A GENERAL DEFENSE OF ERIE RAILROAD CO. V. TOMPKINS

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I. THE ERIE AND SWIFT DECISIONS .......................................................... 21

II. THE STATUTORY AND PRAGMATIC ARGUMENTS ..................................... 25
  A. The Rules of Decision Act ................................................................. 25
     1. The Text of Section 34 ................................................................. 25
     2. General and Local Law in the Nineteenth Century ......................... 30
  B. Uniformity and Discrimination ........................................................... 45
  C. Erie, Chevron, and Deference to State Judges on State Law Questions .... 52

III. THE CONSTITUTIONAL ARGUMENT ......................................................... 57
  A. Erie and Positivism ............................................................... 57
  B. Erie and Federalism ............................................................... 64
     1. Legislative Power and Dual Federalism ......................................... 64
  C. Objections .................................................................................... 76
     1. Erie’s Original Meaning ............................................................... 76
     2. Erie and the Legal Process School ............................................... 82
     3. Are Judicial and Legislative Powers Coextensive? ......................... 87
     4. Proving Too Much and Too Little: Judicial Lawmaking and the Administrative State ................................................................. 94
  D. Erie’s Premises: The State Courts’ Power and Inclination to Make Law .. 100
     1. Lawmaking Power and Deference to State Courts ......................... 101
     2. What if State Courts Don’t Want Federal Deference? ....................... 108

IV. ERIE, JUDICIAL ACTIVISM, AND THE NEW DEAL SETTLEMENT ......... 112

CONCLUSION ............................................................................................. 121

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Erie Railroad Co. v. Tompkins\textsuperscript{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.” \textsuperscript{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.\textsuperscript{4} Craig Green has described Erie’s rationale as a “myth” that must be “repressed,”\textsuperscript{5} and Suzanna Sherry has even gone so far as to brand Erie “the worst decision of all time.”\textsuperscript{6} Outside the ivory tower, Erie’s restrictive vision of federal law-

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\item 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.
\item 304 U.S. 64 (1938).
\item Id. at 78.
\item Craig Green, Repressing Erie’s Myth, 96 Calif. L. Rev. 595, 596 (2008) [hereinafter Green, Repressing].
\item 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 and expansive theories of federal common law.  

Although Ed Purcell noted over a decade ago that the *Erie* literature had reached “staggering proportions,” *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.” 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.

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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. Rejekting 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.” Although the extent to which *Erie* necessarily implicated issues of positivism and legal realism remains disputed, 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. 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. Likewise, in an era of resurgent dynamism at the state level, *Erie*’s respect for the preservation of state pre-

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17 See, e.g., PEF RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, *State Governments Viewed Favorably as Federal Rating Hits New Low* (April 15, 2013), http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/ (“Even as 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. 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*. Part II considers *Erie*’s statutory and pragmatic arguments, rehabilitating *Erie*’s interpretation of the Rules of Decision Act without insisting that Justice Story got that statute wrong at the time *Swift* was decided. Part III turns to the main event—*Erie*’s constitutional rationale. That rationale, I submit, correctly wove together notions of federalism and separation of powers by insisting that Congress, not the federal courts, must act in order to displace state law. Finally, Part IV situates *Erie* within the broader context of contemporary federalism doctrine. *Erie* is far from an anachronism, as some critics have suggested; rather, I argue that, federalism-wise, we are living in the Age of *Erie*.

I. THE *Erie* AND *Swift* DECISIONS

On a “dark night” in Pennsylvania, an Erie Railroad Company freight train struck Harry Tompkins, a twenty-seven-year-old factory worker who...
was walking on a footpath alongside the train tracks. 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. 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. 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.” 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.” 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. The Supreme Court granted certiorari “because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law.”

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.” Erie thus cannot be understood apart from Swift, decided by Justice Story in 1842. That case arose out of a complicated series of credit transactions involving a shady land speculation

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.\textsuperscript{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.\textsuperscript{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 \textit{bona fide} holder and therefore not subject to any fraud defense that Tyson might raise.\textsuperscript{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 \textit{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{30} Tony Freyer has attempted to untangle the transactions in some detail in his extremely helpful book, see Tony Freyer, \textit{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, \textit{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.

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

\textsuperscript{32} See Swift, 41 U.S. (16 Pet.) at 15–16.

\textsuperscript{33} \textit{Id.} at 16–18.

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

\textsuperscript{35} Swift, 41 U.S. (16 Pet.) at 18.
of general commercial law.”

On these more general questions, the federal court’s obligation was “to ascertain, upon general reasoning and legal analogy, . . . the just rule furnished by the principles of commercial law.”

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. 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.

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.”

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,” Justice Brandeis read it to govern “all matters except those in which some federal law is controlling.” 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. 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.”

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.”

*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.

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

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”).
50 Erie R. Co. v. Tompkins, 304 U.S. 64, 72 (1938).
51 Id.
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. 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.” As Judge Friendly observed, “the debate only demonstrates on what quicksand any attempt to interpret so vulnerable a statute on the basis of an unexplained change from an earlier draft must rest.”

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.”

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.


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
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.’” 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.

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. 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. 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.” “This Court adopts the State decisions,” the Court had said, “because they settle the law applicable to the case.” 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.
The critical point is that Justice Story thought this distinction—between local and general law—captured the meaning of the Rules of Decision Act. 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.” 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. 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.

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-
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 judical authorities in *Swift*, the underlying commercial law principles rested on the customary practices of merchants.\(^{78}\)

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

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

\(^{76}\) See, e.g., BRIDWELL & WHITTHEN, 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.”).


\(^{78}\) 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. Roberts, L.R. 10 Exch. 337, 346 (1875).

\(^{79}\) FREYER, supra note 30, at 23–25.

\(^{80}\) See, e.g., BRIDWELL & WHITTHEN, 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, a court cannot articulate a legal rule reflecting the practices of private actors without also, to at least some degree, shaping those practices. 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. 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. 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.

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”).

“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.

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.”).

See, e.g., Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 V.A. 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 & WHITTEM, 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).

See, e.g., BRIDWELL & WHITTEM, 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’”).

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 ARIZ. 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 lawmakership 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.” 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.” 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.”

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

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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.


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

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

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

93 Id.
94 BRIDWELL & WHITTEN, supra note 63, at 99.
95 41 U. S. (16 Pet.) 1, 19 (1842).
96 See, e.g., FREYER, supra note 30, at 39–40 (noting that state judges shared independent authority to develop commercial law with the federal courts); Fletcher, supra note 90, at 1515 (“In marine insurance cases, deviations by individual state courts from the general law were sufficiently rare that these courts, even when they disagreed, considered themselves engaged in the joint endeavor of deciding cases under a general common law.”).
97 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. 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.” 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.”

States generally chose not to localize commercial rules, because “it would have constituted commercial suicide for them to do so beyond certain boundaries.” 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.

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. 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.”).


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 limitation 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. Chic. L. Rev. 483 (1997) (describing the loosening of dormant Commerce Clause constraints on state law after 1937). Despite occasional decisions suggesting limits on extraterritorial state regulation, see, e.g., BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996), no one thinks that the states simply lack power to regulate commercial transactions that cross state lines.

106 See, e.g., Field, Sources of Law, supra note 55, at 903 (observing that “the last clause, ‘in cases where they apply,’ without any specification of what those cases might be, leaves the provision open to
as referring to the two boundaries of the general law. In many areas, such as real property, the law had always been “localized”; in others a state might choose to abrogate its prior commitment to the general customary rules. In either scenario, however, the question of state law’s scope was itself a question of state law. Recall that Justice Story begins the critical passage in Swift not simply by noting the commercial nature of the question presented, but by observing the stance taken by the state’s courts: “[T]he courts of New York do not found their decisions upon . . . any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law.”107 In other words, Story did not derive the general law’s applicability in Swift from some categorical federal choice of law principle, but rather from the decision of the New York state courts to follow the general law in cases like Swift. It is, on this view, always a matter of local law whether general law applies.108 Hence Section 34’s language referred to state law rules about the choice between local and general law.109

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

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

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

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

108 See, e.g., Bellia & Clark, supra note 49, at 658 (“[W]hen federal courts applied general commercial law, they did not displace state law, but rather acted in accord with a state’s choice to apply general commercial law.”); Hill, supra note 102, at 443 (“In equity no less than at common law the federal courts tended to apply state law which was cognizable as such, resorting to independent applications of the ‘general law’ insofar as the ‘general law’ was understood to be the law of the state.”).
109 That language also presumably incorporated the Supremacy Clause’s principle that state law cannot apply where it has been displaced by a validly-enacted federal rule. But as already explained, no such rules were present in cases like Swift or Erie.
110 BRIDWELL & WHITTEN, supra note 63, at 99.
111 Id.
such conflict principles dictated that it apply, but not otherwise."  

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. 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.” States would not be permitted to localize their law retroactively to the detriment of out-of-staters. 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. 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. 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. As Larry Lessig has explained,

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

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

114 Id. at 99.

115 See id. at 129.

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


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
This 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.\textsuperscript{119}

\textit{Baugh} made clear that the Court’s criteria for which issues were governed by general law had expanded considerably:

\textit{The 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.}\textsuperscript{120}

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


Some revisionist scholars have argued that \textit{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 \textit{Swift} failed to read Section 34 as a broad mandate “for federal courts sitting in diversity . . . to apply federal common law.”\textsuperscript{123} This argument, which relies on the work of the late Wilfred Ritz,\textsuperscript{124} focuses not on the word “laws” but on the meaning of “the several states.” Professor

\textsuperscript{119} Lessig, \textit{supra} note 78, at 1792.
\textsuperscript{120} 149 U.S. at 378.
\textsuperscript{121} See, \textit{e.g.}, Town of Venice v. Murdock, 92 U.S. 494 (1875); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).
\textsuperscript{122} See, \textit{e.g.}, Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870).
\textsuperscript{123} Sherry, \textit{Wrong}, \textit{supra} note 6, at 135.
Ritz pointed to usage by eighteenth century legal draftsman that frequently employed “the several states” to mean “the states as a group” rather than each state individually. 125 That suggested that Section 34 should be read to require federal courts to apply “American law generally” rather than “the law of a particular state.” 126 Adopting Ritz’s reading, Professor Sherry concludes that “the instruction in Section 34 to apply ‘the laws of the several states’ directed courts not to the law of any individual state, but rather to the law of all states—in other words, to federally-developed common law. The purpose was to ensure that American law, not British law, would apply in the federal courts.” 127 Sherry’s view seems to be that this law was plainly federal—not “general”—in nature. 128

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

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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., Grève, 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 Rutherford, Reconstructing Erie: A Comment on the Perils of Legal Positivism, 10 Const. Comment. 285, 286 (1993) (“endorse Ritz’s reasoning”); Jay Tidmarsh, A Theory of Federal Common Law, 100 NW. U. L. Rev. 585, 615–16, 615 n.193, 616 n.194 (2006) (relying on Ritz’s conclusions); see also Peter W. Low, John C. Jeffries, Jr. & Curtis A. Bradley, Federal Courts and the Law of Federal-State Relations 9–11 (7th ed, 2011) (offering an extended and uncritical summary of Ritz’s evidence and argument); Green, Twin Aims, supra note 18, at 1889 (also endorsing Ritz’s reading, but concluding that it simply makes the Rules of Decision Act irrelevant to “the division of common lawmaking power between federal and state courts”).
130 Ritz, supra note 124, at 83. Significantly, Professor Ritz admitted that “there is no hard-and-fast rule requiring” this distinction and that even within the Judiciary Act itself, “[i]n some contexts either word may be appropriate and one may disagree as to which is the most felicitous.” Id. at 83, 87.
ample, he cites a handful of isolated early state laws, as well as a couple of statements and actions by federal officials, but none establishes the sort of collective meaning that Ritz’s argument attributes to “several.” Consider this order issued by the Continental Congress in 1777:

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

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

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

131 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 777–78 (Worthington Chauncey Ford ed. 1907) (quoted in Ritz, supra note 124, at 83) (Ritz’s italics).
132 The closest thing today would be the National Association of Attorneys General, but it is not an official body and in any event was not founded until 1907. See About NAAG, NAT’L ASS’N OF ATTORNEYS GEN., http://www.naag.org/about_naag.php (last visited Sept. 29, 2013).
133 U.S. CONST. art. II, § 2, cl. 1 (cited in Ritz, supra note 124, at 84) (Ritz’s italics).
134 U.S. CONST. art. I, § 8, cl. 3 (cited in Ritz, supra note 124, at 85) (Ritz’s italics).
135 Ritz, supra note 124, at 85 (discussing 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 50–53 (1953)).
136 Again, the closest thing to this idea would be the work product of the various unofficial organizations working to coordinate and harmonize state laws, such as the American Law Institution’s “re-statement” 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.’” 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. 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.” 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.

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 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, 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 Ameri-
can law, as distinguished from English law,” 142 much less Professor Sherry’s
more aggressive assertion that Section 34 is a delegation of broad fed-
eral common lawmaking power. 143 As a matter of semantics, a collective
and fungible usage may nonetheless refer to a grouping of distinctive enti-
ties. 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 com-
mon 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 posi-
tive acts or judicial decisions was avowedly English, and although it be-
came 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 de-
bated 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

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 modific-
tions were materially and extensively different.”). And at least one state opted out of the common law
altogether. See LA. CIV. CODE ANN. art. 1 (2013) (“[T]he sources of law . . . are legislation and cus-
tom.”).
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 land-
scape of American, English, and civil law.”); Fletcher, supra note 90, at 1517 (observing that “[t]he law
merchant . . . was the general law governing transactions among merchants in most of the trading na-
tions 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.”\(^\text{148}\) This cosmopolitan character was critical, as the use of general law was meant to integrate American courts into the broader commercial world.\(^\text{149}\) Professor Ritz provides no explanation whatsoever as to why the Framers of the Judiciary Act would have wanted to thwart that development.\(^\text{150}\)

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.”\(^\text{151}\) The overwhelming majority of scholars have concluded that the general law applied under *Swift* was not federal in character;\(^\text{152}\) 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.\(^\text{153}\) 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.\(^\text{154}\) The late eighteenth and early nineteenth centuries simply did not

\(^{148}\) 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.


\(^{150}\) 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 definition and punishment of national crimes.” *Id.* at 148. As he points out, “[t]his interpretation seems to raise only one problem with Section 34. It did not use the word ‘criminal’ in referring to its application.” *Id.* at 147. That strikes me as a rather large problem, as is his inability to cite any contemporary describing Section 34 as a purely criminal measure. Moreover, Ritz insists that once the First Congress enacted the Crimes Act in 1790, 1 Stat.
furnish a hospitable climate for broad notions of federal common lawmaking authority.  

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. 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 \textit{Swift}, but also state rules mandating a departure from general law in favor of local policy, as in \textit{Erie}. 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.”

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.

See, e.g., Jay, \textit{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”).  

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.

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, \textit{Wrong}, supra note 6, at 134. But it has long been accepted that \textit{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 \textit{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.  

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,\(^\text{159}\) 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.”\(^\text{160}\) 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.\(^\text{161}\) 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.\(^\text{162}\) In so doing, Justice Brandeis hoped to minimize forum-shopping by out-of-state parties for the most advantageous substantive law.\(^\text{163}\) As Professor Sherry points out, however, “*Erie* simply replaced the vertical forum-shopping of *Swift* with horizontal forum-shopping.”\(^\text{164}\) 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.”\(^\text{165}\)

To some extent, horizontal disuniformity is inevitable in a federal system—indeed, it is the *essence* of a federal system.\(^\text{166}\) 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.


168 313 U.S. 487 (1941).


170 313 U.S. at 496–97.

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


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.\textsuperscript{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.\textsuperscript{175} And there may be certain benefits to allowing the federal courts to do so.\textsuperscript{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.\textsuperscript{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.\textsuperscript{178}

\textsuperscript{174} See Hart, supra note 10, at 517–25.

\textsuperscript{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 Vt.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.

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


\textsuperscript{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.  

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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state courts within the same jurisdiction.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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 \textit{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

\begin{itemize}
\item \textsuperscript{180} See \textit{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”).
\item \textsuperscript{181} See Laycock, \textit{supra} note 175, at 337 (arguing for a return to territorial rules).
\item \textsuperscript{182} Donald Cavers made a somewhat similar point in his report on \textit{Klaxon} to the American Law Institute. He noted that, if \textit{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 \textit{Restatement}. Donald F. Cavers, \textit{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 \textit{Klaxon}. See \textit{id}. My concern, by contrast, is that federal courts in a post-\textit{Klaxon} world would \textit{not} return to a territorial view of choice of law, leaving us with basically the same horizontal uniformity problem that currently inspires \textit{Klaxon}’s critics.
\item \textsuperscript{183} See Sherry, \textit{Wrong, supra} note 6, at 135; see also \textit{supra} Section II.A.3 (criticizing this argument).
\item \textsuperscript{184} See GREVE, \textit{supra} note 4, at 134–36; see also Samuel Issacharoff & Catherine M. Sharkey, \textit{Backdoor Federalization}, 53 UCLA L. REV. 1353, 1368–69 (2006) (arguing for a similar result through federal preemption of state law).
\end{itemize}
law’ as the ‘law merchant’ applied in diversity” in Swift.  

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. 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.” 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.” This holding elicited Justice Holmes’s famous comment that “[t]he common law is not a brooding omnipresence in the sky”—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. 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. 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

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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”—a dilemma that David Currie aptly described as the “Devil’s Own Mess.” 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. 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. 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. 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. 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.) (“The 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.


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

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. 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. 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. In Chicago, Milwaukee & St. Paul Railway. Co. v. Solan, for instance, the Supreme Court said that...

[the 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 . . .

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.").


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.\textsuperscript{203} For example, when Professor Hill observed that “in theory the federal courts deemed themselves to be applying state law during the era of \textit{Swift v. Tyson},”\textsuperscript{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 \textit{other than} the general law.\textsuperscript{205} Professor Purcell’s discussion is also consistent with this notion; when he says that the common law under \textit{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.”\textsuperscript{206} The “general” law described by Judge Fletcher and others shared all these characteristics.\textsuperscript{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 \textit{Swift} to be state law, then the distinction between \textit{Swift} and \textit{Erie} lies in the degree of deference that federal courts owe to state courts on the proper construction of state law.\textsuperscript{208} \textit{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 \textit{Erie}’s mandate of deference to decisions of the state’s highest court).\textsuperscript{209} This notion turns out to lie at the heart of \textit{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 \textit{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 \textit{local}}
kind. It might be possible—although doubtful—to interpret the statutory grant of diversity jurisdiction to imply a mandate to apply the general commercial law, much as the admiralty grant was long interpreted as a mandate to apply the general maritime law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Swift}, the federal courts deferred to state constructions of state statutes,\textsuperscript{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 \textit{Chevron U.S.A.},

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\textsuperscript{210} \textit{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.

\textsuperscript{211} \textit{See supra note 107–113 and accompanying text.}

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

\textsuperscript{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. \textit{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. \textit{See generally} HART & WECHSLER, supra note 66, at 462–63; Stacey L. Dogan & Ernest A. Young, \textit{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).

\textsuperscript{214} \textit{See Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938); supra notes 47, 66 and accompanying text.}
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2013] A GENERAL DEFENSE OF ERIE RAILROAD CO. V. TOMPKINS 55

Inc. v. Natural Resources Defense Council, Inc.,\textsuperscript{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;\textsuperscript{216} that the agency is more democratically accountable than a court;\textsuperscript{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.\textsuperscript{218} Each of these justifications finds a persuasive analogy in the \textit{Erie} context. The third—that agencies have been delegated interpretive authority by the legislature—speaks to \textit{Erie}’s constitutional underpinnings, and I accordingly address it in Part III. But the other two—expertise and accountability—provide pragmatic justifications for \textit{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,\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).
\textsuperscript{217} See \textit{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, \textit{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 \textit{Chevron}).
\textsuperscript{219} See, e.g., Tafflin v. Levitt, 493 U.S. 455, 459–60 (1990) (holding that state courts presumptive-ly have jurisdiction to hear federal law claims unless Congress clearly states its intention to exclude them).
\textsuperscript{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.*

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. 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. 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.

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. 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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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.\textsuperscript{226}

III. THE CONSTITUTIONAL ARGUMENT

Justice Brandeis concluded his discussion of the statutory and pragmatic issues in \textit{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.”\textsuperscript{227} For \textit{Erie}’s many critics, however, “the unconstitutionality of the course pursued” in \textit{Swift} has been anything but clear.\textsuperscript{228} Part of the problem is that both critics and defenders of \textit{Erie} disagree about the nature of \textit{Erie}’s constitutional rationale.\textsuperscript{229} In my view, \textit{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 \textit{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. \textit{Erie} and Positivism

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

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

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.

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.” 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.’”

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.”

Similarly, William Casto has written that “[u]nder *Swift* . . . judges were considered the living oracles of a preexisting natural law.” 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.”

When *Swift* is seen in this light, “*Erie* is often regarded as a victory of legal positivism over natural law.” 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.” 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*. 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 sociolo-

gy.”

It is certainly true that *Swift* could not be unconstitutional *solely* be-

cause 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.” 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.

This positivist perspective thus forced courts applying the general

common law to search for some sort of legal authorization to do so. In oth-

er words, “[t]his [positivist] strand of *Erie* requires federal courts to identify

the sovereign source for every rule of decision.” Failure to do so could

amount to a constitutional problem.

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 com-

muning with a brooding omnipresence.” Two critical aspects of Story’s

analysis in *Swift* rendered that decision completely consistent with the posi-

tivist theory that law must be grounded in social facts. First, the general

commercial law was customary in its origin. Its rules were derived from


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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).


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.\textsuperscript{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 \textit{Swift} as inherently antipositivist.\textsuperscript{248} I think that conventional wisdom is basically right, but that \textit{Erie} nonetheless adopted a considerably different view of what judges do in diversity cases than \textit{Swift} had articulated, primarily because the judicial role under \textit{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 \textit{sine qua non} to [\textit{Erie’s}] constitutional argument.”\textsuperscript{249}

Under \textit{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.\textsuperscript{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 \textit{right}.\textsuperscript{251} Moreover, any state choosing to depart from general law principles in the commercial field would have placed it—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.


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

249 Casto, \textit{supra} note 230, at 928. George Rutherglen makes a curious claim that Justice Brandeis’s positivism left him without a basis for overruling \textit{Swift}. Professor Rutherglen asserts that Brandeis “appealed 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 \textit{Swift v. Tyson} for lacking such a source.” Rutherglen, \textit{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, \textit{supra} note 90, at 1549.

251 \textit{Id.} at 1562–63; see also H. Parker Sharp & Joseph B. Brennan, \textit{The Application of the Doctrine of \textit{Swift v. Tyson} Since 1900}, 4 INT. 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{255} These were not areas where interested parties valued certainty over content.\textsuperscript{256} Moreover, these expansions brought the general law increasingly into conflict not only with state court decisions but also with state statutes. In \textit{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.\textsuperscript{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.”\textsuperscript{258}

This expansion of the general law seems to have been driven—or at least accompanied—by a shift in Swift’s underlying rationale.\textsuperscript{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 expa-
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. 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.” *Erie* thus raised a question of federalism that *Swift* had not.

Although there is fairly widespread agreement today that *Erie*’s positivism requires courts “to identify the sovereign source for every rule of decision,” 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.” 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.” I have criticized this view at greater length elsewhere, and a number of

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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; Bredwell & 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.
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.\textsuperscript{268} Nothing in \textit{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 \textit{Swift}.\textsuperscript{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. \textit{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 \textit{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 \textit{Swift}—but it did mean that \textit{Erie} had to be a case about federalism.

\textit{Erie}’s federalism rationale, however, is frequently misunderstood.

1. Legislative Power and Dual Federalism

Misinterpretation of \textit{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 \textit{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.”\textsuperscript{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.”\textsuperscript{271} Brandeis compounded the confusion when he added, at the end of the section, “that in applying the doctrine [of \textit{Swift}]
this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”

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).


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


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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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”).


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. 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. 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.


Contemporary federalism doctrine—and most contemporary federalism theory as well—largely accepts that Congress shares broad, largely concurrent regulatory powers with the States. The principal limits on national authority thus arise from the difficulty of enacting federal legislation and the states’ political representation in that process. 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,” and no less significant that the federal courts may formulate rules of decision far more readily

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.

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.”).

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’”).

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.


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).

Mishkin, supra note 284, at 1685.
than Congress can enact laws. 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).

As in other areas of federalism doctrine, 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.

This judicial federalism theory of *Erie* fits well into a broader vision of federalism commonly associated with the Legal Process school of jurisprudence. 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.

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.\textsuperscript{297}

As the current editors of \textit{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.”\textsuperscript{298} Nonetheless, they suggest—I think correctly—that “the First Edition’s thesis [remains] accurate over an extremely broad range of applications.”\textsuperscript{299}

\textit{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 \textit{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.\textsuperscript{300} In that sense, the late nineteenth century expansion of the \textit{Swift} doctrine had indeed “invaded rights . . . reserved by the Constitution to the several States”\textsuperscript{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.\textsuperscript{302} Congress can declare only \textit{statute} law, made through the Article I lawmaking process. As Professor Clark has explained,

\begin{footnotes}
\textsuperscript{297} \textit{Hart \& Wechsler}, supra note 66, at 459 (quoting the first edition, published in 1953); see also \textit{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); \textit{Morton Grodzins, The American System: A New View of Government in the United States} 80–86 (1966) (adopting the interstitial view); \textit{Hill}, supra note 102, at 442 (“[T]here are vast reaches within the scope of the commerce power which have always been deemed to be subject to the sovereign power of the states until pre-empted for the federal prerogative by action of Congress . . . . Until such pre-emption takes place the federal courts have always understood that the law of the states furnishes the rule of decision.”).
\textsuperscript{298} \textit{Hart \& Wechsler}, supra note 66, at 459–60.
\textsuperscript{299} \textit{Id.}
\textsuperscript{300} See, e.g., Hart, supra note 10, at 526.
\textsuperscript{301} \textit{Erie R. Co. v. Tompkins}, 304 U.S. 64, 80 (1938).
\textsuperscript{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. \textit{See Jay, Part Two}, supra note 91, at 1312; \textit{compare id.}, with infra note 513 (discussing state provisions receiving the common law).
\end{footnotes}
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-


\(^{304}\) 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 (1992) (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. 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.


\(^{307}\) 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.\textsuperscript{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\textsuperscript{309}—broad lawmaking authority to administrative agencies.\textsuperscript{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\textsuperscript{311}) in the Rules of Decision Act itself. Against such a reading, Aaron Nielson has argued \textit{Erie} should be read to rest on the nondelegation doctrine.\textsuperscript{312} “In light of the broad, unchanneled power exercised by federal courts under \textit{Swift v. Tyson}’s interpretation of the Rules of Decision Act,” he insists, “\textit{Erie} . . . can and should be understood as a nondelegation case.”\textsuperscript{313}

The nondelegation reading of \textit{Erie} is best read to make two distinct claims: Congress \textit{can’t} delegate a general lawmaking power to the federal courts, and in any event Congress \textit{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.\textsuperscript{314} But although the Court has proven extremely reluc-


\textsuperscript{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)).

\textsuperscript{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.

\textsuperscript{311} See supra Part II.A.3.

\textsuperscript{312} Aaron Nielson, \textit{Erie as Nondelegation}, 72 Ohio St. L.J. 239 (2011).

\textsuperscript{313} Id. at 241–42.

tant to draw firm lines fixing the outer limits of permissible delegations, it has always treated the underlying constitutional principle as sound.\textsuperscript{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.”\textsuperscript{316}

Moreover, “the constitutional principles underlying the [nondelegation] doctrine apply with full force to delegations to courts.”\textsuperscript{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.\textsuperscript{318} Moreover, as Professor Neilson points out, one of the Court’s earliest nondelegation cases concerned a judicial delegation.\textsuperscript{319} In \textit{Wayman v. Southard},\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{322}

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


\textsuperscript{316} Lemos, supra note 310, at 413; see also Nielson, supra note 312, at 263; Cass R. Sunstein, \textit{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”).

\textsuperscript{317} Lemos, supra note 310, at 405.

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

\textsuperscript{319} See Nielson, supra note 312, at 270.

\textsuperscript{320} 23 U.S. (10 Wheat.) 1 (1825).

\textsuperscript{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.” \textit{Id}

\textsuperscript{322} 23 U.S. (10 Wheat.) at 42–43.
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; 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. 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. 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? 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. 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.

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.
329 In Texas Indus., Inc. v. Rudcliff 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.  

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.  Both sorts of
law, moreover, serve fundamental constitutional values of federalism and separation of powers.\footnote{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).} 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.\footnote{333 See, e.g., Cass R. Sunstein, After the Rights Revolution: Reconcepting 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.} 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.\footnote{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).}  

Our experience under \textit{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.”\footnote{335 Mishkin, supra note 284, at 1685.} 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.”\footnote{336 Id.}  

The most important implication of this judicial federalism reading of \textit{Erie} is that federal common law is always constitutionally problematic.\footnote{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 \textit{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.} “Problematic” is not the same thing as “unconstitutional”; as Judge Friendly famously pointed out, \textit{Erie} cleared the way for legitimate forms of federal common law.\footnote{338 Friendly, supra note 57, at 405.} But federal judge-made law always requires special justifi-
cation under *Erie*. 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. 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.

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 non-legislative 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

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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).


of powers. They often insist, however, that this rationale “finds no support in the decision itself.”

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. 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.” 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”—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.” 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

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.\footnote{See, e.g., Monaghan, \textit{Constitutional Common Law}, supra note 329, 11–12 (\textit{\textit{[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.
\textit{)}).} 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. “\textit{[N]o clause in the Constitution,}” he wrote, “\textit{purports to confer such a power \textit{[\textit{to declare substantive rules of common law applicable in a State\textit{]}}\textit{ upon the federal courts.\textit{}}\textit{}}”\footnote{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 \textit{Swift} entailed the mere application by federal courts of a “transcendent-}\textit{}}\textit{ 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 States’\textit{\textit{)}}—is about separation of powers. Green, \textit{Repressing, supra} note 5, at 617 (quoting \textit{Erie}, 304 U.S. at 78). “By its terms,” Green admits, “this language does support new-myth limits on federal courts’ lawmaking authority.” \textit{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.” \textit{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 \textit{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, \textit{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,” \textit{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. \textit{See, e.g., Merrill, \textit{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, \textit{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.” \textit{See Young, \textit{Federal Common Law, supra} note 8, at 1660–65; \textit{see also Rutherglen, \textit{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 \textit{Hinderlider v. La Plata River & Cherry Creek Ditch Co.}, 304 U.S. 92 (1938), which he decided on the same day as \textit{Erie}. \textit{See PURCELL, \textit{supra} note 9, at 188.} Hence, much of the federal common law that does exist can be squared with a judicial federalism reading of \textit{Erie}, although different commentators may disagree about particular areas. \textit{See, e.g., Young, \textit{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.\footnote{\textit{Erie, 304 U.S. at 78; \textit{see also LOW, JEFFRIES, \\& BRADLEY, \textit{supra} note 129, at 13 (“This language suggests that \textit{Erie} is based, at least in part, on separation of powers.”).}}
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

\(^{350}\) *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,” and the reasons he gives for that conclusion strongly suggest that the principle is in fact constitutional. 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.” This principle fits comfortably with accounts of Erie grounded in constitutional principles of judicial federalism—that is, that Erie “enforce[d] federal law-making procedures and the political safeguards of federalism they incorporate.”

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.”

This is a problem, however, only if we assume—as many of Erie’s critics do—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. These concerns have been linked from the beginning. The Constitution protects federalism primarily by limiting federal lawmaking. 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.\textsuperscript{365} Brandeis broke no new ground by intertwining these concerns in \textit{Erie}.\textsuperscript{366} Professors Bridwell and Whitten suggest that the separation of powers concern was not unknown prior to \textit{Erie}.\textsuperscript{367} Rather, two factors allowed federal courts to apply the general law under \textit{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.”\textsuperscript{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.”\textsuperscript{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 \textit{Erie} in ways that departed from Justice Brandeis’s specific early-twentieth-century Progressive vision.\textsuperscript{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.\textsuperscript{371} If our understanding of \textit{Erie}—and in

\footnotesize{\textsuperscript{365} See \textit{FEDERALIST} No. 51, at 351 (James Madison) (Jacob E. Cook ed., Wesleyan University Press 1961); see also \textit{HART} \& \textit{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).}

\footnotesize{\textsuperscript{366} See, \textit{e.g.}, \textit{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, \textit{The Legitimacy of Federal Common Law}, 12 \textit{PACE L. REV.} 303, 305 (1992).}

\footnotesize{\textsuperscript{367} See \textit{BRIDWELL} \& \textit{WHITTEN}, supra note 63, at 29–31.}

\footnotesize{\textsuperscript{368} \textit{Id.} at 30.}

\footnotesize{\textsuperscript{369} \textit{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 \textit{criminal} prosecutions, while exercising a robust general law decision-making power in civil commercial cases. Compare, \textit{e.g.}, \textit{United States v. Hudson} \& \textit{Goodwin}, 11 U.S. (7 Cranch) 32 (1812) (rejecting federal common law crimes), \textit{with} \textit{Swift} v. \textit{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 \textit{BRIDWELL} \& \textit{WHITTEN}, supra note 63, at 47.}

\footnotesize{\textsuperscript{370} See \textit{PURCELL}, supra note 9, at 247–49.}

\footnotesize{\textsuperscript{371} See \textit{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 criticism attacks the Legal Process school head on. In an important review of Professor Purcell’s book on *Erie*, Susan Bandes portrayed the Legal Process worldview as hopelessly out of touch with contemporary, pluralistic American legal culture. Professor Bandes is hardly the only contemporary critic of Legal Process thinking; her critique is representative of a broader uneasiness in the Federal Courts field about whether that field’s founding jurisprudential paradigm remains viable in our current legal and intellectual environment.\(^{372}\) Given the close relation between *Erie* and Legal Process thinking about federalism, it is worth pausing to consider her arguments.

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

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

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\(^{373}\) 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.”

Bandes would do better to focus on the positions that the Legal Process school actually took.

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.”

Although process jurisprudence originated more or less at the same time as Legal Realism, 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.

But at least the strands of Legal Process thinking that—and many contemporary Federal Courts scholars—take to be most important was neither as formalist nor as rationalistic as Bandes suggests.

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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 Persistence, supra note 283 (contrasting dual federalism and process federalism). Wechsler certainly did not think that federalism had an “abstract and timeless logic.”

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

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

379 See id. at 205.

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.\textsuperscript{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.\textsuperscript{383}

Hence the principle of “institutional settlement,” which lies at the heart of the Legal Process vision.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{386}

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

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\textsuperscript{382} See infra notes 387–90 and accompanying text.
\textsuperscript{383} Fallon, supra note 296, at 964.
\textsuperscript{384} DUXBURY, supra note 296, at 255–56.
\textsuperscript{385} HART & SACKS, supra note 296, at 4.
\textsuperscript{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.”).
\textsuperscript{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,\textsuperscript{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.\textsuperscript{389} But consider the notion at the heart of the Legal Process view of \textit{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{392} But a Legal Process-style emphasis on allocation of legitimate decisionmaking can also advance progressive causes. Just last term, for example, in \textit{United States v. Windsor},\textsuperscript{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.\textsuperscript{394} As \textit{Windsor} and other cases have shown, we have little reason to assume that federalism will undermine substantive justice, even from a progressive perspective.\textsuperscript{395} Federalism protects minorities’ rights both to

\begin{itemize}
\item \textsuperscript{388} See, e.g., \textit{Duxbury}, supra note 296, at 208–09, 235, 255.
\item \textsuperscript{389} See \textit{Duxbury}, supra note 296, at 259–60 (discussing reasoned elaboration); Fallon, supra note 296, at 966 (same).
\item \textsuperscript{390} See, e.g., William N. Eskridge, Jr., \textit{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).
\item \textsuperscript{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 \textit{Erie} context, given the broad consensus that the pre-\textit{Erie} general common law was inimical to progressive causes and individual remedies against national corporations.
\item \textsuperscript{392} Bandes, supra note 237, at 868–69.
\item \textsuperscript{393} 133 S. Ct. 2675 (2013) (striking down the federal Defense of Marriage Act).
\item \textsuperscript{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 \textit{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.  

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


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”).

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 abroad406 all create situations in which judicial power is not coextensive with the powers of the legislative and political branches.

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”).
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

\(^{407}\) 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).


\(^{412}\) 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.” 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. 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.

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. 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.

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 but it hardly translates without controversy to federal courts. 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

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. 304, 312 (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.”

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. 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.” In other words, Swift would support displacing state law even in situations that fell outside Congress’s commerce power. 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. 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.”

If Brandeis were concerned about the scope of Congress’s legislative jurisdiction, he would hardly choose topics fitting plainly within that jurisdiction—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. 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-

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?\(^{435}\)

\(^{429}\) 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 Atheron 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

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.\textsuperscript{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).”\textsuperscript{442} This is thus a case where the judiciary’s power to act may well have depended on the fact that Congress had acted first.

Even more obviously, the judiciary’s power to resolve a dispute about who had the power to establish the U.S. position on Jerusalem hardly equated with a judicial power to make law itself on that question. The Chief Justice distinguished between two questions: “whether Jerusalem is the capital of Israel,” and “whether Zivotofsky may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth.”\textsuperscript{443} “The D.C. Circuit erred, he said, when it “treated the two questions as one and the same.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{447}

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

\textsuperscript{441} Id. at 1428.
\textsuperscript{442} Id.
\textsuperscript{443} Id. at 1427.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
\textsuperscript{446} Id.
\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{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.”\textsuperscript{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 \textit{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 presentation.”\textsuperscript{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.\textsuperscript{451} But that is not my claim. My own view has always been that, under the circumstances that each court faced at the time, \textit{both Swift} and \textit{Erie} were rightly decided.\textsuperscript{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.\textsuperscript{453} But as the nineteenth century wore on, the

\textsuperscript{448} See Sherry, \textit{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.

\textsuperscript{449} Greve, \textit{supra} note 4, at 375.

\textsuperscript{450} Id.

\textsuperscript{451} One might also, however, say the same of Justice Brandeis.

\textsuperscript{452} See \textit{also} Bellia & Clark, \textit{supra} note 49, at 687–88, 701 (taking a similar view).

\textsuperscript{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. \textit{See, e.g.}, Kadens, \textit{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,\(^\text{454}\) tort cases,\(^\text{455}\) and even cases involving deeds of land.\(^\text{456}\) This radical expansion of \textit{Swift}'s scope coincided with erosion of the strong norm of deference to state courts on construction of state statutes and constitutions.\(^\text{457}\)

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 \textit{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.\(^\text{458}\) 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 \textit{Swift}'s reasoning—that is, that the state itself had determined that general law should govern the relevant class of cases.\(^\text{459}\) 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 \textit{Swift} “got out of hand and eventually prompted [federal] judges to substitute their own views of sound public policy on the states.”\(^\text{460}\) The answer is that a doctrine that originally \textit{reflected} state policy—New York’s own decision to apply the

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

\textit{Lane v. Vick, 44 U.S. (3 How.) 464, 476 (1845).}


\textit{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, \textit{Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law}, 74 Tul. L. Rev. 1263 (2000); see also Lucas A. Powe, Jr., \textit{Rehearsal for Substantive Due Process: the Municipal Bond Cases}, 53 Texas L. Rev. 738, 745–47 (1975).}

\textit{See FREYER, supra note 30, at 23–25; Fletcher, supra note 90, at 1513.}

\textit{See Baugh, 149 U.S. at 377–78; Robbins, 67 U.S. at 428–29; supra text accompanying notes 116–120.}

\textit{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. 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.” This development, moreover, “has encountered no serious real-world legal or political challenges, and none are on the horizon.” 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.” 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. 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. 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, and the Court has proven willing to limit the preemptive force of agency decisions in a number of important

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

The more serious version of Professor Greve’s “too much” argument focuses instead on the extensive use of federal common law after *Erie*.  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.

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. Judge-made federal law plays a critical role, for example, in admiralty, disputes between states, foreign relations law, labor–management relations, and matters involving the proprietary relations of the United States government. 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).


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*).


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


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.”

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, 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. 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; that most of the foreign affairs rules can be justified as self-imposed prudential limitations on judicial review; that the Clearfield line of cases is not obviously necessary but may be largely assimilated to notions of conflict preemption; that state versus state cases may be a legitimate uses of “general” law where states are not competent to legislate; and that freestanding federal common law in admiralty is unconstitutional. But, the important point is that the new federal common law must be grounded in a plausible interpretation

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 law-making are indistinguishable).


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 or claims that applying state law would thwart particular federal interests that cannot otherwise be easily protected. 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,” 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 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. 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.


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.

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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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
494 See Nelson, *Erie*, supra note 6, at 981.
495 Id. at 984.
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. 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, 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.

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.*" 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.” On this view, there could be no federal authority to disregard a state’s allocation of lawmaking authority to its courts. 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.
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.\textsuperscript{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 lawmaker authority to the state’s highest court.”\textsuperscript{505} And although “Holmes believed that this allocation was implicit in each and every state constitution,”\textsuperscript{506} Professor Nelson argues that that premise “is at least contestable and may be false”:\textsuperscript{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.\textsuperscript{508}

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

I do not want to concede the premise—that is, while I do think \textit{Erie} requires federal courts to defer to state courts on the meaning of state law, there were also cases under \textit{Swift}—including \textit{Swift} itself—in which the federal courts plainly applied general law rather than state law, and \textit{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.\textsuperscript{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-

\textsuperscript{505} Nelson, \textit{Erie}, supra note 6, at 980.
\textsuperscript{506} Id.
\textsuperscript{507} Id. at 984.
\textsuperscript{508} Id. at 982.
\textsuperscript{509} Id. at 984.
terials, the Court is accused of, or praised for, making law."\footnote{Id. at 1.} 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 \textit{Chevron}-style deference described earlier: Having been delegated authority to \textit{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.\footnote{See, e.g., Burt Neuborne, \textit{State Constitutions and the Evolution of Positive Rights}, 20 \textit{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, \textit{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.”).} 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,\footnote{See, e.g., CAL. CIV. CODE \S 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, by the rule of decision in all the courts of this State.”); N.C. GEN. STAT. ANN. \S 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, \textit{The Common Law: An Account of Its Reception in the United States}, 4 \textit{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.”).} 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.\footnote{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).} Indeed, a significant subset of those reception statutes explicitly endorse the state courts’ role in applying and developing the common law rules in areas as diverse as products liability and corporate takeovers.

\textit{Note:} This note was added to the text for the 2013 edition of \textit{Erie Railroad Co. v. Tompkins}, 304 U.S. 64 (1938).
law. 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. 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.

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. 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. If that is

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 lawmakers’ 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. 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 lawmakers’ 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. 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,

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.\footnote{525} \textit{Murdock} held that the U.S. Supreme Court 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.\footnote{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.\footnote{527} Second, and more fundamentally, as Martha Field has ex-

\footnote{525}{87 U.S. (20 Wall.) 590, 626 (1874).}

\footnote{526}{See \textit{id.} at 631 (interpreting Section 25 of the Judiciary Act to limit Supreme Court review of state supreme court decisions to federal questions); \textit{see also id.} at 633 (reserving judgment as to whether, if Congress had conferred such authority [to review state law questions], the act would have been constitutional); \textit{see also} Harrison, \textit{Federal Appellate Jurisdiction}, \textit{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.” \textit{Id.} In particular, Professor Harrison argues that \textit{Murdock} tested on notions of “dual federalism,” but not the principle of separate and exclusive fields of regulatory authority that I discussed earlier, \textit{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.” \textit{See} Harrison, \textit{Federal Appellate Jurisdiction}, \textit{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. \textit{See generally} Young, \textit{Puzzling Persistence}, \textit{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. \textit{See}, \textit{e.g.}, Nat’l Fed’n of Indep. Bus. \textit{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 \textit{v.} Texas, 552 U.S. 491 (2008) (striking down an attempt by the President to issue commands to the state courts); Printz \textit{v.} United States, 521 U.S. 898 (1997) (holding that Congress may not “commandeer” state executive officials); Seminole Tribe of Florida \textit{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. \textit{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 \textit{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 \textit{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 \textit{Taylor v. Beckham}, 178 U.S. 548, 570–71 (1900)); \textit{cf.} Anthony J. Bellia, Jr., \textit{Federal Regulation of State Court Procedures}, 110 \textit{Yale L.J.} 947 (2001) (identifying serious constitutional objections to federal regulation of the state courts). In any event, it may not matter whether \textit{Murdock} is constitutionally-grounded. Professor Field points out that, despite \textit{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, \textit{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.}

\footnote{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
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.\(^{533}\)

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.\(^{534}\) 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.\(^{535}\) I think Green’s argument, while ingenious, ultimately underestimates the reasons compelling federal court deference to state court decisions.

\(^{530}\) 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 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.\footnote{Scho

\footnote{See supra notes 216, 219–220 and accompanying text. See supra notes 217, 221 and accompanying text. See supra notes 501–504 and accompanying text.} See supra notes 216, 219–220 and accompanying text.\footnote{See supra notes 217, 221 and accompanying text. See supra notes 501–504 and accompanying text.} 537 Scholars have written about the extent to which Georgia has or has not adopted this or that aspect of the U.C.C.\footnote{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-b8f2-76a4f9335e2/Financial%20Services%20Alert_%204.23.13.pdf. 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). 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”).

\footnote{See supra notes 216, 219–220 and accompanying text. See supra notes 217, 221 and accompanying text. See supra notes 501–504 and accompanying text.} 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,\footnote{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-b8f2-76a4f9335e2/Financial%20Services%20Alert_%204.23.13.pdf. 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). 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”).

\footnote{See supra notes 216, 219–220 and accompanying text. See supra notes 217, 221 and accompanying text. See supra notes 501–504 and accompanying text.} 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;\footnote{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). 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”).

\footnote{See supra notes 216, 219–220 and accompanying text.} they are more democratically accountable to the state electorate;\footnote{See supra notes 216, 219–220 and accompanying text. See supra notes 217, 221 and accompanying text. See supra notes 501–504 and accompanying text.} and state law typically delegates law-making authority to state courts.\footnote{See supra notes 216, 219–220 and accompanying text. See supra notes 217, 221 and accompanying text. See supra notes 501–504 and accompanying text.} Professor Green’s argument questions only the third of these grounds, but the first two are sufficient to provide strong pragmatic justifications for deference.

One might object that, if a state really does view the common law as unitary and general, then the relevant law is not state law at all. On this
view, as the Georgia Supreme Court put it in Slaton, “[t]he common law is presumed to be the same in all the American states where it prevails.”\footnote{148 S.E. 741, 743 (Ga. 1929).} 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.\footnote{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.”).} 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.\footnote{See, e.g., Conrad & Kessler, supra note 538 (describing the variations in Georgia’s adoption of the U.C.C.).}

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.\footnote{See supra notes 510–532 and accompanying text.} 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”\footnote{The Western Maid, 257 U.S. 419, 432 (1922) (Holmes, J.).} to apply as an alternative, federal courts can only apply the state law administered by the state courts.

* * *

\textit{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 \textit{Erie} stands for. If \textit{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.”\footnote{Weinberg, Federal Common Law, supra note 266, at 812.} And yet \textit{Erie} said that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the
law of the state . . . There is no federal general common law.** 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.** 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.** 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.** Although the leading case associated with this latter shift—Garcia v. San Antonio Metropolitan Transit Authority**—is also associated with judicial abdication,** it has become clear since that Garcia’s notion of “process federalism” can be enforced with significant bite.** Although the Court continues to enforce some sort of outer bound to Congress’s authority,** the most important cases have to do with what goes on within the realm of Congress’s enumera-

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** 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.
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).
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. Filburn560 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

557 See Young, Ordinary Diet, supra note 289, at 261–65.
559 PURCELL, supra note 9, at 3.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{569}

\textit{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.\textsuperscript{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.”\textsuperscript{571} Rather,

\begin{quote}
[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.\textsuperscript{572}
\end{quote}

The latter sort of case is, of course, \textit{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.\textsuperscript{573}

The judicial federalism rationale of \textit{Erie} also fits comfortably with the process federalism that dominates contemporary federalism doctrine. Justice Blackmun explained in \textit{Garcia} that “the principal means chosen by the

\begin{footnotes}
\textsuperscript{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.”).

\textsuperscript{568} See id. at 564–65.

\textsuperscript{569} See Young, \textit{Ordinary Diet}, supra note 289, at 261–62.

\textsuperscript{570} Quoted in HART & WECHSLER, supra note 66, at vi.

\textsuperscript{571} Id.

\textsuperscript{572} Id.

\textsuperscript{573} See Mishkin, supra note 284, at 1686 (arguing that \textit{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”).
\end{footnotes}
2013] A GENERAL DEFENSE OF ERIE RAILROAD CO. V. TOMPKINS 115

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

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.
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.\footnote{583}

It is hard to say, however, that the Rehnquist Court’s activism—such as it was—cut against \textit{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.\footnote{584} The Court’s 2004 decision in \textit{Sosa v. Alvarez-Machain}\footnote{585} provides an important example. In its first significant encounter with human rights suits under the Alien Tort Statute,\footnote{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.”\footnote{587} Prominent among these reasons were the conception of law affirmed in \textit{Erie} and that decision’s “significant rethinking of the role of the federal courts in making [common law].”\footnote{588} Whether or not \textit{Sosa} resolved the longstanding dispute about the status of customary international law in domestic courts,\footnote{589} it left little doubt about the continuing importance of \textit{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 \textit{Erie}), a significant majority of Americans favored concentration of power in the federal government as opposed to the

\footnotetext[583]{\textit{Id.} at 406 n.85.}

\footnotetext[584]{\textit{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. Sand-

\footnotetext[586]{oval, 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); \textit{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 \textit{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”).}

\footnotetext[585]{542 U.S. 692 (2004).}

\footnotetext[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 \textit{Hart & Wechsler, supra note 66}, at 679–85.}

\footnotetext[587]{\textit{Sosa}, 542 U.S. at 725.}

\footnotetext[588]{\textit{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 “\textit{Erie}’s fundamental holding that a general common law \textit{does not exist}.” \textit{Id.} at 744 (Scalia, J., concurring in part and in the judgment) (emphasis in original).}

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.”

A survey in April of 2013 found that 57% of Americans viewed state governments favorably while only 28% viewed the federal government favorably. 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.

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.”

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. 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).


594 ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT 102 (1992); see also PHILIP W. ROEDER, PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES 24-27 (1994) (collecting studies indicating that state governmental capacity has improved significantly in recent decades); Van Horn, supra note 17, at 2–3 (describing a “quiet revolution” as a result of “changes in representation, government organization, and managerial competence” at the state level, with the result that “[s]tate officials are far more willing and able to carry out significant responsibilities”).

595 See, e.g., United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (striking down the federal Defense of Marriage Act, which denied federal recognition to same-sex marriages, as applied to a couple married under the laws of New York; the Court emphasized that “[t]he State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import”); Letter from Dayna K. Shah, Managing Assoc. Gen. Counsel, GAO, to Senators Tom Harkin, Susan Collins &
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


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).


599 See, e.g., Seth Kreimer, Federalism and Freedom, 574 ANNALS AM. ACADE. POL’Y & 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.”).
2013] A GENERAL DEFENSE OF ERIE RAILROAD CO. V. TOMPKINS 119

now seems, well, so sixties.\textsuperscript{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.”\textsuperscript{601} Sherry thus complains that “Erie has been drafted into service in the war against judicial ‘activism.’”\textsuperscript{602} Erie’s real victim, this view suggests, was not so much \textit{Swift v. Tyson} as \textit{Roe v. Wade}.\textsuperscript{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.\textsuperscript{604}

This is all a bit overheated for me. In the years that \textit{Erie} has been understood primarily as a limitation on judicial lawmaking, the Supreme Court has decided not only \textit{Roe} but also \textit{Lawrence v. Texas},\textsuperscript{605} \textit{Roper v. Simmons},\textsuperscript{606} \textit{Citizens United v. FEC},\textsuperscript{607} and \textit{Bush v. Gore}.\textsuperscript{608} The Court hard-

\textsuperscript{600} See, e.g., Gerken, supra note 396 (extolling a “new progressive federalism”).
\textsuperscript{601} Sherry, Wrong, supra note 6, at 150.
\textsuperscript{602} Id. at 151.
\textsuperscript{603} 410 U.S. 113 (1973).
\textsuperscript{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. \textit{See, e.g.,} Lucas A. Powe, Jr., \textit{Are “the People” Missing in Action (and Should Anyone Care?)?}, 83 TEXAS L. REV. 855 (2005) (reviewing \textsc{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. \textit{See, e.g.,} Antonin Scalia, \textit{Originalism: The Lesser Evil}, 57 U. CIN. L. REV. 849 (1989) (embracing a “fainthearted” brand of originalism); \textsc{Jack M. Balkin, Living Originalism} (2011) (pushing a brand of “originalism” that is basically the same as living constitutionalism).
\textsuperscript{605} 539 U.S. 558 (2003).
\textsuperscript{606} 543 U.S. 551 (2005).
\textsuperscript{607} 558 U.S. 50 (2010).
\textsuperscript{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,” 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. 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.

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). The Erie doctrine is hardly the only problem with CIL or with current international human rights litigation in American courts, but Erie does provide the most compelling argument against the federalization of CIL norms through federal judicial decisions. It is hard to think of many instances nowadays, however, where such federalization is actually important to the agenda of international human rights, and Congress retains the power to federalize

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).


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. 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. 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.

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.” 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. The decision’s correctness and rationale remain worth debating, however, if only because they provide a useful practical
frame for some of the most fundamental questions of jurisprudence and constitutional structure. These include not only what we should understand judges to be doing when they decide cases, but also the division of lawmaking power between the branches of the national government and the appropriate model for preserving the federal balance. If *Erie* were otherwise, far more would change than the law applied in diversity cases.

But as often happens, the conventional wisdom turns out to be correct: *Erie* was right, basically for the reasons given in the opinion. The Rules of Decision Act requires federal courts to apply state law in the absence of positive federal law, not because of some dubious inference from the Act’s drafting history but because the kind of general common law that the states accepted during the *Swift* era no longer exists. *Erie*’s insistence on vertical uniformity—that federal and state courts sitting in the same state should apply the same law—is far from perfect, but the alternative of horizontal uniformity among federal courts in different states is likely unattainable; in any event, the obstacle to that uniformity is not *Erie* but rather the lack of uniform and territorial choice of law rules. Justice Brandeis’s nonconstitutional arguments, in other words, remain sound today.

It is *Erie*’s constitutional reasoning, however, that should claim it a place at the center of the structural canon. If the Civil Procedure teachers will not teach it—an endemic problem in some law schools—then the Constitutional Law faculty should. Because “law in the sense in which courts speak of it today does not exist without some definite authority behind it,” 622 the displacement of state law must be traceable to the valid exercise 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

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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.