant bite.[555] Although the Court continues to enforce some sort of outer bound to Congress's authority,[556] the most important cases have to do with what goes on *within* the realm of Congress's enumer-

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

550 *See, e.g.*, Green, *Repressing*, *supra* note 5, at 623 (identifying customary international law as the true issue).

551 *See* Young, *Ordinary Diet*, *supra* note 289, at 257–61; Gardbaum, *supra* note 105, at 486.

552 *See* Wechsler, *supra* note 290 (stressing political safeguards); Clark, *Procedural Safeguards*, *supra* note 306.

553 469 U.S 528 (1985).

554 *See, e.g.*, William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

555 *See, e.g.*, Printz v. United States, 521 U.S. 898, 918–22 (1997) (relying in part on process arguments to hold that Congress may not commandeer state executive officials); *see generally* Young, *Two Cheers*, *supra* note 292; *see also* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341 (anticipating this development).

556 *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act as outside Congress's power under the Commerce Clause).

ated powers—powers which, after all, now largely overlap with those of the States.[557]

Where does *Erie* fit in all this? A significant school of thought holds that it doesn't fit at all. Kurt Lash asserts that *Erie* "had nothing to do with nationalism, redistribution, or any other part of the New Deal political agenda."[558] As Edward Purcell puts it, *Erie* "bore an oblique and problematic relationship to the jurisprudence of the 'Roosevelt Court.'"[559] And Suzanna Sherry, invoking the Court's expansion of federal authority in cases like *Wickard v. Filburn*[560] and *NLRB v. Jones & Laughlin*,[561] as well as its undermining of state sovereignty and "exclusive territoriality" in cases like *International Shoe Co. v. Washington*,[562] asserts that "[t]he *Erie* Court's solicitude for state sovereignty, and its reliance on 'pre-New Deal federalism,' is inexplicable in the midst of this march toward federal dominance."[563]

I have already rejected the notion that *Erie* relied on "pre-New Deal federalism,"[564] but I now want to press the further claim that *Erie* actually fits rather well with post-New Deal federalism jurisprudence. In fact, it is fair to say that *Erie* is the archetypal case of that jurisprudence. I do not claim that Erie is a *product* of the New Deal jurisprudence or quarrel with Professor Purcell's account of *Erie* as a specimen of Brandisian progressivism.[565] As Susan Bandes has noted, "[t]he age that gave rise to the *Erie* decision was ending as the decision was issued, dramatically altering many of the social concerns and political assumptions on which the decision had been based."[566] I do claim that *Erie*, despite being a product of an earlier era, fit beautifully with the federalism doctrine that would emerge after the New Deal.

The statements from Professor Sherry and others quoted above take an unfortunately simplistic view of what the New Deal and the New Deal Court accomplished. The point, as Stephen Gardbaum has well demonstrated, was not simply to achieve "federal dominance" but to liberate government at *both* the state and national levels from the constraints imposed

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557 *See* Young, *Ordinary Diet*, *supra* note 289, at 261–65.

558 Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 461 (2001).

559 PURCELL, *supra* note 9, at 3.

560 317 U.S. 111 (1942).

561 301 U.S. 1 (1937).

562 326 U.S. 310 (1945).

563 Sherry, *Wrong*, *supra* note 6, at 148 (quoting Green, *supra* note 5, at 607); *see also* Bandes, *supra* note 237, at 850 (arguing that *Erie*'s federalism—at least as understood by its Legal Process school defenders—was completely cut off from its historical roots).

564 *See supra* Part III.A.1.

565 *See* PURCELL, *supra* note 9, at 114.

566 BANDES, *supra* note 237, at 849.

on it by the Old Court.[567] Those constraints included not only a more limited affirmative commerce power, but also notions of economic substantive due process and a rigorously enforced dormant Commerce Clause that kept the states from regulating pursuant to their view of the public interest.[568] After the New Deal, both the national and the state governments enjoy broad regulatory scope, and attention necessarily shifts to the modes of resolving conflicts that may arise between their efforts.[569]

Erie's place in this post-New Deal vision stands out in the preface to the first edition of the famous *Hart & Wechsler* casebook on federal jurisdiction, published in 1953. That preface compares the "[p]roblems of federal and state legislative competence" that generally arise in "elementary courses in constitutional law" with the problems to be addressed in the new book.[570] The former sort of problems, which "arise in clear-cut instances of conflict" and call for "adjudication of competing claims of power," "touch only the beginnings of the problems."[571] Rather,

> [f]or every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power; Congress has been silent with respect to the displacement of the normal state-created norms, leaving courts to face the problem as an issue of choice of law.[572]

The latter sort of case is, of course, *Erie*. No federal statute had sought to set a railroad's duty of care to a passerby, and thus the case presented no question of "ultimate power"; instead, the federal diversity court faced a difficult "choice of law" problem in judging between the general common law and the law of the state. In a world of largely concurrent jurisdiction, Professors Hart and Wechsler insisted, these would be the most important problems.[573]

The judicial federalism rationale of *Erie* also fits comfortably with the process federalism that dominates contemporary federalism doctrine. Justice Blackmun explained in *Garcia* that "the principal means chosen by the

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567 Gardbaum, *supra* note 105, at 486 ("[W]hat occurred in many areas was not a shift from exclusive state authority to concurrent federal and state authority, but a shift from a regulatory vacuum to concurrent powers: *both* federal and state governments were constitutionally enabled to regulate a large number of areas of social and economic life that previously they had both been prohibited from regulating.").

568 *See id*. at 564–65.

569 *See* Young, *Ordinary Diet*, *supra* note 289, at 261–62.

570 Quoted in HART & WECHSLER, *supra* note 66, at vi.

571 *Id.*

572 *Id.*

573 *See* Mishkin, *supra* note 284, at 1686 (arguing that *Erie* is of profound constitutional significance whether or not Congress could override it, because "it rests on premises related to the basic nature of our federal system which are presupposed to govern in the absence of clear congressional determination to change and reallocate power within that system").

Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[574] Separation of powers at the national level, in other words, is the key to federalism. Hence, as Brad Clark has recognized, "the Constitution prescribes precise procedures to govern the adoption of each source of law recognized by the Supremacy Clause as 'the supreme Law of the Land,'" and "all of these procedures assign responsibility for adopting such supreme law solely to actors subject to the political safeguards of federalism."[575] And whatever doubts one might have about the efficacy of political safeguards standing alone,[576] "federal lawmaking procedures continue to constrain federal lawmaking simply by establishing multiple 'veto gates,' and thus effectively creating a supermajority requirement."[577] In the later stages of the *Swift* regime, federal courts had begun to displace state law by formulating effectively federal rules of decision without regard to this system of structural safeguards.[578] By insisting that federal courts may not make federal law outside the constitutionally ordained legislative process, *Erie* became the central decision of modern process federalism.[579]

Professor Purcell offers a different view near the conclusion of his book on *Erie*. He contends that "[a]lthough *Erie* constrained the federal courts in some ways, it also channeled them in new directions where they could enjoy freedom and, eventually, even greater power."[580] He worries that Justice Brandeis's judicial federalism "corollary" has become "of uncertain import" in contemporary jurisprudence, "because the social and institutional trajectory of the twentieth century challenged the corollary's wisdom and utility, and hence its power to command judicial allegiance."[581] "[I]n an age of accelerating interstate and international integration," he writes, judges "could not deny the compelling need for effective national ordering in those areas they valued most highly and thought most essential to the nation's well-being."[582] Purcell supports this concern by noting a scholarly literature asserting that "[t]he Rehnquist Court . . . actively made

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574 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985).

575 Clark, *Erie's Source*, *supra* note 90, at 1304.

576 *See, e.g.*, Prakash & Yoo, *supra* note 305, at 1459 ; Baker & Young, *supra* note 305, at 106–33.

577 Clark, *Erie's Source*, *supra* note 90, at 1304–05.

578 *See, e.g.*, BRIDWELL & WHITTEN, *supra* note 63, at 115–27; HART & WECHSLER, *supra* note 66, at 556–58; Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1319 (2000).

579 This is not lost on all of *Erie*'s critics. GREVE, *supra* note 4, at 242 ("[T]he true protection for the 'states as states' is not their representation in Congress. Rather, it is the certainty that *Congress will consistently fail to enact, and federal courts will under* Erie *refuse to supply, federal rules of decision in a specified domain*—the state exploitation of interstate commerce. So viewed, *Erie*'s legacy dovetails with the New Deal's ambivalent preemption doctrine.") (emphasis in original).

580 PURCELL, *supra* note 9, at 300.

581 *Id.* at 302.

582 *Id.*

law implementing its values, sometimes ignoring or setting aside congressional actions in the process."[583]

It is hard to say, however, that the Rehnquist Court's activism—such as it was—cut against *Erie*'s principle of judicial federalism. That Court continued an earlier tendency to restrict federal common law with respect to both primary obligations and implied federal remedies.[584] The Court's 2004 decision in *Sosa v. Alvarez-Machain*[585] provides an important example. In its first significant encounter with human rights suits under the Alien Tort Statute,[586] the Court wrote that "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute."[587] Prominent among these reasons were the conception of law affirmed in *Erie* and that decision's "significant rethinking of the role of the federal courts in making [common law]."[588] Whether or not *Sosa* resolved the longstanding dispute about the status of customary international law in domestic courts,[589] it left little doubt about the continuing importance of *Erie* as a restraint on judicial lawmaking.

Moreover, Professor Purcell's assurance that the future belongs to national power may itself be out of date. In 1937, at the height of the New Deal (and a year before *Erie*), a significant majority of Americans favored concentration of power in the federal government as opposed to the

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583 *Id.* at 406 n.85.

584 *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (narrowing the implied right of action under the Alien Tort Statute to exclude wholly extraterritorial cases); Alexander v. Sandoval, 532 U.S. 275 (2001) (restricting federal common law implied rights of action under federal statutes); O'Melveny & Myers v. FDIC, 512 U.S. 79, 83–86 (1994) (holding that state law governed the liability of a failed bank's former law firm in a suit brought by a federal agency as receiver); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (establishing a balancing test for federal common lawmaking that presumptively tips in favor of state law); *but see* Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (establishing a federal common law "military contractor defense" in products liability actions, even though the United States was not a party). For an overall assessment, *see generally* HART & WECHSLER, *supra* note 66, at 629 (stating that "characteristic[s] of the Court's current approach to federal common lawmaking" include "careful analysis of the asserted need for uniformity, concern that federal rules of decision will generate intrastate disuniformity, and a preference for incorporation of state law absent a demonstrated need for a uniform federal rule of decision").

585 542 U.S. 692 (2004).

586 28 U.S.C. § 1350 (conferring jurisdiction on the federal courts in a "civil action by an alien for a tort only, committed in violation of the law of nations"). On the ATS, *see generally* HART & WECHSLER, *supra* note 66, at 679–85.

587 *Sosa*, 542 U.S. at 725.

588 *Id.* Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have gone further and eliminated altogether judicial discretion to recognize customary international law claims under the ATS, based on "*Erie*'s fundamental holding that a general common law *does not exist*." *Id.* at 744 (Scalia, J., concurring in part and in the judgment) (emphasis in original).

589 *See, e.g.*, Bradley, Goldsmith, & Moore, *supra* note 16 (addressing this question); Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. FORUM 28–35 (2007), available at http://www.harvardlawreview.org/media/pdf/young.pdf (same).

states;[590] however, a recent overview of opinion research observed that "trust in the federal government has declined since the 1960s," while "attitudes toward subnational governments have held steady or even improved."[591] A survey in April of 2013 found that 57% of Americans viewed state governments favorably while only 28% viewed the federal government favorably.[592] Because our system rests, as Alexander Hamilton pointed out, on intergovernmental competition for "the confidence and good will of the people," these opinion trends matter.[593]

These trends in public opinion correspond to changes in institutional reality. As Alice Rivlin has observed, "[t]he dissatisfaction with state government that reached a crescendo in the 1960s not only prompted an explosion of federal activity, it also brought a wave of reform to the states themselves. . . . [S]tates took steps to turn themselves into more modern, responsive, competent governments."[594] The result is an increasingly stark contrast between political gridlock at the national level and policy innovation in the states. States have led the way on gay rights, with the federal government acting primarily as a brake on reform.[595] Individual states have

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590 *See* Megan Mullin, *Federalism*, *in*, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 209, 217 (Nathaniel Persily, Jack Citrin & Patrick J. Egan, eds. 2008). In the 1937 poll, Americans favored the federal government by 46 to 34 percent; in polls with the same wording taken in 1981 and 1995, those numbers had reversed to 28 to 56 percent and 26 to 64 percent, respectively. *Id.*

591 *Id.* at 214 (collecting opinion studies from 1976 to 2006).

592 *See* PEW RESEARCH CTR., *supra* note 17. By October, in the midst of the latest round of government shutdown and debt ceiling follies, the federal government's favorable had declined further to 19 percent. *See* PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably* (October 18, 2013), *available at* http://www.people-press.org/files/legacy-pdf/10-18-13%20Trust%20in%20Govt%20Update.pdf. The October poll does not appear to have addressed confidence in state governments. *See also* Chris Cilizza & Aaron Blake, *Are We in the End Times of Trust in Government*, WASH. POST (Feb. 7, 2013), *available at* http://www.washingtonpost.com/blogs/the-fix/wp/2013/02/07/are-we-in-the-end-times-of-trust-in-government/ (lamenting a steep and lasting decline in trust in the *federal* government, but ignoring data on robust public trust in the states).

593 The Federalist No. 17 (Alexander Hamilton), at 109 (J.E. Cooke ed., 1961); *see also* Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L. J. 1669 (2007) (arguing that trust levels affect the federal balance of power).

594 ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT 102 (1992); *see also* PHILIP W. ROEDER, PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES 24-27 (1994) (collecting studies indicating that state governmental capacity has improved significantly in recent decades); Van Horn, *supra* note 17, at 2–3 (describing a "quiet revolution" as a result of "changes in representation, government organization, and managerial competence" at the state level, with the result that "[s]tate officials are far more willing and able to carry out significant responsibilities").

595 *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (striking down the federal Defense of Marriage Act, which denied federal recognition to same-sex marriages, as applied to a couple married under the laws of New York; the Court emphasized that "[t]he State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import"); Letter from Dayna K. Shah, Managing Assoc. Gen. Cousnel, GAO, to Senators Tom Harkin, Susan Collins &

developed their own policies to combat global warming even while pressing a reluctant federal government to take action.[596] States have played a similar role on immigration reform, taking action on their own while also stimulating a national debate on the subject.[597] Even healthcare reform, the current administration's signature national policy innovation, seems to have dubious prospects at the national level while individual states continue to pursue more radical reforms.[598]

It is thus far from obvious that, as Professor Purcell contends, our "social and institutional trajectory" continues to undermine the "wisdom and utility" of *Erie*'s view of federalism. Many lawyers and academics formed their views about federalism in an earlier era, when state autonomy seemed both technologically outdated and morally retrograde.[599] Whether or not that view was ever fair, a lot has happened since then, and Purcell's view

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Jeff Merkely, *Re: Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data* (Oct. 1, 2009), *available at* http://www.gao.gov/new.items/d10135r.pdf ("Although federal law does not prohibit discrimination in employment on the basis of sexual orientation, 21 states and the District of Columbia provide such protection in their statutes.").

596 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (upholding the standing of a group of states to challenge the federal Environmental Protection Agency's refusal to issue regulations governing greenhouse gas emissions); Rocky Mt. Farmers Union v. Corey, 2013 U.S. App. LEXIS 19258, at *13 (9th Cir. Sept. 18, 2013) (upholding California's Low Carbon Fuels Standard against a dormant Commerce Clause challenge and noting that "California's role as a leader in developing air-quality standards has been explicitly endorsed by Congress in the face of warnings about a fragmented national market"); *see also* REGIONAL GREENHOUSE GAS INITIATIVE, http://www.rggi.org/home (last visited Nov. 3, 2013) (agreement by nine northeastern and mid-Atlantic states to establish a regional cap and trade program for electric generating plants).

597 *See generally* David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264483; Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

598 *Compare, e.g.*, Amy Goldstein & Juliet Eilperin, *Healthcare.gov: How political fear was pitted against technical needs*, WASH. POST, Nov. 2, 2013, available at http://www.washingtonpost.com/politics/challenges-have-dogged-obamas-health-plan-since-2010/2013/11/02/453fba42-426b-11e3-a624-41d661b0bb78_story.html?hpid=z1 (documenting "the disastrous rollout of the new federal health insurance marketplace"); Susan Page, *USA Today/Pew Poll: Health care law faces difficult future*, USA TODAY (Sept. 16, 2013), *available at* http://www.usatoday.com/story/news/politics/2013/09/16/usa-today-pew-poll-health-care-law-opposition/2817169/ ("53% disapprove of the health care law, the highest level since it was signed; 42% approve. By an even wider margin, intensity favors the opposition; 41% of those surveyed strongly disapprove while just 26% strongly approve."), *with* Zach Howard, *Vermont Single-Payer Health Care Law Signed by the Governor*, REUTERS (May 26, 2011, 2:44 PM), *available at* http://www.huffingtonpost.com/2011/05/26/vermont-health-care-reform-lawsingle-payer_n_867573.html.

599 *See, e.g.*, Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACADE. POL. & SOC. SCI. 66, 67 (2001) ("In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct.").

now seems, well, *so sixties*.[600] In an era of resurgent and innovative states, accompanied by national gridlock, *Erie*'s concern for preserving state autonomy is more relevant and more critical than ever.

It is *Erie*'s limitation of judicial lawmaking that may ultimately motivate some of the more violent attacks on its holding. According to Professor Sherry, "that new myth [*Erie*'s judicial federalism rationale] has lent support to a distorted view of what judges do and what they are supposed to do, in ways that are detrimental to our constitutional democracy."[601] Sherry thus complains that *"Erie* has been drafted into service in the war against judicial 'activism.'"[602] *Erie*'s real victim, this view suggests, was not so much *Swift v. Tyson* as *Roe v. Wade*.[603] The consequences, moreover, are dire and far-reaching: According to Sherry,

> We are now enjoying the benefits of *Erie*'s dichotomy [between "legitimate judicial interpretation and illegitimate judicial lawmaking"] in the form of a highly politicized judicial nomination process, and academic calls either to abandon judicial review and substitute popular constitutionalism or to constrain judicial discretion by means of some utopian grand theory of interpretation. The judiciary, it seems, is in danger of losing both its independence and its ability to lead.[604]

This is all a bit overheated for me. In the years that *Erie* has been understood primarily as a limitation on judicial lawmaking, the Supreme Court has decided not only *Roe* but also *Lawrence v. Texas*,[605] *Roper v. Simmons*,[606] *Citizens United v. FEC*,[607] and *Bush v. Gore*.[608] The Court hard-

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600 *See, e.g.*, Gerken, *supra* note 396 (extolling a "new progressive federalism").

601 Sherry, *Wrong*, *supra* note 6, at 150.

602 *Id.* at 151.

603 410 U.S. 113 (1973).

604 Sherry, *Wrong*, *supra* note 6, at 152–53. Each of these specific claims is highly suspect. It is not clear that the nomination process is any more "politicized" than in the past, at least for supreme court justices. And I doubt the fights over the lower federal courts have much to do with federal common law. Academic calls to 'take the Constitution away from the courts' enjoyed barely fifteen minutes of prominence before going back out of style, thanks to the appointment of some liberal justices more to the academy's liking and, possibly, some pretty devastating reviews. *See, e.g.*, Lucas A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEXAS L. REV. 855 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW and demonstrating that the most plausible historical instance of "popular constitutionalism" was the South's "massive resistance" to school desegregation). And while originalism has become more mainstream as a theory of constitutional interpretation, that is owing largely to its becoming *less* "utopian"—that is, originalists have loosened the constraints that it purports to impose on judges. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (embracing a "fainthearted" brand of originalism); JACK M. BALKIN, LIVING ORIGINALISM (2011) (pushing a brand of "originalism" that is basically the same as living constitutionalism).

605 539 U.S. 558 (2003).

606 543 U.S. 551 (2005).

607 558 U.S. 50 (2010).

608 531 U.S. 98 (2000).

ly seems deterred either from addressing the great issues of the day or from exercising considerable creativity in doing so. And I doubt that the critics of those decisions will pack up their tents and go home if *Erie* can be shown to be in error. Debates about the proper latitude of construction for constitutional provisions and statutes did not start with *Erie*, and they will persist long after *Erie* has been forgotten.

Putting aside the abundant evidence that the Court is doing just fine in terms of its "independence and its ability to lead,"[609] it is a monstrous leap to lay current threats to judicial legitimacy at *Erie*'s door. What *Erie did* help to do, however, was to divert federalism doctrine from the highly confrontational track that it had been on prior to the New Deal. Instead, we now have a federalism doctrine that is largely deferential to the political process, stepping in where necessary to remedy distortions or circumventions of that process.[610] I have argued elsewhere at length that this sort of role not only plays to judicial competence, but also avoids the risk of damaging institutional confrontations that characterized the era of dual federalism.[611]

Similarly, Craig Green's contempt for *Erie* seems to be motivated by the impediment it poses to his generation's equivalent to Professor Sherry's substantive due process: customary international law (CIL).[612] The *Erie* doctrine is hardly the only problem with CIL[613] or with current international human rights litigation in American courts,[614] but *Erie* does provide the most compelling argument against the federalization of CIL norms through federal judicial decisions.[615] It is hard to think of many instances nowadays, however, where such federalization is actually important to the agenda of international human rights,[616] and Congress retains the power to federalize

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609 Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, in PERSILY, CITRIN & EGAN, *supra* note 590, at 333, 348–49 (concluding, based on extensive studies of polling data, that the Supreme Court retained broad public support even after the controversy over *Bush v. Gore*).

610 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (refusing to invalidate the "individual mandate" to purchase health insurance under the national Affordable Care Act, but limiting Congress's ability to coerce state participation in the Medicaid expansion and leaving states to make the ultimate judgment about whether to expand their benefit programs).

611 *See* Young, *Two Federalisms*, *supra* note 305, at 65–121.

612 *See* Green, *Repressing*, *supra* note 5, at 623–24.

613 *See, e.g.*, Kadens & Young, *supra* note 77 (arguing that CIL is not actually customary); Kelly, *supra* note 76, at 463-65 (arguing that CIL is not even law).

614 *See* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1669 (2013) (concluding that the Alien Tort Statute does not apply to extraterritorial claims).

615 *See, e.g.*, Sosa v. Alvarez–Machain, 542 U.S. 692, 725–26 (2004); Bradley & Goldsmith, *supra* note 243, at 827; Young, *CIL*, *supra* note 84, at 493–96.

616 For many years, the central examples advanced by human rights advocates of CIL norms that might trump state law involved international law limits on the death penalty. *See, e.g.*, Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 322–26. But these arguments have become largely moot as the Supreme Court has significantly expanded Eighth Amendment limitations on capital punishment. *See, e.g.*, Roper v. Simmons, 543 U.S.

customary norms by statute.[617] Significantly, the federal courts *have* asserted the power to make federal common law in foreign affairs cases, but they have generally used that power to *avoid* making broad statements about international law norms.[618] That tendency suggests that caution would prevail concerning the federalization of CIL norms even if *Erie* had come out differently. In any event, *Erie*'s limits on CIL are plainly in step with the contemporary Court's caution about international law generally.[619]

Far from being out of step with the jurisprudence of its era, then, *Erie* has proven critical to the New Deal Settlement. As Professor Purcell ultimately acknowledges, *Erie* "established an essential foundation for the continued operation of legal federalism in a new age of centralization, nationalization, and globalization."[620] If the current American correlation of political forces tells us anything, it is that contemporary pressures to centralize coexist with resurgent vitality at the state level, even as national governance seems in crisis. *Erie*'s interstitial vision of federal law is thus more central than ever. This is not because subsequent interpreters have twisted *Erie* to suit their own purposes, but rather because Justice Brandeis recovered what the Founders had known all along—that federalism and separation of powers are integrally related, and that the processes by which laws are made may often be more important than substantive constraints on those laws. In so doing, *Erie* put constitutional law on a better footing to deal with the bewildering complexity of modern governance. That is why *Erie* deserves to be understood as the central case of contemporary American federalism.

CONCLUSION

Michael Greve is no doubt right that, as a practical matter, *Erie* stands "unassailable" today.[621] The decision's correctness and rationale remain worth debating, however, if only because they provide a useful practical

551 (2005) (striking down the juvenile death penalty). It is not obvious what will replace the juvenile death penalty as a doctrinal flashpoint for the CIL issue. Ironically—from Professor Green's perspective—the best candidate may involve CIL limits on expropriation of private property, which property rights advocates might invoke to ratchet up scrutiny in takings cases.

617 *See* U.S. CONST. art. I, § 8 (conferring power on Congress "[t]o define and punish . . . offenses against the law of nations").

618 *See, e.g.*, Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (explaining the Court's reluctance to apply controversial CIL norms of expropriation).

619 *See, e.g.*, *Kiobel*, 133 S. Ct. at 1664 (warning about "the danger of unwarranted judicial interference in the conduct of foreign policy"); Sanchez–Llamas v. Oregon, 548 U.S. 331, 334 (2006) (refusing to defer to the International Court of Justice on a question of treaty interpretation); Medellin v. Texas, 552 U.S. 491, 508 (2008) (holding that an International Court of Justice judgment ordering reconsideration of a domestic capital conviction of a foreign national was not self-executing and thus could not be enforced absent action by Congress).

620 PURCELL, *supra* note 9, at 299.

621 GREVE, *supra* note 4, at 373.

frame for some of the most fundamental questions of jurisprudence and constitutional structure. These include not only what we should understand judges to be doing when they decide cases, but also the division of lawmaking power between the branches of the national government and the appropriate model for preserving the federal balance. If *Erie* were otherwise, far more would change than the law applied in diversity cases.

But as often happens, the conventional wisdom turns out to be correct: *Erie* was right, basically for the reasons given in the opinion. The Rules of Decision Act requires federal courts to apply state law in the absence of positive federal law, not because of some dubious inference from the Act's drafting history but because the kind of general common law that the states accepted during the *Swift* era no longer exists. *Erie*'s insistence on vertical uniformity—that federal and state courts sitting in the same state should apply the same law—is far from perfect, but the alternative of horizontal uniformity among federal courts in different states is likely unattainable; in any event, the obstacle to that uniformity is not *Erie* but rather the lack of uniform and territorial choice of law rules. Justice Brandeis's nonconstitutional arguments, in other words, remain sound today.

It is *Erie*'s constitutional reasoning, however, that should claim it a place at the center of the structural canon. If the Civil Procedure teachers will not teach it—an endemic problem in some law schools—then the Constitutional Law faculty should. Because "law in the sense in which courts speak of it today does not exist without some definite authority behind it,"[622] the displacement of state law must be traceable to the valid exercise of federal lawmaking authority. Under the federal separation of powers, that authority generally belongs to Congress, which can legislate only by a difficult process in which the states are represented. Outside the ambit of federal legislation (or, sometimes, uniquely preemptive federal interests), the state law background remains in force. This interstitial view of federal law, with a broad national lawmaking jurisdiction circumscribed by political and procedural safeguards, remains the most promising model for maintaining our federal balance in the modern era.

Attacks on *Erie* generally arise out of dissatisfaction with this model. Federalism is untidy. When one has figured out the optimal legal answer to a pressing problem, it is hard to see why that solution ought not be adopted across the board. Democracy is untidy, too, and it is always tempting for smart people to look to smart judges to fashion new rights or new solutions when the democratic process seems stalled or uninterested. Against these impulses, *Erie*'s vision of federalism and separation of powers stands for humility. Consensus eludes us on many important questions, and federalism's messy patchwork helps us generate new answers or, sometimes, agree to disagree. Likewise, history teaches us that federal judges have their own

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

foibles as lawmakers; our Constitution places its bet on a uniquely American form of mixed government.

However "unassailable" *Erie* may be in its original context of choice of law in diversity cases, the decision's import sweeps far more broadly. It is, as I began by saying, the most important federalism decision of the twentieth century. What remains is for courts and commentators to take *Erie*'s rationale more seriously in the important and related debates that continue to arise in the twenty-first. These include matters of administrative preemption, the domestic status of customary international law, and continuing controversies over the lawmaking authority of federal courts. *Erie*'s wisdom may be conventional, but it still has much to teach us.