William & Mary Law Review

Volume 54 | Issue 3 Article 9

Valid Rule Due Process Challenges: Bond v. United States and Erie's Constitutional Source

Kermit Roosevelt III

VALID RULE DUE PROCESS CHALLENGES: *BOND v. UNITED STATES* AND *ERIE*'S CONSTITUTIONAL SOURCE

KERMIT ROOSEVELT III*

TABLE OF CONTENTS

* Professor of Law, University of Pennsylvania Law School. This Article was presented at the Law Without a Lawmaker symposium at William & Mary Law School, February 2012. I thank Michael Green, the organizer, and my fellow participants for their helpful comments and insights. Additional thanks are due to participants at a workshop at Brooklyn Law School and to James Y. Stern.

INTRODUCTION

What is wrong about law without a lawmaker? One response, and I think a fair one, is that the main difficulty of law without a lawmaker is that it does not exist. But my purpose in this Article is not to argue for that view.[1] I will assume, as our domestic legal system generally does, that a law is something that has legal effect, and it has that effect because it was created or adopted by an entity with the power to create rights or impose obligations.[2] "Law" that does not have the backing of some sovereign is not law, at least not domestically.[3] The questions I want to pursue are the following: If we accept this view, which we can loosely term positivist, what problem would law without a lawmaker pose? Would the Constitution restrain courts or other government actors from purporting to enforce such "law"?

The question might seem a surprising one to ask. Why should the Constitution protect us from something that does not exist? If it shields us from law without a lawmaker, why not Santa Claus and zombies as well?[4] But it turns out that this actually is an issue that

---

1. I think it is relatively commonsensical and relatively widely shared, and in any case, our legal system has taken it as a premise since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[B]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it." (internal quotation marks omitted)). For a more recent academic statement of the view, see Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 524 (2004).

2. Sovereigns can of course adopt laws that they do not make. A state can receive the general common law; it can adopt the Second Restatement of Conflict of Laws or the Code of Hammurabi; it could even prescribe that its contract law consisted of "the principles of equity and justice." But in all of these cases, it is the state's act that gives these things legal force. The state may not make them, but it makes them laws. Whether the state's high court should then be authoritative in its exposition of these things is a separate question, though I believe the Constitution gives it the ability to claim authoritative status and may well prevent a disclaimer. And how exactly pre-*Erie* state courts understood the operation of the general common law is still another question. *See* Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1127-35 (2011) (discussing these issues).

3. I add this qualification because international law and admiralty do seem to function quite like law without a lawmaker. *See* Caleb Nelson, *The Persistence of General Common Law*, 106 COLUM. L. REV. 503, 512 (2006) (discussing international law); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 274 (1999) (describing admiralty as "a form of general common law").

4. The Supreme Court has held that the Constitution does not protect us from Santa Claus, at least not on Establishment Clause grounds. *See* Lynch v. Donnelly, 465 U.S. 668,

the Constitution addresses and about which it gives a relatively clear answer. If there is no law without a lawmaker—if, as Holmes said, "law in the sense of which courts speak of it today does not exist without some definite authority behind it"—then its purported enforcement is coercion without law.[5] It is the government using its power to compel an individual to do something—to take an action, or refrain from acting, or possibly to pay money if he is the target of a suit for damages—in the absence of any legal warrant for the compulsion. That amounts to a deprivation of liberty or property without law. With no law, there cannot be due process of law, so what we have is a relatively clear violation of the Due Process Clause.[6] The issue is not a lack of procedure, so the violation is of what we now tend to call substantive due process. Thus, the substantive aspect of the Due Process Clause protects us from government coercion that is not backed by a valid law. I will call this a "valid rule" due process argument.[7]

---

687 (1984) (permitting inclusion of creche in Christmas display). Zombies do not appear in the Supreme Court's opinions, with the possible exception of Justice Scalia's memorable characterization of the *Lemon* test as "some ghoul in a late-night horror movie." Lamb's Chapel v. Moriches, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

5. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

6. The principle that coercive action must be backed by a valid rule has been recognized in the literature, notably in Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3. The Supreme Court has also articulated it and drawn the connection to the Due Process Clause. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786-87 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power.... This is no less true with respect to [judicial jurisdiction] than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere."); Giacco v. Pennsylvania, 382 U.S. 399, 403 (1966) ("Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land."). There remains, of course, the question of what will make a rule invalid, which I explore in the body of this Article. I note here, however, that I do not mean to adopt the position that a rule that is invalid in any application is invalid in the relevant sense. For a more extensive discussion, see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998). I ask instead whether there is a rule that is valid to the extent that it governs the individual's action.

7. For discussions of the "valid rule requirement," see, for example, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1332-33 (2000); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 386-87 (1999).

This model of substantive due process as restraining government action unauthorized by law might seem odd. It is not the modern doctrinal formulation, which tends to work instead in terms of fundamental rights that trump otherwise valid laws.[8] But my aim in this Article is to show that this form of argument is much more common than supposed. The due process prohibition of compulsion without law is the invisible thread that connects doctrinal areas often thought of as quite distinct: *Erie*, *Lochner*-era substantive due process, overbreadth, and modern federalism decisions such as *United States v. Morrison*,[9] *United States v. Lopez*,[10] and *Bond v. United States*.[11] In what follows, I will explain how those different doctrinal areas conform to this model, and what their connection means.

I. *ALLGEYER* AND *LOCHNER*

Nowadays, it is conventional to call cases such as *Allgeyer v. Louisiana*[12] and *Lochner v. New York*[13] substantive due process decisions.[14] So claiming that they should be understood as the product of a principle I have identified as substantive due process is neither novel nor controversial. What is slightly more controversial is my description of that principle as a restraint on government action unauthorized by law. Modern substantive due process cases are concerned with the question of whether the interest asserted by an

8. To determine whether an asserted right is fundamental, the Court asks either whether it is deeply rooted in our traditions and practices, *see* Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997), or whether it is fundamental to personhood, *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850-51 (1992) (plurality opinion), with no explanation of why one inquiry rather than the other is chosen.

9. 529 U.S. 598 (2000).

10. 514 U.S. 549 (1995).

11. 131 S. Ct. 2355 (2011).

12. 165 U.S. 578 (1897).

13. 198 U.S. 45 (1905).

14. It was not so at the time they were decided: the distinction between substantive and procedural due process did not exist before the New Deal, and the phrase "substantive due process" did not appear in a Supreme Court opinion until 1948. *See* James W. Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999) (citing Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting)).

individual qualifies as a fundamental right.[15] If it does, it is typically protected by the demanding strict scrutiny test: it can be abridged only if such abridgment is necessary to serve a compelling state interest.[16] If the necessity or the compelling interest is lacking, an otherwise valid law—one concededly within the power of government to enact—will be trumped by the fundamental right.[17] Fundamental rights, we could say, carve islands of individual liberty out of the stream of government power.

At least, that is the modern analysis of substantive due process. The principle I have identified is rather different. It is not concerned with identifying islands of liberty or fundamental rights that trump otherwise valid laws. The importance of the individual's interest is largely irrelevant. Instead, the approach I have described seeks to find and enforce limits on government power—the banks of the stream. Government power is delegated by the people; it is limited; and if those limits are exceeded, the purported law is simply void. It is no law at all, and no attempt to enforce it can be dignified with the name "due process of law." This model of substantive due process has a long history in American jurisprudence—longer, in fact, than the fundamental rights version. It can be traced back to Justice Chase's opinion in *Calder v. Bull*, where Chase noted that

> [t]he purposes for which men enter into society will determine the *nature* and *terms* of the *social* compact; and as *they* are the foundation of the *legislative* power, *they* will decide what are the *proper* objects of it: The *nature*, and *ends* of *legislative* power will limit the *exercise* of it.... There are acts which the *Federal*, or *State*, Legislature cannot do, *without exceeding their authority*.... An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative authority*.[18]

---

15. *See* Washington v. Glucksberg, 521 U.S. 702, 719-22 (1997).

16. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 932 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("To overcome the burden of strict scrutiny, the interests must be compelling.").

17. *See* Lawrence v. Texas, 539 U.S. 558, 573-74 (2003).

18. 3 U.S. (3 Dall.) 386, 388 (1798). For recent recognitions of this variant of substantive due process, see, for example, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 177 (2011) (describing theory whereby "the *process* by which a law is applied to individuals includes a judicial assessment

Which of these versions of substantive due process is at work in *Lochner*-era cases? The question is disputed in the literature, but I believe an examination of *Allgeyer* and *Lochner* will suggest the latter.

A. Allgeyer

In 1894, the Louisiana legislature passed a law that imposed a thousand-dollar fine on anyone who issued or obtained marine insurance from a company that had not complied with all elements of Louisiana's insurance regulation.[19] The statute specified its scope: it reached anyone who issued an insurance certificate "in this State" or took any other act in-state to effect insurance "on property, then in this State."[20] E. Allgeyer & Co., a company exporting cotton from New Orleans to Europe, bought insurance for a cotton shipment from the Atlantic Mutual Insurance Company, a New York corporation.[21] The contract was executed in New York, but the cotton was in New Orleans at the time of the transaction. Allgeyer sent a description of it from New Orleans to New York.[22]

Louisiana deemed the transmission of the description an "act in this State to effect ... insurance on property, then in this State," in the words of the statute and accordingly sought to impose the

---

of whether the substance of a statute was within the *jurisdiction* or *power* of the legislature to enact"); Louise Weinberg, *An Almost Archaeological Dig: Finding a Surprisingly Rich Early Understanding of Substantive Due Process*, 27 CONST. COMMENT. 163, 165-67 (2010) (distinguishing the two versions); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423-27 (2010) (describing different versions).

19. Allgeyer v. Louisiana, 165 U.S. 578, 579 (1897). The statutory language read as follows:

> *Be it enacted by the General Assembly of the State of Louisiana*, That any person, firm or corporation who shall fill up, sign or issue in this State any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this State to effect, for himself or for another, insurance on property, then in this State, in any marine insurance company which has not complied in all respects with the laws of this State, shall be subject to a fine of one thousand dollars for each offense, which shall be sued for in any competent court by the attorney general for the use and benefit of the charity hospitals in New Orleans and Shreveport.

Id.

20. *Id.*

21. *Id.* at 580-81.

22. *Id.* at 580-82.

thousand-dollar fine on Allgeyer.[23] When the case reached the Supreme Court, all the Justices agreed that the Constitution barred liability.[24] But why?

There is certainly language in *Allgeyer* that seems to suggest something like the modern conception of rights as trumps.[25] Fourteenth Amendment liberty, the Court announced,

> means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[26]

But these are not rights that necessarily trump an otherwise valid state law. As the Court put it, "We do not intend to hold that in no such case can the State exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises."[27] These liberties may be restrained, as the words of the Constitution make clear, by due process of law.

The key issue in *Allgeyer* is why the Louisiana regulation did not constitute due process of law. What was wrong with Louisiana's

---

23. *Id.* at 579.

24. *Id.* at 592-93.

25. For examples of scholarship reading *Allgeyer* this way, see, for example, Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 56 n.28 (describing *Allgeyer* as recognizing "unenumerated fundamental rights that are insulated from state police power regulation"); Stephen A. Plass, *Mandatory Arbitration as an Employer's Contractual Prerogative: The Efficiency Challenge to Equal Employment Opportunity*, 33 CARDOZO L. REV. 195, 210 (2011) (stating that *Allgeyer* "is credited with formally holding that liberty of contract is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment"). For a counterexample, see David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 376-77 (1985) ("It is clear enough that what moved the Court was what it perceived as the extraterritorial application of state law and not the substance of the law in general.").

26. *Allgeyer*, 165 U.S. at 589.

27. *Id.* at 590.

attempt to demand compliance with its marine insurance regulations? The answer is not that liberty of contract is a fundamental right that cannot be restrained in the name of state regulation of the insurance industry.[28] It is quite clear from the Court's opinion that New York could have enacted and enforced an identical statute—it could have set requirements for the issuance of marine insurance and fined either party to the contract if Atlantic Mutual did not meet those requirements.[29] It is equally clear that Louisiana could enforce its statute against people who formed contracts in Louisiana or contracted with companies that did business there.[30] The law was not invalid in toto, but it could not be enforced against Allgeyer. The problem, the Court said, was that Louisiana's demand was made with respect to "a valid contract made outside the State and with reference to a company which [was] not doing business within its limits."[31] Louisiana exceeded the limits of its power because those limits coincided with the borders of the state.

Allegeyer relied, then, on the principle that state legislative jurisdiction was territorially bounded.[32] Louisiana lacked the power to regulate a contract formed and performed outside the state, and a statute purporting to do so was no law but, in Chase's words, a mere "act."[33] We no longer have this conception of territorial limits on state legislative jurisdiction, of course,[34] but that is not the important point. What is important is that *Allgeyer* is not about a fundamental right to contract that trumps state law. It is about the limits of state lawmaking power; it is about the banks of the stream, not the islands.

Allgeyer is a particularly clear example of the reliance on the limits of government power because the limits were actual physical boundaries: state power, the Court said, could not be projected

---

28. *See* James Y. Stern, Note, *Choice of Law, the Constitution, and* Lochner, 94 VA. L. REV. 1509, 1511-12 (2008).

29. *See Allgeyer*, 165 U.S. at 583-84, 592-93.

30. The Court noted that in *Hooper v. California*, 155 U.S. 648 (1895), it had upheld a similar law as applied to contracts within the state, and it did not question *Hooper*. *See Allgeyer*, 165 U.S. at 586-88.

31. *Allgeyer*, 165 U.S. at 593.

32. *See* Currie, *supra* note 25, at 376-77.

33. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

34. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981) (enunciating relaxed limits on legislative jurisdiction).

beyond state lines. But there were other, invisible lines that limited state power as well.

B. Lochner

Joseph Lochner owned a bakeshop in Utica, New York. He hired an employee to work more than sixty hours a week, in violation of a New York law setting maximum hours for bakers.[35] Lochner was convicted of the offense and fined fifty dollars, but when his case reached the Supreme Court, the Court held (as in *Allgeyer*, but this time not unanimously) that the state law was unconstitutional.[36]

What was the problem with the law? As in *Allgeyer*, the problem was that the state had exceeded its authority. As the Court put it, "The limit of the police power has been reached and passed in this case."[37] Understanding what that limit was requires us to look more closely at the concept of the police power.

Nowadays, "police power" is often used to indicate a general legislative power—a power that has no limits and whose exercise may be defeated only by the assertion of a trump-like right.[38] But in the *Lochner* era, it was understood differently. Much as the federal government is now understood to have limited powers to address particular issues, the state police power was understood to authorize legislation directed to particular purposes. In *Lochner*'s formulation, the state could legislate to promote "the safety, health, morals, and general welfare of the public."[39]

The problem with New York's maximum hours law was not that it collided with a fundamental right to contract. The Court conceded that working hours could be limited by any valid exercise of the

---

35. Lochner v. New York, 198 U.S. 45, 46-47 (1905).

36. *Id.* at 64.

37. *Id.* at 58.

38. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567 (1995) (warning that accepting federal authority to regulate mere possession of firearms would "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); Stephen L. Carter, *Originalism and the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 141, 146 (1992) (describing "general police power" as a government's power "to do anything it pleases so long as it does not trample on rights").

39. *Lochner*, 198 U.S. at 53. In theory, state authority is still limited—it is limited to the police power—but the police power is now understood to be a general power: an ocean, rather than streams.

police power.[40] In earlier cases, it had upheld a maximum hours law for miners as a means to protect their safety[41] and a Sunday closing law as conducive to "the general welfare."[42] The problem was that none of the police power justifications—safety, health, morals, or general welfare—were available. A substantial part of the majority opinion, and also of Justice Harlan's dissent, was devoted to discussing whether a health or safety rationale was persuasive. Ultimately, the majority decided it was not.[43] Nor could the law be explained as an attempt to make all members of the public better off.[44] Instead, the Court believed that the New York law was an example of partial legislation—a law that favored one group (employees) at the expense of another (employers).[45] This type of law was akin to the government "tak[ing] ... from A and giv[ing] ... to B," which Justice Chase had offered as an example of legislative action that would not constitute a law.[46]

Just as in *Allgeyer*, then, the *Lochner* Court was using the Due Process Clause to protect individuals against government acts that were invalid because they exceeded government authority. The purported laws were invalid on their own terms, not because the Due Process Clause rendered them so.[47] What barred their enforcement

---

40. *Id.* at 54.

41. *See* Holden v. Hardy, 169 U.S. 366, 398 (1898) (upholding maximum hours law for miners).

42. *See* Hennington v. Georgia, 163 U.S. 299, 305 (1896) (internal quotation marks omitted).

43. *Lochner*, 198 U.S. at 58, 64. There is also a brief discussion of whether the regulation could be sustained "as a labor law, pure and simple." *Id.* at 57. Restrictions on contracting power were considered permissible when one of the parties lacked full capacity, for example by reason of minority or mental defect. But the Court quickly concluded that bakers did not fall into that category. *See id.*

44. *See id.* at 64.

45. *See id.*

46. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). For elaboration of this point, see, for example, Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 998-1000 (2005); John V. Orth, *Taking from* A *and Giving to* B*: Substantive Due Process and the Case of the Shifting Paradigm,* 14 CONST. COMMENT. 337, 339-40 (1997).

47. If these laws were invalid on their own terms, one might ask, why does the Due Process Clause matter at all? Why does the Court go to the trouble of deciding that the individuals are asserting a protected liberty interest, if not to decide that this liberty can be used as a trump over state law? The answer is that if the Due Process Clause did not protect them, Lochner and Allgeyer might still have won their cases—if the Supreme Court's analysis of the limits of the police power was correct—but they would not have had federal claims. Limits on the police power come from general constitutional law—principles common to all

was not an island of preferred liberty but the boundaries of government power.

Of course, we no longer hold the same views about limits on state police power as the *Lochner* Court.[48] But that does not mean that this model of constitutional analysis has vanished from our jurisprudence. To the contrary, although more recent cases may not invoke the Due Process Clause explicitly, they too rely on the principle that the clause bars enforcement of laws that exceed lawmaking power. In the next Part, I argue that *Erie* belongs to this model too.

II. *ERIE*

The story of *Erie Railroad Co. v. Tompkins* is well known, but a brief rehearsal will serve to foreground the elements that are important for my purposes. *Erie* arose out of an accident in Pennsylvania, when an Erie Railroad train struck a pedestrian, Harry Tompkins.[49] A key issue in the case was whether the railroad owed a duty of care to someone, like Tompkins, walking parallel to the tracks on railroad property.

The law that governed this issue, under the pre-*Erie* framework, was the general common law. The general common law was law without a lawmaker; it was a set of rules that judges found, rather than made. As Brandeis put it, quoting Oliver Wendell Holmes, it was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[50]

---

free governments—but state violations of these limits were not understood to create federal claims until after the enactment of the Due Process Clause. *See* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1304-05 (2000). There is some irony in the fact that this general constitutional law, used to prevent state coercion without law, was itself akin to law without a lawmaker—it was not textually enacted by the states. But courts attributed it, if somewhat loosely, to the sovereign people, so it did have a positivist pedigree.

48. More precisely, we do retain the view that the state police power extends only to acts that are in the public interest. But we also now believe that courts should be extremely deferential to the legislature's view of what fits that criterion: "When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 32 (1954).

49. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69-70 (1938).

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

Because the general common law was not made by any sovereign, no courts were authoritative in its interpretation.[51] Thus while there was in theory a single law—the general common law—that determined whether the railroad owed Tompkins a duty of care, in practice, federal courts and the courts of different states might adopt different interpretations, with no single authority to impose uniformity. In fact, the courts of Pennsylvania had apparently adopted a minority position, ruling that in such cases railroads had only a duty "to refrain from willful or wanton injury."[52] Seeking to avoid this interpretation, Tompkins sued in federal court in New York, and the Second Circuit obligingly announced that "upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is."[53] Noting that the "great weight of authority" rejected the Pennsylvania position, the Second Circuit did too: it held that the railroad owed Tompkins a duty of care and could be found negligent if he was struck by an object protruding from the train.[54]

The Supreme Court reversed. The Court said that the Second Circuit's approach, which was the approach of *Swift v. Tyson*,[55] was based on a mistaken reading of the Rules of Decision Act.[56] More than that, it was unconstitutional.[57] But why?

Locating *Erie*'s constitutional source has long been considered a task of some difficulty.[58] On the account developed in this Article, however, the reasoning is quite straightforward, and it is identical to that deployed in *Lochner* and *Allgeyer*. Law, Brandeis announced, does not exist without a lawmaker:

---

51. *See* 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.12 (1935); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1838-39 (2005) (discussing nature of general common law).

52. Tompkins v. Erie R.R. Co., 90 F.2d 603, 604 (2d Cir. 1937).

53. *Id.*

54. *Id.*

55. 41 U.S. (16 Pet.) 1 (1842).

56. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72-73 (1938).

57. *Id.* at 77-78.

58. *See, e.g.*, Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1289 (2007) (noting that *Erie*'s constitutional source "has remained elusive for almost seventy years"); Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 602-14 (2008) (rejecting several constitutional rationales).

> [B]ut 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....
>
> [T]he 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.[59]

The rule of law the Second Circuit was applying—that the railroad owed Tompkins a duty of care—was not created by Pennsylvania, because its courts followed a different rule.[60] But it was not the law of any other state either; given the territorialist understanding then dominant in choice of law, no other state's law could determine rights related to an accident in Pennsylvania.[61] Nor was the law federal. Congress did, of course, have power under the Commerce Clause to regulate railroads,[62] and it could have imposed a federal rule by statute. But it had not. Federal courts probably lacked the power to do so on their own initiative, and in any case, the Second Circuit did not purport to be making federal law.[63] So the Second Circuit's rule was law without a lawmaker, which is to say no law at all. Applying it to impose liability on the railroad was the deprivation of property without law and, a fortiori, without due process of law.[64] *Erie*'s constitutional source—the constitutional

---

59. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533, 535 (1928) (Holmes, J., dissenting)).

60. *Id.* at 70. Might Pennsylvania courts have decided that Pennsylvania's law would be the general common law, while also deciding that their views as to the content of that law should not be authoritative? This would give the general common law a positivist pedigree while allowing for independent interpretation in federal courts and the courts of other states. The suggestion has been made. *See* Green, *supra* note 2, at 1121-35. But it is hard for me to see why a state would adopt that position, as there seem to be obvious reasons why it would be desirable for other courts to follow its interpretation of its own law, and no Justice in *Erie* appeared to think that this was what was going on. *See* Roosevelt, *supra* note 51, at 1840-41. Contemporaneous accounts of the general common law also sound nonpositivist. *See generally id.* at 1838-40 (discussing Joseph Beale's view of the general common law).

61. *See generally* KERMIT ROOSEVELT III, CONFLICT OF LAWS: CONCEPTS AND INSIGHTS 6, 113-14 (2010) (discussing territorialist understanding).

62. *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

63. Tompkins v. Erie R.R. Co., 90 F.2d 603, 604 (2d Cir. 1937).

64. It is worth noting that the application of this fictitious law to uphold liability *in court* amounted to a deprivation of property sufficient to trigger due process protection. It was not

provision that would be violated by continued adherence to the pre-*Erie* practice—is the Due Process Clause.[65]

Erie, of course, featured a situation in which there was no federal statute even purporting to determine the parties' substantive rights.[66] The only way in which a federal rule might have been imposed was through judicial common lawmaking, but the federal courts had not purported to do so either. What happens, however, if the federal government does seek to exercise its authority, but fails? What if Congress adopts an act that goes beyond its power? That is the topic of the next Part.

III. *LOPEZ* AND *MORRISON*

It is now an axiom of our constitutional jurisprudence that federal lawmaking power is enumerated and limited.[67] A law that reaches beyond congressional power is no law at all; it is simply void. So what happens when the federal government seeks to enforce such a law against an individual?

Two cases from the end of the twentieth century presented this question. In 1992, Alfonso Lopez was arrested on the grounds of Edison High School in San Antonio, Texas, carrying a .38 caliber handgun.[68] The federal government prosecuted him under the Gun-Free School Zones Act of 1990 (GFSZA), which prohibited the possession of firearms within statutorily defined school zones.[69]

In 1994, Antonio Morrison, a student at Virginia Tech, allegedly raped Christy Brzonkala, a fellow student.[70] She sought to hold him liable under the federal Violence Against Women Act (VAWA), which created a federal civil rights cause of action for the victims of gender-motivated violence.[71]

---

necessary to inquire whether the railroad had a liberty interest in the out-of-court activity that was being restrained, injuring trespassers. Lochner and Allgeyer both likewise faced obvious in-court deprivations, imprisonment and a fine, which means that the discussion in those cases of whether contract is a Fourteenth Amendment liberty was actually unnecessary.

65. *See* Weinberg, *supra* note 1, at 524.

66. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 70 (1938).

67. *See* United States v. Morrison, 529 U.S. 598, 607 (2000).

68. United States v. Lopez, 514 U.S. 549, 551 (1995).

69. *Id.*

70. *Morrison*, 529 U.S. at 602.

71. *Id.* at 604.

In each case, the Supreme Court struck down the federal law, on essentially the same grounds. The activities in each case were conducted purely intrastate, and neither mere possession nor violent crime were "economic" in nature.[72] Consequently, Congress could not reach them using its power to regulate interstate commerce.[73]

So the laws were invalid. But what constitutional provision stopped the federal government from imprisoning Lopez or demanding that Morrison pay compensation to Brzonkala? In a recent decision, the Court described a similar argument as the claim that the federal law "would violate the Commerce Clause."[74] The court of appeals in *Lopez* and Lopez's lawyers at that level both suggested that congressional legislation that went beyond Congress's enumerated powers would "violate[ ] the Tenth Amendment."[75]

Neither of these contentions is particularly plausible. Congress can hardly be said to violate the Commerce Clause by enacting a law not supported by the commerce power; the clause is a grant of power, not a restriction. Certainly, we would not say that a law sustainable on some other ground, such as Section Five of the Fourteenth Amendment, violates the Commerce Clause because it cannot also be based on the Commerce Clause. Nor does the Tenth Amendment, if read in the most straightforward way, place limits on Congress. It does not forbid Congress from doing anything; what it does is affirm the existence of state powers in much the same way that the Ninth Amendment affirms the existence of individual rights.[76] And even if we read the Tenth Amendment to imply the

---

72. *Id.* at 602, 610-11 (noting and endorsing the economic/noneconomic distinction from *Lopez*); *see also Lopez*, 514 U.S. at 551, 567-68.

73. Because Congress also sought to rely on its power to enforce the Fourteenth Amendment as a basis for VAWA, the *Morrison* Court considered and rejected that power as well. *Morrison*, 529 U.S. at 619-27.

74. Gonzales v. Raich, 545 U.S. 1, 4 (2005). The Court may not have intended to endorse this characterization, because it attributed the characterization to the respondents, who offered that framing in their brief. *See* Brief for Respondents at 7, *Raich*, 545 U.S. 1 (No. 03-1454), 2004 WL 2308766, at *7 (asserting that application of the Controlled Substances Act "would violate the Commerce Clause").

75. United States v. Lopez, 2 F.3d 1342, 1346 (5th Cir. 1993) (noting Lopez's argument that GFSZA violates the Tenth Amendment); *id.* at 1366 (suggesting that ultra vires federal law violates the Tenth Amendment). Lopez's lawyers at the Supreme Court level did not mention the Tenth Amendment in their brief. *See* Brief for Respondent at vii, *Lopez*, 514 U.S. 549 (No. 93-1260), 1994 WL 396915, at *4 (listing constitutional provisions involved, omitting the Tenth Amendment).

76. The Tenth Amendment confirms that although the states surrendered some powers

existence of states' rights that trump federal law, as some cases have, neither *Lopez* nor *Morrison* identified any such specially protected area of state authority.[77] Instead, as with *Erie* and *Lochner*-era cases, the constitutional provision that bars coercive action by the federal government in *Lopez* and *Morrison* is the Due Process Clause.[78] The federalist argument in such cases is best understood as a valid rule due process claim.

Because the issue in these cases was simply the scope of federal power, neither defendant relied on a law-trumping individual right. Lopez might imaginably have made a Second Amendment argument, but he did not; Morrison obviously could not claim any specially protected interest in rape.[79] Individual rights of that sort do not matter if the claim is that the purported law is void because it exceeds the enacting sovereign's powers. But law-trumping rights may be relevant in another way. A law is void if it goes beyond legislative power, but it is also void, at least in part, if it collides with a law-trumping right. If the right belongs to the individual in court, then the analysis is straightforward: the individual asserts the right and can resist enforcement of the law on that ground. But what happens if the right at issue belongs not to the individual in

---

to the national government, like the power to conduct foreign affairs, and accepted some constitutional limits on their powers, like the ban on bills of attainder, remaining powers were not annihilated by the adoption of the Constitution. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (describing the amendment as "stat[ing] but a truism"). The Ninth Amendment likewise works as an argument against an implied deprivation of rights: the Constitution's enumeration of certain rights should not be taken as a decision to annihilate those not enumerated. *See* Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 501 (2011).

77. *See Morrison*, 529 U.S. at 619; *Lopez*, 514 U.S. at 567-68.

78. In assigning this role to the Due Process Clause, I do not mean to suggest that in its absence Lopez would have gone to jail. Judges would presumably have found some principle—something like the general constitutional law at work in *Lochner*—to prevent the government from imprisoning him without a valid law. But to say that some Bill of Rights provisions in part restate fundamental principles of government that courts might enforce even without textual support is neither uncommon nor particularly controversial. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 147-56 (1998) (describing the declaratory theory of the Bill of Rights). Note, however, that Lochner's case would have come out differently because in the absence of the Fourteenth Amendment Due Process Clause, he would have had no federal question.

79. As noted in the discussion of *Erie*, *supra* note 64, the in-court deprivations the defendants faced were sufficient to trigger due process protections, even though at least Morrison would have had a hard time arguing that his out-of-court behavior was liberty protected under the Due Process Clause.

court, but to someone else? Can the valid rule due process argument ever be made in that situation? The next Part discusses this issue.

IV. OVERBREADTH, THIRD-PARTY STANDING, AND *BOND*

A. Overbreadth and Third-Party Standing

The question of when one person can assert another's rights is generally considered under the rubric of third-party standing.[80] In that framework, the answer is typically that individuals must assert their own rights. They cannot resist enforcement of a law against them on the grounds that it might, in some other application, infringe on someone else's rights.[81] The Supreme Court has indicated that this rule is prudential, however, and in some cases it may be relaxed.[82] If an individual has some kind of relationship with the third party whose rights she seeks to raise, and if the third party faces some obstacle to asserting his own rights, the Court may allow third-party standing.[83]

Things look different when the First Amendment enters the picture. In the First Amendment context, individuals are frequently allowed to argue that, although the government could validly regulate their behavior, the law by which it seeks to do so also trenches on protected activity.[84] Although this argument also relies on the rights of individuals not present before the court, it is typically not described as third-party standing. Instead it is called overbreadth.

---

80. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 (1991).

81. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975) (stating that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); United States v. Raines, 362 U.S. 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912) (noting the argument that a statute was void in other applications "and, if so void, [was] void *in toto*"; responding that "this court must deal with the case in hand, and not with imaginary ones").

82. *See* Singleton v. Wulff, 428 U.S. 106, 118 (1976).

83. *Id.* at 117-18.

84. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1587 (2010).

In the First Amendment context, the rule that a substantially overbroad law is invalid is well established.[85]

Overbreadth doctrine is notoriously puzzling, and I cannot list every oddity here, much less make sense of them all.[86] I will focus on two. The first puzzle relates to third-party standing. Discussions of third-party standing seem to assume that while third-party standing may be granted in some cases and withheld in others, all such cases are alike at the merits stage.[87] If third-party standing is granted, the individual before the court will fare at least as well as would the absent third party whose rights he seeks to invoke. In other words, if individual *A*, whose activity can be regulated,[88] is allowed to invoke the rights of individual *B*, whose activity is protected, then individual *A* will win.

By way of example, consider the jurisprudence of the Establishment Clause before *Employment Division v. Smith*.[89] Under the rule of *Sherbert v. Verner*, religious activity occupied a preferred position: it was entitled, at least in some cases, to an exemption from generally applicable laws.[90] Suppose that a statute forbade the use of peyote and that, under established law, Native

---

85. *See, e.g.*, *id.* (discussing overbreadth).

86. Overbreadth has attracted the attention of some very able scholars. In addition to Fallon, *supra* note 80, excellent articles include Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261-79 (1994), and Isserles, *supra* note 7.

87. *See, e.g.*, *Wulff*, 428 U.S. at 113-16; Broadrick v. Oklahoma, 413 U.S. 601, 612-14 (1973).

88. One point frequently made in the literature on overbreadth is that it is misleading or oversimplified to speak of activity as protected or unprotected, because constitutional rights actually do not carve out protected spheres of activity but rather protect only against certain kinds of rules. *See, e.g.*, Adler, *supra* note 6; David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 77-81 (2006). This sounds like a sophisticated point, but I think it is actually analytically unhelpful. That is, I think that the model of protected versus unprotected activity is a useful way of conceptualizing many constitutional rights. The fact that, for instance, the government may arrest me for burning someone else's flag does not necessarily show that there is no such thing as a protected activity of speech. It could also be taken as showing that speech may be restrained if it combines with unprotected conduct, or that some restraints on speech are sufficiently important and leave open sufficient alternative channels, such as allowing me to burn my own flag, that they are permissible. Thus, in this Article I will continue to speak of protected and unprotected activity.

89. 494 U.S. 872 (1990).

90. 374 U.S. 398, 410 (1963). *Sherbert* held that laws that substantially burdened religious exercise must meet strict scrutiny. *Id.* at 402-03. This strict scrutiny was, however, not as demanding in practice as one might have expected. *See Smith*, 494 U.S. at 885.

Americans would be entitled to an exemption for the use of peyote in religious rituals. Could it possibly be the case that if some other individual, say a bored college student, is allowed to invoke the rights of Native Americans, he would prevail just as they would? Could it possibly be the case that only a prudential rule stands in the way of that outcome?

So the first puzzle is about whether, or when, the unprotected party should fare as well as the protected one in third-party standing cases. The second puzzle is about their relative fates in the context of First Amendment overbreadth challenges. Here, the situation is even stranger: the unprotected party actually does better than the protected one. When the protected party would presumably win invalidation of the statute as it applies to his protected conduct,[91] the unprotected party receives a total, facial invalidation.[92] Suppose, for instance, that a city has a statute prohibiting all live entertainment. A theater owner wishing to put on a Shakespeare play can challenge the statute on First Amendment grounds and will prevail: the city cannot prohibit the performance of plays. The owner of a nude dancing club could challenge the statute too, but not on the grounds that the city cannot prohibit nude dance.[93] Instead, he would argue that the statute is unconstitutional in many other applications, such as its application to dramatic plays. He too would prevail, but the outcome would be a total invalidation of the statute on overbreadth grounds.

How can we resolve these two puzzles? The key to understanding them, I will suggest, is the form of due process argument I have been discussing. The crucial question is when a third party's rights may work to invalidate a law in its application to the individual before the court. When they do, the individual resisting enforcement

91. This raises the question of whether protected parties should be allowed to make overbreadth challenges. I will conclude they should be able to. *See infra* notes 109-10 and accompanying text.

92. The distinction between facial and as-applied challenges is also a matter of some confusion. As a general matter, I think that probably too much has been made of the distinction. Individuals present arguments against laws. Some arguments suggest total invalidity and some suggest partial. This does not necessarily mark a difference in what the challenger must show. *See generally* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011).

93. The Court's cases on nude dance are complicated. *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (splintering badly on the appropriate approach). For simplicity's sake, assume that nude dance may be prohibited.

may have no rights of his own to assert, but neither is there a valid rule that the government can claim to be enforcing. Imposing sanctions—a fine or imprisonment—in such a situation is a deprivation of liberty or property without due process of law.

To see how this argument relates to overbreadth and third-party standing, start with the first puzzle. When the Court notes that the restriction on third-party standing is prudential, can it really mean to imply that if it chose to relax this restriction, the college student would win a right to consume peyote based on the religious activities of Native Americans? That seems very unlikely. It is tantamount to a suggestion that a single invalid application, if the court considers it, requires the total invalidation of a statute—that is the only way in which the invalidity as applied to the Native Americans can remove the ban on the college student. That suggestion is completely at odds with the doctrine of severability, which holds that courts should generally invalidate only as much of a statute as is necessary.[94]

So the Court cannot mean that any invalid application dooms a statute. Instead, if the student were allowed to raise the rights of Native Americans, the more likely consequence is that a court would declare that their rights trump the statute: peyote use as religious exercise gets an exemption. But this declaration would not help the college student. He would still lose. That portion of the statute governing his nonreligious conduct would remain in effect, so the due process "valid rule" argument would not be available.

What that means is that deciding that the peyote ban could not constitutionally be applied to Native American religious rituals would have no effect on the outcome of the student's challenge. It would be advisory, which suggests that the ban on third-party standing may have constitutional elements as well.[95] At the least, it derives from a fact about the merits: even if an individual were allowed to argue that a statute would be unconstitutional as applied to someone else, he would typically only get a statement of invalidity in that other application. He would not prevail with respect to

94. *See, e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).

95. The Supreme Court has suggested as much. *See* New York v. Ferber, 458 U.S. 747, 767 & n.20 (1982). Note 20 offers a lengthy quotation from *United States v. Raines*, 362 U.S. 17, 21 (1960), which does not explain exactly what the constitutional problem is.

his own case, because there would still be a valid rule regulating his conduct.

This conclusion raises another puzzle. There cannot be a blanket constitutional ban on third-party standing, because the Supreme Court has allowed it in some cases.[96] And it cannot be the case that third-party rights can never help, because some of the individuals asserting the rights of other parties have prevailed.[97] Setting First Amendment overbreadth aside for the moment, the Court has announced that third-party standing may be permitted when there is an appropriate relationship between the individual and the third party whose right he seeks to assert, and some reason why the third party might be discouraged from raising the rights herself.[98]

What distinguishes such a case from the case of the hypothetical college student is precisely that the individuals who prevail in the Court's third-party standing cases are helped by the other party's rights. The portion of the law invalidated by invoking the absent party's rights is the same portion that governs the party before the court. The third party's rights, as it were, clear a space for the unprotected conduct: no valid rule remains to regulate it.

One simple example is a doctor who wants to perform abortions for her patients. She herself has no recognized constitutional right to do so. But if she can invoke her patients' rights to invalidate a law that bans abortions, there will be no law left regulating the conduct she seeks to engage in. Another example is a merchant who wants to sell beer to males between eighteen and twenty-one years old but is prevented by a state law that allows only females in that age range to purchase it.[99] Again, the merchant surely has no right to sell beer to the males, but invoking their rights will invalidate the portion of the law that purports to stop him.[100]

What this analysis suggests is that the traditional aversion to third-party standing should be understood as having two components. The first is what we could call the severability bar: ordinarily, the fact that a law might be unconstitutional as applied to individual *A*, whose conduct is protected, will not prevent it from

96. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 118 (1976).
97. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1592 (2010).
98. *See Wulff*, 428 U.S. at 115-16.
99. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976).
100. *See id.*

being applied to individual *B*, whose conduct is not. Ordinarily, that is, there is no point in allowing third-party standing, because the government will still win on the merits. And hence, ordinarily, there might actually be constitutional problems with the practice because any statements about the rights of the third party would be advisory.

In some cases, however, the part of the statute knocked out by invoking *A*'s rights will be the same part that applies to *B*, or *A*'s rights will invalidate the statute in toto. This kind of case appears to be what the Court has tried to identify by requiring a "relationship" between the individual and the third party.[101] In such cases, the third-party rights do make a difference, so there is no concern about advisory opinions or dictum. There is no severability bar. What remains is what we could call the waiver and representation bar: ordinarily, individuals are probably best positioned to argue for their own rights. More significantly, they are also entitled to waive those rights if they choose.[102] The possibility of waiver is probably what the Court has tried to identify by noting that constitutional rights are "personal."[103] These practical concerns are also substantial, but it is within the judicial power to relax them, and the Court has done so on occasion, most typically when there is some reason to think that individuals who do not wish to waive their rights will nevertheless be discouraged from asserting them.[104]

The analysis thus far explains why some people raising third parties' rights should win, and why others have no possibility of winning and should not be heard in the first place. But now what about the second problem? The nude dance club owner making an overbreadth challenge to a statute that bans live entertainment is not relying on rights that shield his conduct—his conduct is not intertwined with the protected conduct. So he looks like the college student, who should lose on the merits, and in fact should not be heard to raise the rights that can be of no use to him. Yet not only

101. *See Wulff*, 428 U.S. at 114-15. In *Craig*, 429 U.S. at 190 n.4, the Court described such rights as "mutually interdependent," which comes closer to the view I suggest here, although it focused on the harmful effects on the absent parties rather than the question of whether their rights could actually assist the litigant.

102. On the issue of standing and waiver of constitutional rights, see Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1693-1707 (2007).

103. *Wulff*, 428 U.S. at 123.

104. *See id.* at 115-16.

is he allowed to raise these rights, he prevails and even wins a more comprehensive victory than the theater owner.

This cannot be third-party standing of the sort analyzed above. Indeed, it is not. First Amendment overbreadth, as others have noted, is best understood as a substantive First Amendment rule that such laws cannot be enforced against anyone, regardless of whether their speech is protected.[105] Opinions may differ about the nature and definition of this rule. Richard Fallon has described it as "procedural or prophylactic."[106] I think it may be better described as straightforward First Amendment balancing: a law that forbids a substantial amount of protected speech is simply too hostile to speech to justify its acceptable applications. The harm, chilling, occasioned by a prohibition of sufficient protected speech outweighs the benefits of proscribing the unprotected speech or conduct.[107] The law is inherently defective and entirely invalid.[108]

What this means is that First Amendment overbreadth is also an example of the due process valid rule challenge. A party bringing an overbreadth challenge is not asserting the rights of third parties on the theory that those rights shield his conduct, which is what is required for a successful third-party standing claim. The party is asserting them on the theory that a substantial number of invalid applications will doom the statute entirely, leaving no valid rule regulating his conduct. Because the party is relying on a doctrine that negates the entire statute, it is not surprising that he can win a more complete victory than someone who argues only that particular conduct is protected. What is surprising, on this understanding of overbreadth, is that the protected individual is not allowed to mount an overbreadth challenge too.[109] As master of his complaint,

105. *See* Monaghan, *supra* note 6; Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 424 (1974).

106. *See* Fallon, *supra* note 80, at 868.

107. This seems to be the explanation the Court has suggested. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (describing balancing); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (describing harms).

108. A similar calculus seems to underlie the more stringent First Amendment vagueness doctrine: a law that will have a substantial chilling effect because its margins are uncertain cannot be enforced against even unprotected conduct that clearly falls within its scope. *See, e.g.*, Smith v. California, 361 U.S. 147, 151 (1959). Thus, vagueness is also an example of a valid rule due process challenge: an inherent defect dooms the statute, leaving no valid rule in place, and individuals cannot be punished regardless of whether their conduct is protected.

109. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985).

he should be able to do so, even if a court might find that holding his particular conduct protected offers a narrower ground on which to resolve the case.

So First Amendment overbreadth is not best understood as a procedural device for asserting other parties' rights. It is part of the substantive law of the First Amendment. In fact, it is part of other substantive law as well. In the federalism context, for instance, the Court seems to have taken the position that if Congress aims at a class of activity that is beyond its power—such as intrastate acts of mere possession—its law is entirely invalid, without any inquiry into whether particular applications might be permissible.[110] Congress does not have the power to prohibit mere possession of a gun near a school,[111] for instance, but it does seem to have the power to prohibit such possession of guns that have moved in interstate commerce.[112] Of course, almost all guns have moved in interstate commerce. The gun possessed by Alfonso Lopez almost surely had, but the Supreme Court did not inquire into that possibility before striking down the Gun-Free School Zones Act in its entirety.[113] More generally, any doctrinal test that includes a narrow tailoring requirement arguably incorporates something like the overbreadth doctrine.[114]

B. Bond v. United States

The upshot of the previous Section is that both overbreadth and third-party standing are best conceptualized as presenting valid rule due process challenges. There are, however, some differences. In the third-party standing case, the challenging individual claims that the rights of some party not before the court invalidate the law

110. This proposition is in some ways the contrapositive of *Raich*, which said that when Congress aims at a class of activity that is within its power, the fact that isolated instances may be intrastate and noncommercial will not exempt them. Gonzales v. Raich, 545 U.S. 1, 19-20 (2005).

111. *See* United States v. Lopez, 514 U.S. 549, 567-68 (1995).

112. After *Lopez*, Congress reenacted the Gun-Free School Zones Act with a "jurisdictional hook" limiting its application to guns that "ha[ve] moved in or that otherwise affect[] interstate or foreign commerce." United States v. Danks, 221 F.3d 1037, 1038 (8th Cir. 1999) (per curiam) (quoting 18 U.S.C. § 922(q)(2)(A) (2006)). This version has survived lower court challenges. *See, e.g.*, *id.*

113. *See Lopez*, 514 U.S. 549.

114. *See* Monaghan, *supra* note 6.

that purports to govern the individual who is before the court, either in whole or in relevant part, so that no valid rule remains. If the third party's rights invalidate only the irrelevant parts of the law, third party standing is denied, which makes sense given that the individual in such a case would necessarily lose on the merits. In the overbreadth case, the challenging individual claims that the law is invalid in so many applications that it is entirely void. This rule is familiar in the First Amendment context, where it is justified by the danger of a chilling effect, but it actually operates in other contexts as well.

Now we are ready to consider *Bond v. United States*, to ask how it fits in the taxonomy sketched above, and whether it changes anything.[115] The facts are baroque. Having discovered that her best friend and husband had an affair, leading to the friend's pregnancy, Carol Anne Bond sought revenge through a variety of schemes, including attempts to expose the friend to toxic chemicals.[116] This conduct violated 18 U.S.C. § 229, which forbids knowing possession or use of toxic chemicals when not intended for a "peaceful purpose."[117]

Bond did not attempt to deny the conduct but argued instead that the law was void because it was "beyond Congress' constitutional authority to enact."[118] This is easily recognizable as a valid rule due process argument: Bond did not claim that her conduct was privileged in some way, but rather that the law under which she was prosecuted was invalid for some other reason. In that sense, it was just like the arguments that had prevailed in *Lopez* and *Morrison*.

But *Bond* was also different. *Lopez* and *Morrison* dealt with the commerce power.[119] Though the Court struggled over the years to identify the limits to this power, it always maintained that such limits existed, at least in theory.[120] The Court, after a struggle, also

115. 131 S. Ct. 2355 (2011).

116. *Id.* at 2360.

117. *Id.* (citing 18 U.S.C. §§ 229(a), 229F(1), (7), (8) (2006)).

118. *Id.*

119. United States v. Morrison, 529 U.S. 598, 607 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995).

120. Some Warren Court era cases suggest that the Court was willing to engage in only very minimal judicial review of a congressional determination that a law fell within the commerce power. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis

affirmed that "states' rights" were not a limit on the commerce power.[121] So the structure of the analysis in *Lopez* and *Morrison* was clear: law-trumping rights were not at issue; the only question was the boundaries of federal power. *Lopez* and *Morrison* were about the banks of the stream, not about any islands within the stream.

Bond was different because the statute under which Carol Anne Bond was prosecuted was not enacted pursuant to the commerce power. Instead, it was passed to fulfill the United States' obligations under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, a treaty ratified in 1997.[122]

In contrast to the commerce power, where we know that there are streambank limits but no states' rights islands, the restrictions on the treaty power are quite unclear. There might be streambank limits; it might make sense to ask whether a treaty addresses an issue on which there is a real need for international coordination, or whether it is a pretextual device to expand federal regulatory power.[123] No one disputed that Bond could make a streambank argument, just as Lopez and Morrison had. But there might also be island limits—areas of state sovereignty that Congress cannot override.[124] Those would be states' rights. The question *Bond* presented was whether an individual could assert those states' rights, assuming that they existed, in resisting a federal law.[125]

The Third Circuit answered no, relying on *Tennessee Electric Power Co. v. Tennessee Valley Authority*, in which the Supreme

---

for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."). But a limit that is underenforced, or even unenforced, by the judiciary is still a limit that a constitutionally scrupulous Congress is bound to observe. *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 173-74 (2006).

121. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47, 554, 556 (1985). Some limits on the commerce power do seem similar to states' rights, notably the principles that Congress cannot compel state executives to enforce federal laws or state legislatures to enact laws. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (executives); New York v. United States, 505 U.S. 144, 158 (1992) (legislatures).

122. *Bond*, 131 S. Ct. at 2360.

123. For a more radical view, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (arguing that treaties cannot increase the legislative power of Congress).

124. *See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 433-41 (2003).

125. *Bond*, 131 S. Ct. at 2360.

Court refused to allow a group of private power companies injured by competition from the federally chartered Tennessee Valley Authority (TVA) to argue that the TVA was unconstitutional.[126] Toward the end of its opinion, the court commented that "there is no objection to the Authority's operations by the states, and, if this were not so, the [utility companies], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment."[127] This meant, the Third Circuit believed, that in line with traditional third-party standing rules, an individual, absent the state, could not resist application of a federal law on the ground that it violated states' rights.[128]

The United States initially supported the Third Circuit's decision but modified its position at the Supreme Court level.[129] While the Third Circuit seemed to suggest that Bond could not make *any* federalism-based arguments, the United States conceded that Bond could challenge § 229 on the grounds that it exceeded Congress's power, a streambank argument, but maintained that she could not raise states' rights as a defense, an islands argument.[130] Because this appeared to be a more modest position than the one the Third Circuit had taken, the Court appointed Stephen McAllister as an amicus to defend the decision below.[131] McAllister largely agreed with the United States: of course an individual prosecuted under a federal law could defend on the grounds that the statute exceeded federal power.[132] But he claimed the treaty power was unique[133]: it had no streambank limits. Hence, the only argument available was a states' rights one, and traditional third-party standing rules prevented individuals from raising those.[134] Bond herself, unsurprisingly, argued that she should be allowed to raise any argument against the statute.[135]

---

126. *Bond*, 581 F.3d 128, 136-38 (3d Cir. 2009) (citing Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 143-44 (1939)).

127. *Id.* at 136 (alteration in original) (quoting *Tenn. Elec.*, 306 U.S. at 144).

128. *See id.* at 137.

129. *See Bond*, 131 S. Ct. at 2361.

130. *See id.*

131. *Id.*

132. *See* Brief for the Amicus Curiae Appointed to Defend the Judgment Below at 27-47, *Bond*, 131 S. Ct. 2355 (No. 09-01227), 2011 WL 118265, at *11-18.

133. *Id.* at 38-42.

134. *Id.* at 27-47.

135. *See* Brief for Petitioner at 16-17, *Bond*, 131 S. Ct. 2355 (No. 09-1227), 2010 WL

The Supreme Court sided with Bond.[136] It rejected the government's proposed distinction between streambank and island limits. "Federalism," Justice Kennedy wrote for a unanimous Court, "has more than one dynamic."[137] In part, it protects "the integrity, dignity, and residual sovereignty of the States" as "an end in itself."[138] But it also "protects the liberty of all persons within a State .... The limitations that federalism entails are not therefore a matter of rights belonging only to the States."[139] Bond could raise whatever Tenth Amendment arguments she chose, regardless of whether the Amendment was construed as "a truism, or whether it has independent force of its own."[140] Justice Ginsburg, joined by Justice Breyer, wrote a brief concurrence to observe that of course a criminal defendant could always argue that the law that purportedly regulated her conduct was unconstitutional.[141]

What does *Bond* mean for individuals hoping to raise Tenth Amendment arguments against federal laws? Although, or perhaps because, the opinion is unanimous, it does not offer a thick enough theoretical account to make clear how its rule should apply in other cases. Some early reactions have taken the decision to be very important.[142] In my view, however, *Bond* is best understood as merely acknowledging the ability of criminal defendants to raise valid rule due process challenges—not a surprising holding, and not even one that is inconsistent with *Tennessee Electric*. *Bond*'s reach, and its limits, can best be understood by considering several categories of cases it might be thought to affect.

4973133, at *10-11.

136. *Bond*, 131 S. Ct. at 2360.

137. *Id.* at 2364.

138. *Id.*

139. *Id.*

140. *Id.* at 2366-67 (citation omitted) (quoting New York v. United States, 505 U.S. 144, 156 (1992)) (internal quotation marks omitted).

141. *Id.* at 2367-68 (Ginsburg J., concurring).

142. *See, e.g.*, Goldwater Inst., *Groundbreaking US Supreme Court Decision on the Tenth Amendment*, ARIZONATEAPARTY.COM (June 17, 2011, 11:30 AM), http://arizonateaparty.ning.com/profiles/blogs/goldwater-institute ("This decision is as radical in the direction of liberty as the New Deal was radical in the direction of socialism.").

1. Regulated Individuals and Total or Partial and Relevant Invalidity

Generally speaking, *Bond* can be described as holding that an individual regulated by a statute can raise Tenth Amendment arguments when the result, if successful, would be the invalidation of the statute either entirely or to the extent that it governs him. As Justice Ginsburg noted, this is not very surprising. The Court has frequently entertained challenges from regulated individuals that the statute governing their conduct is void, even if the reason for voidness is not a right personal to them.[143] This argument is a standard valid rule due process claim. The only issue in such a case is whether the right that allegedly voids the statute is so personal to another that the rights holder is the only person who should be heard. This is what I have described as the waiver and representation bar to third-party standing.

With respect to structural principles, the Court has been quite willing to allow individuals to make the argument, as in *INS v. Chadha*.[144] In other cases, the Court has sometimes offered reasons why sole reliance on the rights bearer is inappropriate. For instance, in *Eisenstadt v. Baird*, a distributor of contraceptives was allowed to raise the rights of individuals wishing to use them because the distributor was the only person subject to criminal sanctions.[145] In *Singleton v. Wulff*, a doctor was allowed to raise the rights of pregnant women who might have been hesitant to challenge an abortion restriction because of the loss of privacy.[146] In *Craig v. Boren*, however, the Court noted that regulated individuals have "uniformly" been permitted to raise the rights of transactional counterparties, suggesting that this sort of third-party standing is the rule rather than the exception.[147] In *Steward Machine Co. v. Davis*, notably, the

143. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 935-36 (1983) (concerning an individual facing deportation); Craig v. Boren, 429 U.S. 190, 192-97 (1976) (concerning a beer seller); Singleton v. Wulff, 428 U.S. 106, 112-18 (1976) (concerning doctors who performed abortions); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972) (concerning a distributor of contraceptives).

144. 462 U.S. at 935-36.

145. 405 U.S. at 446.

146. 428 U.S. at 117.

147. 429 U.S. at 195. *Craig* lists some other examples of individuals subject to coercion by laws they claim are unconstitutional: white homeowners trying to avoid the constraint of racially restrictive covenants, and contraceptive distributors. *See id.* at 193-97 (citing

Supreme Court allowed a regulated company to raise Tenth Amendment arguments in its challenge to the Social Security Act without any indication that the issue of standing posed a problem worth considering.[148]

Indeed, given that regulated individuals can raise valid rule due process challenges, the argument that the rights that invalidate the law do not "belong" to them is somewhat beside the point. The regulated individuals are not trying to "assert" the rights in the conventional sense but are rather relying on their existence to support the claim that the regulating laws are invalid.[149] The only real concern from that perspective is waiver: if the individuals who do possess the rights would like to waive them, it may be that the laws are not invalid after all.[150] *Bond* is perhaps best described as recognizing that Tenth Amendment rights are not waivable and that the waiver and representation bar to third-party standing will *always* be lowered when such rights are at issue.

Bond thus makes clear that regulated individuals may rely on states' Tenth Amendment rights to argue that the law purporting to govern their conduct is invalid. If, for instance, *National League of Cities v. Usery* were still good law, and the federal government could not set minimum wages for state employees, a janitor at the state capitol would be able to invoke the state's right to challenge a federal law that prohibited him from working for less than the minimum wage.[151] Or, to use the example of a states' right that possibly still retains vitality, if the federal government ordered a

---

Eisenstadt, 405 U.S. at 443-46; Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1963); Barrows v. Jackson, 346 U.S. 249, 255-56 (1953)). Again, an easy explanation for why these people have standing is that, as regulated parties, they have valid rule due process arguments. *But see* Tileston v. Ullman, 318 U.S. 44, 46 (1943) (holding that a physician lacked standing to raise patients' rights in challenging law that prohibited him from giving the patients advice about contraceptives). *Griswold v. Connecticut* distinguishes *Tileston* on the grounds that the doctor sought a declaratory judgment. *See Griswold*, 381 U.S. 479, 481 (1965). Others have distinguished *Tileston* on the grounds that the doctor had not alleged personal injury. Note, *supra* note 105, at 430.

148. 301 U.S. 548, 584-85 (1936).

149. By way of analogy, consider a suit under state law. One party might contend that a relevant state statute has been preempted by federal law—in other words, that it is not an enforceable rule. To make this claim, he need not show that he has any rights under the federal law.

150. *See* Kontorovich, *supra* note 102, at 1700-01.

151. 426 U.S. 833, 836, 845-46, 851-52, 855 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

state to relocate its capital, and as part of that law ordered an individual who had been conducting tours of the current capitol building to cease, the tour guide could rely on the state's right to locate its capital as it saw fit.[152]

2. Regulated Individuals and Partial and Irrelevant Invalidity

Bond does not, however, say anything to indicate that what I have called the severability bar to third-party standing should be relaxed for Tenth Amendment claims. And indeed, it would make very little sense to do so. Assume again that *National League of Cities* remained good law, so that federal wage and hour regulations could not be applied to state employment contracts. Should the janitor at a private factory down the street be allowed to raise the state's Tenth Amendment rights in order to argue that he too should be allowed to contract on whatever terms he chooses? Certainly not, because knocking out the portion of the statute that governed state employee contracts would not have any effect on the portion that governed his contract. Regulated individuals who are not shielded by the rights they seek to invoke should still not be allowed to raise those rights.

3. State-Regulated Individuals and Commandeering Claims

One reason that *Bond*'s import is unclear is that we do not know whether the Tenth Amendment actually contains any states' rights —whether it is merely a truism or whether it has independent force.[153] In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court seemed to give up on the idea of islands of state sovereignty untouchable by federal regulation.[154] In its more recent commandeering cases, however, the Court has articulated principles that look a good deal like states' rights.[155] The Court has announced

152. *See* Coyle v. Smith, 221 U.S. 559, 565-66, 574, 577 (1911).

153. In fact, as suggested above, *see supra* notes 76-78 and accompanying text, these are not the only alternatives. The Tenth Amendment is most naturally read not to affirm the *existence* of state *rights*, but rather the *persistence* of state *powers*. The mere creation of the federal government, it says, did not annihilate state powers that were neither given to the federal government nor stripped from the states.

154. 469 U.S. at 546-47, 554, 556.

155. *See, e.g.*, Reno v. Condon, 528 U.S. 141, 151 (2000) (holding that the challenged law

that the federal government can neither require states to enact legislation nor require state officials to enforce federal laws.[156] Can private individuals argue that a federal law is unconstitutional because it violates these Tenth Amendment limits?

Bond does not clearly answer this question. It does tell us that the waiver and representation bar to third-party standing should not stand in the way. But an individual seeking to raise a *New York v. United States* or *Printz v. United States* claim may face other problems: In the *New York* case, he will be challenging a valid state law.[157] In the *Printz* case, he will be resisting actions of state officials.[158] In either case, the state action is permissible in the absence of the federal mandate.

The fact that the state action is valid in the absence of the federal law poses problems of causation and redressability, two-thirds of the conventional standing triad.[159] Without the federal mandate, the state might still have enacted the state law or directed its officers to enforce the federal one. And if the mandate is struck down, neither state action is thereby invalidated.[160] All the same, the principle that states' Tenth Amendment rights are not waivable suggests that the individual should be able to make the argument. He would not receive direct relief from the state regulation, but the ability to then urge state decision makers to undo their decisions might be tangible enough to meet the redressability demand.[161]

My main point here, however, is not to argue that individuals should or should not be permitted to raise *New York* and *Printz* claims. It is rather to point out that because *Bond* is about an

---

did not "require the States in their sovereign capacity to regulate their own citizens").

156. *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

157. 505 U.S. at 181.

158. 521 U.S. at 904.

159. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (identifying injury, causation, redressability); *id.* at 562 (noting these are harder for unregulated individuals to show). I have assumed that the state regulation constitutes sufficient injury.

160. At least, I would think not. A rule that any state action commanded by the federal government is invalid, though the state had the power to take the action on its own initiative, strikes me as odd. For one thing, it effectively allows the federal government to preempt state laws by demanding them.

161. *See generally* Ara B. Gershengorn, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065 (2000) (arguing that individuals should have standing to make *Printz* and *New York* arguments).

individual regulated directly by the federal government, who can raise a valid rule due process challenge, it does not necessarily resolve the question of *New York*/*Printz* standing. All it does for those claims is remove the waiver and representation bar.

4. Unregulated Individuals

New York and *Printz* claims are difficult because the individual seeking to raise the state's Tenth Amendment rights is not directly regulated by the federal law he wants to challenge. He is, however, at least subject to *some* legal regulation that the federal law commands. Totally unregulated individuals are in a different situation. Imagine, for instance, that the federal government ordered a state to move its capital and the state acquiesced. The law imposes no obligations on private parties. Should the private tour guide for the state capitol, whose receipts will decline, be allowed to raise the state's Tenth Amendment rights to challenge this federal law?

The outcome here is even harder to judge than it was for the *New York*/*Printz* claims. Now, in addition to causation and redressability issues, we have an injury question too. Is the decline in receipts a sufficient injury? *Helvering v. Davis* suggests that the answer may be yes.[162] There, a corporate shareholder was allowed to raise Tenth Amendment arguments in challenging the Social Security Act, pursuant to which the corporation was deducting money from employees' pay.[163] The shareholder's theory was that the corporation, and hence the shareholder, would suffer economic injury thereby, though he was clearly not the subject of regulation.[164]

On the other hand, it is clear that individuals face a higher barrier in seeking to challenge a law that does not purport to govern their conduct. In *Eisenstadt v. Baird*, for instance, the Court seemed to assume that the single individuals who wanted to obtain contraceptives had little opportunity to challenge the law banning their distribution because they were not subject to prosecution.[165] That, after all, was one reason it granted standing to the distributor. More

162. 301 U.S. 619 (1937).

163. *Id.* at 637-40.

164. *Id.*

165. 405 U.S. 438, 446 (1972) (noting that single individuals not subject to prosecution were "to that extent, ... denied a forum in which to assert their own rights").

recently, in *Lujan v. Defenders of Wildlife*, the Court noted that what a plaintiff must show to establish standing "depends considerably upon whether the plaintiff is himself an object of the action ... at issue."[166] "When ... a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," the Court continued, "much more is needed."[167]

The difference between a regulated and an unregulated individual, in *Lujan*'s terms, is that it is harder for the unregulated individual to show injury, causation, and redressability.[168] A different phrasing, in the terms of this Article, is that a regulated individual can mount a valid rule due process challenge, while an unregulated individual cannot. *Bond* deals with regulated individuals. It does not necessarily mean much for unregulated individuals.

In sum, the easiest way to understand *Bond* is as recognizing that regulated individuals can raise valid rule due process challenges. Such individuals are not asserting third-party rights in the sense that they rely on those rights to generate their claims. Their claims arise from their own rights under the Due Process Clause. The role that third-party rights play is the more incidental one of invalidating the rule that purports to govern the individual. The main concern in such a case is that the third parties to whom these rights belong might wish to waive them, with the result that the rule would be valid after all. *Bond* holds that Tenth Amendment rights are not waivable in this sense—not much of an innovation, because *New York* explicitly held exactly the same thing nineteen years earlier.[169]

166. 504 U.S. 555, 559 (1992).

167. *Id.* at 562. In particular, one might question whether a company facing greater competition has suffered the injury to "a legally protected interest" that *Lujan* requires. *Id.* at 560. Standing doctrine is obviously complex and theoretically unsettled. For a review and analysis from a perspective relevant to this Article, see Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009).

168. *See Lujan*, 504 U.S. at 562.

169. *See* 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

CONCLUSION

Valid rule due process challenges are more common than we think. They are not always explicitly articulated, but recognizing that an individual's basic complaint is government compulsion without legal authorization allows us to identify such challenges. There are several benefits to doing so.

In the case of *Lochner*-era substantive due process, understanding the structure of the argument lets us understand this body of law as its contemporaries did, rather than shoehorning the decisions into modern conceptual categories. Reading the cases as about streambank limits on state power rather than law-trumping fundamental rights gives us a deeper understanding of the decisions and also of their relation to modern doctrine.

Lochner's heirs—if by that term we mean more recent decisions that also use this form of argument[170]—are not the usual suspects.[171] Instead, the valid rule due process argument turns out to be the constitutional basis for *Erie*, modern federalism decisions, and overbreadth and vagueness arguments.

Identifying the constitutional principle that restrains the government in such cases has some value in its own right. *Erie*'s constitutional source, for instance, has long been an object of speculation. It also contributes to a more mature understanding of *Lochner* and its pathologies. There is nothing wrong with the form of a valid rule due process argument; the question in each case will be whether courts have identified a sensible limit on legislative power that is appropriate for judicial enforcement. *Lochner*'s limits might at one point have made sense, but they lost fit as circumstances changed.[172]

---

170. In a well-known article, Cass Sunstein looks for decisions that use a contested baseline, which is a different path to follow. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987).

171. One common argument is that *Lochner*-style due process is the intellectual ancestor of *Roe v. Wade*. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 224-29 (1990); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943-45 (1973). However, *Roe* relies on a law-trumping right and is conceptually very different. 410 U.S. 113, 153-54 (1973).

172. *See* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 988-91 (2006).

Last, understanding the form of argument behind federalism and overbreadth decisions can offer courts guidance going forward.[173] The analysis performed here shows the conceptual structure of overbreadth and third-party standing, which helps to clarify the relationship between them. Understanding their structures and relationships, in turn, lets us see the implications of *Bond*, which are less sweeping than might be supposed. In sum, noting the common structure of arguments in different topics and eras gives us a deeper understanding of constitutional doctrine in the past, the present, and the future.

173. I have mentioned several areas in which I believe due process valid rule arguments operate, but there are others. The case of individuals seeking to resist state laws on the grounds of federal preemption, for instance, has caused courts some difficulties. If the state seeks to enforce the law against the individual, his ability to present the preemption argument as a defense is uncontroversial. But if the individual seeks preenforcement injunctive relief, standing problems may arise. If the allegedly preemptive federal statute does not grant the individual a cause of action, what right is he asserting? Some federal courts have reasoned that the Supremacy Clause supplies the necessary individual right. *See, e.g.*, Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 649 (9th Cir. 2009) (permitting suit for injunctive relief "directly under the Supremacy Clause"), *vacated sub nom.* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204 (2012). But it seems odd to read the Supremacy Clause as a source of individual rights, and other courts have questioned whether a preemption claim can go forward in the absence of an individual right under the allegedly preemptive federal statute. *See, e.g.*, TCG Detroit v. City of Dearborn, 206 F.3d 618, 622 n.1 (6th Cir. 2000). In *Douglas*, the Court avoided the issue, though four Justices expressed the view that, at the least, the Supremacy Clause did not *always* supply a cause of action. *See* 132 S. Ct. at 1211-13 (Roberts, C.J., dissenting). It might, however, prove fruitful to ask whether the relationship between the individual and the challenged state law is such that the individual can assert a valid rule due process challenge, in which case the Due Process Clause would supply the necessary individual right.