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Can Erie Survive as Federal Common Law?

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CAN *ERIE* SURVIVE AS FEDERAL COMMON LAW?

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A remarkable aspect of this symposium is its self-conscious effort to straddle theory and doctrine. On the theoretical side, our title "Law Without a Lawmaker" gestures toward an abyss of imponderables. If law without lawmakers were even conceivable, who or what would make such law? And if law without lawmakers is not made by anyone, has it somehow existed forever and always? Even explaining law without lawmakers by reference to an arguably lawmaking divinity or social consensus might not save such unmade law from its skeptics.

By contrast, the prospectus accompanying our symposium shifts quickly from theory to *Erie*.[1] *Erie Railroad Co. v. Tompkins* is a chestnut among American legal technicians, as it prescribes applicable law for federal courts that exercise diversity and supplemental jurisdiction. Regardless of existential disputes that surround "law without a lawmaker," *Erie*'s doctrinal status is overwhelmingly secure.[2]

Some readers might be unsettled by fusions of high theory and workaday doctrine, yet theoretico-doctrinal analyses of *Erie* have surfaced throughout the legal academy. For at least two decades, *Erie* has been the case that launched a thousand ships, as a generation of scholars has sought guidance from *Erie* about topics ranging from customary international law to state choice of law, from federal common law to jurisprudential theory.[3] Each of these

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

2. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4504, at 26-29 (2d ed. 1996 & Supp. 2010) (discussing *Erie*'s doctrinal developments in the Supreme Court).

3. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 320-31 (1997) (customary international law); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651,

interpretations has characterized *Erie* not just as an ordinary decision with facts and a holding, but as an iconic representation of broad constitutional or jurisprudential principles.

This Article takes stock of *Erie*'s florescence. To preview my conclusions, I tend to resist most connections between *Erie* and wider fields of legal doctrine, yet I think that debates over *Erie*'s meaning can illuminate links between legal theory and legal history. Many present-day theorists invoke the cultural authority of doctrinal icons like *Erie* without identifying connections to the judicial opinion's text, context, original meaning, precedential trajectory, or historical reconstruction.[4] Abstract methodologies like originalism, textualism, and "living" dynamism are familiar when it comes to interpreting statutes, constitutions, or treaties.[5] Yet similar methodologies for

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708-15 (1995) (predicting and ascertaining state law); Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1115 (2011) (horizontal choice of law); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 498-99 (2007) (international impact of the United States Constitution); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 163-66 (application of the Alien Tort Statute); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 274, 279 (1999) (maritime preemption).

4. This trend toward transhistorical theorization coexists with a contemporary emphasis on history in constitutional interpretation. *See* G. EDWARD WHITE, HISTORY AND THE CONSTITUTION 5 (2007). And of course, many histories have analyzed icons like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Brown v. Board of Education*, 347 U.S. 483 (1954), and even *Erie*, 304 U.S. 64. *See, e.g.*, FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937); TONY ALLAN FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM (1981); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA (1989); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 6 (1979); James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992); Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011 (1978).

5. *E.g.*, SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION (2003); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 685-91 (1990); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 155-57, 159 (2006).

interpreting judicial decisions have drawn less attention.[6] This Article will not endorse anything like "originalism for judicial opinions."[7] Instead, I simply propose that expansive applications of *Erie*—if construed as representative models for interpreting iconic cases—could raise some of the same jurisprudential problems that *Erie*'s theorists wish to solve. This Article also suggests that *Erie*, like its predecessor *Swift v. Tyson*, should be understood as an example of federal common law—not as a barrier restricting it.

Part I begins by characterizing *Erie* as quite a radical decision in its day. I will argue that, even though the Court's reasoning about constitutional federalism was terribly flawed, *Erie*'s result seemed urgently necessary in 1938 and remains vital today. Much of this history is familiar but underappreciated. Lawyers are often taught that *Erie* is essential, but they less often grasp precisely why or how.[8] Reviewing what *Erie* said, and why, will create a useful baseline for evaluating various interpretations of the decision.

Part II considers modern theories of *Erie* that have little textual support in the Court's opinion. Some scholars have proposed that cases like *Erie* contain "no law" for federal courts to apply other than state law.[9] By these assessments, *Erie*'s result was either inevitable, demanded by right-thinking jurisprudence, or required by constitutional due process. I believe that such theories confuse *Erie*'s result with its justification. *Erie* famously declared that

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6. *But see* Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 468-69 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999) and applying behavioralist theory to interpret judicial decisions).

7. Indeed, I will try to avoid taking a stance on the desirability of originalism, or other grand interpretive theories, in any legal context.

8. *Cf.* Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine and Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 567-69 (2005) (attributing confusion among lawyers to *Erie*'s divergent representations in casebooks, such that "a person's understanding of [the doctrine] will depend almost wholly upon the book and teacher from which and whom it was first learned").

9. *E.g.*, Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RES. L. REV. 823, 827 (2011); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1840-41 (2005); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 871 (1989).

"[t]here is no federal general common law."[10] But that was a performative edict, not a preexisting reality. On the day before *Erie*, there was indeed federal general common law; there was a lot of it. Every federal court in the country had applied federal general common law, and hundreds of cases each year had relied upon such law for nearly a century.[11] Modern assertions that then-operative "law" was "not law" seem to evaluate pre-*Erie* decisions using modern conflicts theories, as though the latter were persistent or natural truths.[12] *Erie*'s own history illustrates how quickly such theories can change.

Part III analyzes *Erie*'s relationship to legal theory, legal history, and conflicts of law. One of the legal academy's great ambitions is to confirm, dispute, or revise conventional wisdom about existing legal doctrine and practice.[13] And although some of these intellectual ventures rely solely on logic and common sense, many follow legal professionals by citing conventional authorities like *Erie*. In recent decades, *Erie*'s venerable name has appeared in immensely wide-ranging debates, and this Article questions in general terms whether the decision's link to some of these issues is overstated.

Without disparaging the use of *Erie* as a quasi-literary source that illustrates jurisprudential points by evocative echo or analogy, I propose that applications of many iconic cases might benefit from closer attention to judicial language and historical context. For *Erie* in particular, such scrutiny does not favor the decision's broadest applications. Instead, I think that *Erie* is best interpreted as a subconstitutional ruling about choice of law in federal courts. On that revised footing, *Erie*'s concern to abolish "federal general common law" would not be a trump card that can easily bolster and

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

11. *See* FREYER, *supra* note 4, at 156-58.

12. *E.g.*, Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1264-99 (1999).

13. *Cf.* OLIVER WENDELL HOLMES, *The Use of Law Schools*, *in* SPEECHES 28, 34-35 (1896) ("[Law professors] have said that to make a general principle worth anything you must give it a body; you must show in what way and how far it would be applied actually in an actual system; you must show how it has gradually emerged as the felt reconciliation of concrete instances no one of which established it in terms. Finally, [law professors] must show its historic relations to other principles, often of very different date and origin, and thus set it in the perspective without which its proportions will never be truly judged."); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-53, 1895 (1988).

embody grand legal theories. The only good *Erie*, I would suggest, is a small *Erie*.

I. THE "SWITCH IN TIME" THAT SAVED DIVERSITY JURISDICTION

Because *Erie* is so uncontroversial today, its radical history is easy to forget. From at least 1842 until 1938, federal courts decided stacks of cases based on what *Erie* would call "federal general common law."[14] In federal cases involving diversity, pendent, or ancillary jurisdiction, federal general common law allowed federal judges to deviate from state law that would have governed similar cases brought in state court.[15] That term of art, "federal general common law," described pre-*Erie* circumstances perfectly. Such law was "federal" because it was created by federal courts and applied exclusively in federal cases without preempting state common law in state court.[16] It was crafted using "common-law" reasoning and techniques, and it did not purport to displace or apply any form of statutory or constitutional law.[17] It was "general" in the same sense as other tort and contract law: it was based upon broad judgments

14. *Erie*, 304 U.S. at 78; *see* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 112-15 (1993). For discussion of the prevalence and ambiguous scope of federal common law in the early Republic, see Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1323 (1985) ("The most we can conclude from a survey of jurisdictional theory from the *Hudson* period is that it was generally conceded that federal courts had what we would term significant common-law powers.").

15. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 360 (1910); Gelpcke v. City of Dubuque, 68 U.S. 175, 206-07 (1863); *cf.* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-27 (1966) (describing *Erie*'s application to state claims brought under pendent jurisdiction); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1043 n.142 (1962) ("Although there may have been some doubts originally as to whether *Erie* was limited to diversity cases, it is now generally recognized that the underlying concern of *Erie*—uniformity of decision by all courts within the same state—is equally applicable to pendent jurisdiction cases." (citations omitted)). Of course, none of this implies that *Swift* and *Erie* issues have arisen exclusively in cases involving particular jurisdictional grants. 19 WRIGHT ET AL., *supra* note 2, § 4520, at 635-41.

16. *Swift*, 41 U.S. at 18-19; *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 294 n.448 (2004) ("[T]he federal common law rules announced in diversity cases before *Erie Railroad Co. v. Tompkins* were not binding precedent in state court proceedings.... [T]he notion of federal common law rules *directly* limiting state court authority—a hallmark of modern federal common law—was foreign to nineteenth-century jurisprudence." (citations omitted)).

17. *Swift*, 41 U.S. at 18-19; FREYER, *supra* note 4, at 40.

concerning efficiency and fairness.[18] Federal general common law under *Swift* was also separated from peculiarly "local" institutions and issues, such as real estate or slavery.[19]

As a historical matter, the *Swift* regime did not rest on high jurisprudential theory. Federal judges simply believed that state courts were sometimes terribly wrong in making common-law rulings about commerce, torts, contracts, and the like.[20] America's greatest conflicts scholar, Joseph Story, held in *Swift* that when Congress clearly granted federal jurisdiction, but did not declare that state law must be binding, federal courts retained common-law authority to make their own substantive decisions.[21] This mechanism of federal general common law allowed federal courts, within the confines of their own federal cases, to avoid perpetrating injustices, inefficiencies, and stupidities that federal judges perceived in various state cases.[22] As the Supreme Court once roared: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."[23] Federal judges felt sure that they could reason about the subjects of general common law just as well as their state-commissioned brethren. Thus, in the presence of statutory jurisdiction, and in the absence of statutory constraint, such judges saw no reason to become ventriloquists for state courts and state common law.[24]

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18. *See Swift*, 41 U.S. at 19 ("[Q]uestions of general commercial law ... [depend] upon general reasoning and legal analogies."); *id.* ("[T]he true interpretation and effect [of contracts and commercial instruments] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.").

19. *Id.* at 18-19. A notable interplay of local and general law appears in *Rowan v. Runnels*, 46 U.S. (5 How.) 134 (1847). Authored by Chief Justice Taney, *Rowan* enforced a sales contract for slaves despite a state constitutional provision that had banned the transportation of such slaves into the state. FREYER, *supra* note 4, at 48-49.

20. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-76 (1938).

21. *See Swift*, 41 U.S. at 9. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 247 (3d ed. 2005) ("[Story's] seminal work on conflict of laws [in 1837] systematized a new field (at least new to the United States) out of virtually nothing.").

22. *See Erie*, 304 U.S. at 74-76.

23. Gelpcke v. City of Dubuque, 68 U.S. 175, 206-07 (1863).

24. *Cf.* Sybron Transition Corp. v. Sec. Ins. of Hartford, 258 F.3d 595, 597 (7th Cir. 2001) ("[I]f in a usual diversity case the federal court acts as a ventriloquist's dummy for the state judiciary, we are playing this hand double dummy: the second circuit has interpreted New York law, and we are interpreting the work of the second circuit."); Richardson v. Comm'r of Internal Revenue, 126 F.2d 562, 567 (2d Cir. 1942) ("In searching for the correct legal rule ... , we are not here compelled by [*Erie*] to play the rule [sic] of ventriloquist's dummy to the courts

The Supreme Court held in the late twentieth century that the federal diversity statute is not a license for federal courts to make substantive law.[25] But I would stress that *Swift*'s contrary result was not absurd in the abstract. Just as Article III had contemplated, Congress granted diversity jurisdiction, and this led federal courts to face cases in which federal statutes, treaties, and the Constitution prescribed neither applicable substantive law nor choice-of-law rules.[26]

Jurisdictional grants that do not specify substantive law, and thus require judicial lawmaking, are not at all rare. Whether one reviews English colonialism, territorial courts under the Northwest Ordinance, or the broad run of state tribunals, courts must have frequently confronted legislative grants of jurisdiction without substantive guidance.[27] *Swift*'s choice to apply its own judicially crafted rules of substantive law—rather than those of New York's courts—implied a federal judicial authority to create such substantive rules. Federal courts correspondingly asserted and exercised the power to limit federal general common law, applying such rules to only some issues decided in diversity cases.[28] Federal courts also invoked

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of some particular state; as we understand it, 'federal law,' not 'local law,' is applicable.").

25. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996) ("Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law."); *cf.* City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").

26. The Rules of Decision Act was only an arguable and partial exception. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 600 n.23 (2008) (describing debates over the Rules of Decision Act).

27. *See* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1569-70 (2008) ("[T]he Founders understood that in creating courts, they were creating bodies capable of acting in ways that would impose obligations on parties properly brought before them."); *id.* at 1569 ("The grants to the Supreme Court of original jurisdiction over the states and to federal courts generally of jurisdiction in admiralty presuppose judge-made law that will have purchase without the Senate ever having a participatory chance."); *cf.* Northwest Ordinance of 1787, art. II, *reprinted in* 1 U.S.C. LVI (2006) ("The inhabitants of the said territory shall always be entitled to the benefits of ... judicial proceedings according to the course of the common law."); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS & BEGINNINGS TO 1801, at 1-2 ("Eighteenth century lawyers made much of the idea ... that an Englishman carries his law with him to a new country.... Closer to truth, because demonstrable, is the proposition that what went with the adventurers was what Montesquieu called the spirit of the laws.").

28. *See supra* note 15.

lawmaking authority not to make federal general common law preemptive with respect to state courts' common-law decisions.[29] Although federal general common law's nonpreemptive status is sometimes criticized, and it certainly seems odd today,[30] such nonpreemption must at the time have seemed like a useful compromise that simultaneously protected state courts' autonomy to decide state cases and federal courts' autonomy to avoid perceived errors.

This is how matters stood for almost one hundred years, but the verb "stood" does not imply stasis. Federal courts continually decided cases using federal general common law, but courts floundered in prescribing such law's scope and substance. From 1842 to 1938, the analytical boundaries of federal general common law were frequently confused.[31] Problems arose not only in distinguishing "general" law from "local" law but also in separating "common law" from statutory and constitutional interpretation, as these categories were applied to regulate state and federal courts' interpretive authority.[32]

More importantly, federal courts in the late nineteenth century were targets of intense political and cultural critique. The *Lochner* era's decisions about economic due process, federalism, and labor injunctions are famous examples.[33] But federal courts were also attacked as retrograde, antiprogressive lawmakers because of federal general common law decisions that enforced municipal bonds and the fellow-servant rule, for example.[34] Time and again, federal judges were characterized as out of touch with a changing economy and democracy; as prorailroad, procorporation, and procapitalist; and as craven minions of large-scale business and East Coast Empire.

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29. *See supra* note 16.

30. *See*, *e.g.*, William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 930-48 (1988); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1517-35 (1997); Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 673-75 (1998).

31. *See* FREYER, *supra* note 4, at 35-37, 55-56, 73-77, 84-86, 92-96, 99-100; *see also* PURCELL, *supra* note 4, at 51-56.

32. FREYER, *supra* note 4, at 45-75.

33. *See* PURCELL, *supra* note 4, at 85-91.

34. *See* FREYER, *supra* note 4, at 63-71, 87-88; PURCELL, *supra* note 4, at 13-16.

Federal constitutional rulings in this era led to FDR's unsuccessful Court-packing plan; they ended when the Court changed course and FDR picked new Justices to replace retirees.[35] Likewise, these same national politics, academic protests, and judicial retirements influenced federal general common law.[36] The Court responded by scrapping nearly a century of *Swift*-era case law even more suddenly and firmly than the so-called constitutional "revolution of 1937" with respect to commerce power.[37] By some metrics, American judicial history has never seen a more dramatic reversal than *Erie Railroad Co. v. Tompkins*.[38]

Along with the magnitude of *Erie*'s result, another notable feature is the decision's transparently weak reasoning.[39] Justice Brandeis's majority opinion was split into three enumerated sections that explicitly separated *Erie*'s social and political problems from the Court's declared holding. The opinion's first two sections described *Swift*, its precedential trajectory over the years, and widely various

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35. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 11-25, 208 (1998); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 713-20 (2009).

36. *See generally* Borchers, *supra* note 14, at 97; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483 (1928).

37. *See* William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was There a "Switch in Time"?*, 78 TEX. L. REV. 1347, 1348-51 (2000) (reviewing BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998)).

38. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 272 (1941) ("[I]n some respects [*Erie* was] one of the most remarkable in the Court's history."); Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 461 n.12 (2001) ("There is no doubt ... that *Erie* was viewed at the time as a revolutionary decision.").

39. *See, e.g.*, Green, *supra* note 26, at 602-14; *cf.* 19 WRIGHT ET AL., *supra* note 2, § 4505, at 52-53 (noting *Erie*'s "remarkably abbreviated" and "puzzling" constitutional holding); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach,* 71 CORNELL L. REV. 733, 756 (1986) ("Long after *Erie,* there was widely shared uncertainty as to the *reach* of its constitutional holding."); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 237 n.69 (2003) (noting "the murky bases of the decision in *Erie* itself, [ ] which lacks specificity on what exactly was unconstitutional"); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 341 n.97 (1980) ("[T]he supposed constitutional error at issue here—the error of creating common law where the legislature does not desire it—is *not* the kind of error which the courts are alone in being able to correct, because the legislature itself can correct it anytime it so chooses, simply by enacting superseding legislation.... If one persists in framing the argument in constitutional terms, it cannot be for functional reasons, but must be for reasons of emphasis.").

criticisms of federal general common law.[40] These sections included commentary on the Rules of Decision Act and an odd reference to "equal protection of the law."[41] Yet the Court made clear that "the injustice and confusion incident to the doctrine of *Swift v. Tyson*" were independent of *Erie*'s ground for decision.[42] In notably specific language, the Court's holding relied exclusively upon "the unconstitutionality of the course pursued" under the *Swift* regime, as described in section three of the Brandeis opinion.[43]

Section three, addressing *Swift*'s unconstitutionality, is an analytical hodgepodge. There are two bare declarations of *Erie*'s result —"the law to be applied in any case [like *Erie*] is the law of the [S]tate," and "[t]here is no federal general common law"[44]—and the Court offers two supporting arguments. Of the latter, one quotes Justice Holmes concerning the "fallacy" of *Swift*-era common law.[45] According to Holmes, federal general common law could exist only as a "transcendental body of law" that lacked any "definite authority behind it"—he elsewhere called such law "a brooding omnipresence."[46] For Holmes, this violation of legal theory represented "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[47]

Other scholars have shown the bankruptcy of *Erie*'s arguments about legal positivism.[48] In shortest form, I would simply note that

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40. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71-78 (1938).

41. *Id.* at 74-75 ("[Under *Swift*] grave discrimination by non-citizens against citizens ... rendered impossible equal protection of the law."). *See generally* Green, *supra* note 26, at 603 (explaining that "*Erie* did not—and could not—reverse *Swift* as violating the constitutional equal protection" because, inter alia, the Supreme Court did not apply the Equal Protection Clause to the federal government until 1954).

42. *Erie*, 304 U.S. at 76.

43. *Id.* at 77-78 ("The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. *But the unconstitutionality of the course pursued ... compels us to do so.*" (emphasis added) (footnote omitted)).

44. *Id.* at 78.

45. *Id.* at 79.

46. *Id.* ("transcendental body of law"); S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("brooding omnipresence").

47. *Erie*, 304 U.S. at 79 (quoting Holmes).

48. *E.g.*, Goldsmith & Walt, *supra* note 30, at 675 ("[T]he many outstanding mysteries

a legal "fallacy" is no proof at all of unconstitutionality. Just as the Constitution "does not enact Mr. Herbert Spencer's Social Statics,"[49] it also does not enact John Austin's lectures on jurisprudence,[50] H.L.A. Hart's *Concept of Law*,[51] or any work concerning twenty-first-century positivism.[52] Furthermore, as Part II of this Article explains, common-law decisions by federal courts about torts or contracts were not more "antipositivist" than state court decisions on similar topics.[53] Both judiciaries relied on general principles of justice and righteousness, and the Constitution no more forbids federal courts from pursuing such goals than it forbids state courts from doing so. Theoretical imperatives of this sort, regardless of their conceptual validity and coherence, do not qualify as constitutional objections.

Brandeis's second argument in section three offers *Erie*'s only explicitly constitutional analysis, and it is based upon *Lochner*-era federalism. Here is the Court's reasoning in full:

> Congress has no power to declare substantive rules of common law applicable in a [s]tate whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.... We merely declare that in applying [*Swift*,] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several [s]tates.[54]

Almost no one embraces this argument as stated, and in a world of expansive commerce power, it is obvious why. The scope and strength of congressional "power" have increased greatly since 1938, and enclaves of "reserved" states' rights are correspondingly few.[55]

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about the practical implications of *Erie*'s holding cannot, as many think, be resolved by recourse to legal positivism.").

49. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

50. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1-30, 126-96 (1832).

51. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

52. HANS KELSEN, GENERAL THEORY OF NORMS (1991).

53. *See infra* notes 79-90 and accompanying text.

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

55. *See* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 689 (2008) ("The nineteenth and twentieth centuries have seen the birth of many important individual rights, which are enforced against the states through a combination of

Brandeis quoted an 1893 dissent by Justice Field, but that approach to dual federalism was becoming antique when *Erie* was decided; it is defunct today.[56] *Erie*'s constitutional holding was never "one of the modern cornerstones of our federalism."[57] More accurately, its reasoning was an outdated vestige of the previous generation's federalism, which the Supreme Court had already begun to reject.[58]

Problems with *Erie*'s constitutional argument are obvious when one considers two hypothetical statutes. The first states: "In federal cases affecting interstate commerce, federal courts shall not be bound to follow state common law." The second says: "In federal cases affecting interstate commerce, federal courts shall not be bound to follow state choice-of-law rules." If readers preferred, both hypothetical statutes could eschew federal preemption in state courts, thereby explicitly resurrecting *Swift* in the spheres of both substantive law and conflicts.

In my view, these might be somewhat stupid statutes, yet each would be unquestionably constitutional, thus confuting *Erie*'s holding that Congress and federal courts—equally and in parallel—have "no power" to declare "substantive rules of common law applicable in a [s]tate."[59] Congress has extensive power to authorize such common law, and in the presence of congressional authorization, federal courts have full constitutional authority to make nonpreemptive legal rules.[60]

In some respects, the Court's opinion in *Erie* manifests the ambivalence of its author. Brandeis was a progressive champion who

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congressional and judicial action. These rights have made many state and 'local' issues federal, and have radically pruned states' claims to constitutionally protected sovereignty and respect."); *see also* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 139 (2001) ("By 1950, the Supreme Court had abandoned the enterprise [of dual federalism]—not just in terms of defining the limits of the federal commerce power, but also in terms of limiting *state* power under the preemption and dormant Commerce Clause doctrines.").

56. *Compare Erie*, 304 U.S. at 78-79 (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)), *with* Green, *supra* note 26, at 607-09 (discussing *Baugh*'s significance for *Erie*), *and* Young, *supra* note 55, at 139 (describing dual federalism's "ignominious death").

57. It was Justice Harlan who proposed that *Erie* was a "modern cornerstone." Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

58. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 389-90, 397-400 (1937); Nebbia v. New York, 291 U.S. 502, 524-25, 537-39 (1934).

59. *Erie*, 304 U.S. at 78.

60. *See supra* notes 20-32 and accompanying text.

typically promoted judicial restraint and opposed unnecessary constitutional decisions.[61] In *Erie*, however, his opinion discarded those commitments and relied on federalist doctrines that had restricted governmental power during the *Lochner* era.[62] *Erie* also failed to apply Brandeisian ideas about states as laboratories.[63] Because federal general common law did not preempt state law, *Swift* never affected any state-law lab experiments. If anything, the existence of federal general common law allowed closer comparisons between common-law rules in federal and state courts, thereby clarifying various rules' experimental results.[64]

In *Erie*, Brandeis was willing to scrap established precedent, upset expectations, transform the federal judiciary, and stir the warm embers of constitutional federalism. Why did he do this? Perhaps he wanted to mitigate the "curse of bigness," stopping corporations from manipulating federal jurisdiction for litigative advantage.[65] Consider *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, which Brandeis cited in section one of his opinion to illustrate *Swift*'s "defects, political and social."[66] Under *Black & White Taxicab*, many corporate entities could dissolve and reincorporate in different states simply to get themselves in or out of federal court.[67] Under the *Swift*-era regime,

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61. *See, e.g.*, PURCELL, *supra* note 4, at 115-21.

62. Scholars disagree about whether *Erie* truly relied on the Tenth Amendment. *See id.* at 178-80 (arguing that the Tenth Amendment argument plays no central part in *Erie*). *But see Erie*, 304 U.S. at 80 (holding that *Swift* "invaded rights which ... are reserved by the Constitution to the several [s]tates").

63. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

64. *Cf.* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1992 (2011) (arguing that federal courts should be open to "cross-systemic pollination of interpretive theory").

65. *See generally, e.g.*, UROFSKY, *supra* note 35, at 300-26 (discussing Justice Brandeis's stance as an "opponent of big business and monopoly").

66. *See Erie*, 304 U.S. at 73-74 (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928)).

67. *See* FREYER, *supra* note 4, at 102 (speculating that in the period between the turn of the century and the Great Depression, "as much as 80 percent of [diversity cases] involved corporations engaged in interstate enterprise ... [as] corporations developed the practice of reorganizing in states with loose incorporation laws, solely for purposes of creating diversity of citizenship ... to avoid state law when it was against them").

this kind of manipulation could decisively alter substantive law and results.[68]

Erie did not directly eliminate the *Black & White Taxicab* scenario; Tompkins's case had nothing to do with corporate citizenship, domicile, or eligibility for diversity jurisdiction. Instead, what *Erie* accomplished was to lower the practical stakes of jurisdictional manipulations. By eliminating federal general common law, *Erie* reduced the substantive significance of diversity jurisdiction, thereby deflating federal courts' reputation as antiprogressive lawmakers.[69] As we have seen, these practical consequences were not part of the Supreme Court's holding in *Erie*, and the Court did not offer any conceptual analysis of judicial power.[70]

Yet I think that, beneath the surface, both *Erie* and *Swift* were pragmatic responses to historically particular problems. In *Swift*, the perceived issue was forcing federal judges in federal cases to unjustly impose badly wrought state common law.[71] In *Erie*, the perceived problem was allowing federal judges in federal cases to impose badly wrought federal general common law. The doctrinal differences between *Swift* and *Erie* reflect different priorities in balancing these systemic risks, and it is possible—though who can really say—that each judgment was quite defensible given its own historical circumstances.

II. DID *SWIFT* PRODUCE LAW WITHOUT A LAWMAKER?

Legal theorists sometimes acknowledge flaws in *Erie*'s constitutional arguments, yet even these critics tend to mimic Brandeis's

68. *Black & White Taxicab*, 276 U.S. at 532 (Holmes, J., dissenting) ("[k]nowing that the Courts of Kentucky held contracts of the kind in question invalid and that the Courts of the United States maintained them as valid," the plaintiffs reincorporated in the state favorable to their suit in order to bring the action); *see also* FREYER, *supra* note 4, at 104 ("The company's reincorporation was for the express purpose, as stated in the brief, of creating federal diversity jurisdiction.").

69. *Cf.* PURCELL, *supra* note 4, at 196 ("Aside from their shared surprise, commentators agreed that the [*Erie*] decision would have important social consequences. Most seemed to acknowledge that *Swift* had led to serious abuses, and many noted its social and economic significance. '[I]n nine cases out of ten,' commented two writers, *Swift* had worked 'to the advantage of a corporate litigant.'").

70. *See* Green, *supra* note 26, at 618-22 (discussing conceptual deficiencies in *Erie*-based attacks on federal common law).

71. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842).

opinion in assuming that because *Erie* is a big case, it needs a big constitutional warrant.[72] A popular candidate for this constitutional cameo role is separation of powers. Despite Brandeis's explicit connection between congressional and judicial power, and despite his historically specific target of federal *general* common law, some scholars have interpreted *Erie* as imposing peculiar constitutional restraints on nearly all federal judicial lawmaking.[73] This separation of powers argument is important, and it has found sponsors at the very highest levels of the bench and the legal academy.[74] However, because I have elsewhere analyzed this constitutional reasoning in detail, and because other scholars have launched similar critiques of a separation of powers approach to *Erie*, I will not repeat that discussion here.[75]

Instead, I will consider a construction of *Erie* based on theories about the nature of law itself. With respect to cases like *Swift* and

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72. *See, e.g.*, Martha A. Field, *Sources of the Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 924, 926 (1986); Resnik, *supra* note 39, at 237 n.69 (highlighting "the murky bases of the decision in *Erie* itself [ ]which lacks specificity on what exactly was unconstitutional").

73. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1403-04 (2001); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46-47 (1985); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 791-92 (1989).

74. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in the judgment) ("Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it.").

75. *See* Green, *supra* note 26, at 615-55; *see, e.g.*, Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 758-65 (2010); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 145-47 (2011); Strauss, *supra* note 27, at 1581; Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 963-67 (2011). One clarification I would make here is to bifurcate two versions of the separation of powers argument. The stronger objection to *Swift* might claim that federal courts can never make federal general common law under any circumstance. A weaker objection would argue that federal courts cannot make such common law without congressional authorization. In my view, the former is implausibly radical. By comparison, the latter argument is so interwoven with questions of statutory interpretation that it resembles *Youngstown Sheet & Tube v. Sawyer*'s framework for shared powers between Congress and the President. 343 U.S. 579, 635-38 (1952). *Youngstown*, like this weaker separation of powers objection, is focused on distinctions between congressional support, congressional opposition, and, in the "zone of twilight," mysterious congressional silence. *See* Green, *supra* note 26, at 656-59.

Erie, some scholars have argued that federal courts must apply state common law because there is literally no other law to apply.[76] From this viewpoint, federal courts would act "lawlessly" and violate constitutional due process if they declined to follow state law in such circumstances.[77]

If truly "[t]here is no federal general common law," then perhaps it would make sense that disputes like *Swift* and *Erie* could only be governed by state common law. But what exactly does it mean to say "[t]here is no federal general common law"? After *Erie*, the phrase meant that the Court had rejected federal general common law and had forbidden such lawmaking in the future.[78] But that is the result of *Erie*; it cannot be bootstrapped into a reasoned basis for that result. To rephrase the point, *Erie* commanded and decreed that there is no federal general common law, but the Court was not simply describing conditions as they stood prior to its decision.

The most interesting interpretation of *Erie*'s famous phrase is that federal general common law, even as it existed during the *Swift* era, was not really "law." Law is a many splendored thing, however, and it has correspondingly various meanings. The following discussion will consider three of these.

One sense of law corresponds to a certain sort of governmental phenomenon, organizing statist violence under a rubric of acceptable procedures and bureaucratic formality.[79] In this sense, federal general common law was unquestionably law because it was announced by federal judges according to standard adjudicative methods. When necessary, federal marshals enforced courts' judgments, and judicial edicts in this field were thought to represent the sovereign authority of the United States. To be specific, the violence applied through federal general common law was not rogue vigilantism, nor was it intended as a hortatory governmental recom-

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76. *See supra* note 26 and accompanying text.

77. *See generally* Kermit Roosevelt III, *Valid Rule Due Process Challenges:* Bond v. United States *and* Erie*'s Constitutional Source*, 54 WM. & MARY L. REV. 987, 998-1000 (2013); Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1062-70 (2013).

78. *See* Curtis Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 876-78 (2007).

79. *See generally* HART, *supra* note 51, at 181-82, 253-54 (explaining legal positivism as the philosophical idea that law derives from "posited" legal authority of some sovereign rather than natural law or other sources).

mendation. Public officials who believed and declared themselves to be proper lawmakers self-consciously pursued *Swift*-era law as law.[80] For modern positivists who wish to apply H.L.A. Hart's "rule of recognition," federal judicial declarations that established common-law rules under *Swift* seem just as lawful as common-law rules of state courts throughout United States history.[81]

A second interpretation of what qualifies as "law" concerns forms of social organization. Law under this view depends less on whether a governmental agent says, "I make the law," than on whether society accepts particular acts of lawmaking as binding mandates.[82] Here also, *Swift*'s federal general common law easily qualified as lawful relative to other judicial lawmaking, including federal courts' statutory and constitutional interpretation as well as state courts' interpretation of torts and contracts.[83] As with other judicial decisions, relevant social actors largely accepted *Swift*'s federal general common law as legally authoritative—even if substantively wrong—rather than condemning it as lawless extortion.[84] This helps explain why most litigating parties followed federal courts' decrees, and why actors outside the courtroom often structured their relationships in the shadow of such legal rules. Analysis of law as a coordinating and normative social influence only confirms the apparent status of federal general common law as, in fact, "law."

To be sure, federal general common law was excoriated by some contemporaries as bad law and, by Holmes at least, as not law at all.[85] Yet these critiques were notably similar to criticism of Gilded

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80. *See* Goldsmith & Walt, *supra* note 30, at 680-85.

81. *See* HART, *supra* note 51, at 112-13 (applying the rule of recognition to justify common-law decision making).

82. *See generally* Francesco Parisi, *Spontaneous Emergence of Law: Customary Law*, *in* 5 ENCYCLOPEDIA OF LAW & ECONOMICS 603, 603-06 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) (explaining that customary law gains status by reference to operative social norms).

83. *Cf.* FRIEDMAN, *supra* note 21, at 435 (noting with respect to nineteenth-century New York law that "[p]rosecutors and courts conceivably had almost as much power under [broad statutory] language as under the reign of common law crime"); Green, *supra* note 26, at 628-29 (criticizing sharp distinctions between common law and statutory law).

84. *Cf.* Bradford R. Clark, *Federal Common Law: A Structural Interpretation*, 144 U. PA. L. REV. 1245, 1290-91 (1996) (noting that "*Swift* was defensible at the time it was decided" and that federal courts "vastly expanded ... the *Swift* doctrine").

85. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) ("If there were such a transcendental body of law outside of any particular [s]tate but obligatory within it unless and until changed by

Age constitutional law, labor law, or even state common law.[86] A normal line of attack for legal critics, in history and today, is to argue that some objectionable doctrinal target is lawless.[87] Consider the refrain of modern first-year students who wonder, "Where is the *law* in the constitutional law we are studying?" The objection is only half-serious. One may strongly disagree with *Lochner*-era federalism, or with New Federalism, or with *Roe v. Wade* without believing that such decisions truly lie outside the capacious boundaries of what counts as law. And this remains true even if some critics press the charge of "lawlessness" for rhetorical effect. Critics of *Swift*-era federal general common law behaved much like other advocates of doctrinal reform, yet their arguments that such federal general common law was not "law" never extended much beyond simpler arguments that federal courts were making "bad law."[88]

Third, in contrast to positivist and sociolegal analysis, some commentators argue that *Swift*'s common law was "not law" based on ideational conceptions of law. A key element of modern legal systems is that a professional community recognizes them as law by reference to a perceived system of rules and principles.[89] The latter exist in the realm of ideas as well as actions. Evaluative systems of this kind are always incompletely theorized, and they often contain

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statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law.").

86. *See* FREYER, *supra* note 4, at 63-65, 72-74, 87-88; PURCELL, *supra* note 4, at 13, 85-91. *See generally* 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 3 (1993) ("The two-hundred-year history of the Supreme Court has been divided among a dozen or more chief justices.... Each Court has been graded, and some have been deemed great, others mediocre, some quite dismal. By all accounts, the Court over which Melville Weston Fuller presided, from 1888 to 1910, ranks among the worst.").

87. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part) ("The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973) ("[*Roe v. Wade*] lacks connection with any value the Constitution marks as special[;] it is not a constitutional principle and the Court has no business imposing it.").

88. *See, e.g.*, *Black & White Taxicab*, 276 U.S. at 532-35 (Holmes, J., dissenting).

89. *See generally* Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982) ("[J]udges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.").

internal tensions or contradictions. But just as asserted principles of legal culture struggle to separate judicial activity from judicial activism, legal culture likewise separates what is legally aggressive from what is truly lawless.[90]

One component of operative legal culture could be called "high jurisprudential theory" because it operates at a different level from the governmental and social spheres that I have discussed thus far. The importance of high-theoretical arguments as compared with political values or self-serving guild protectionism has varied across time. Yet American law has never fully abandoned its claims to intellectual substance, and jurisprudential theories have been part of that enterprise for a very long time.[91]

In applying ideational standards of law, some *Erie* theorists are influenced by choice-of-law theories of interest analysis.[92] These scholars argue that, as a federal sovereign, the United States has no interest in tort or contract disputes that are heard in federal court.[93] In turn, this lack of sovereign interest is thought to diminish or eliminate the United States' authority, especially in cases in which

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90. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1447 (2001); Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 579 (2008) ("[T]he conventions that determine what makes an argument about the Constitution good or bad, what legal claims are plausible, and which are 'off the wall,' change over time in response to changing political, social, and historical conditions."); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (discussing ways that legal culture can impact perceptions of judicial activity).

91. For late-twentieth-century debates regarding law and moral theory in particular, see Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998); Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998) (responding to Posner); Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739 (1998) (same); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751 (1998) (same); John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768 (1998) (same); Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776 (1998) (same); *see also* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 10-12 (1998). Older examples include H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

92. *See, e.g.*, Bauer, *supra* note 12, at 1281-99 (endorsing an interests analysis as relevant to decisions involving procedural *Erie* questions); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 696 (1974) ("[*Erie*] really required that the state's interests be balanced against whatever interests the federal government might have in the application of its rule.").

93. *E.g.*, Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1942 n.27 (1991) (explaining that, in federal diversity cases, the United States "has no ... interest as [a] federal sovereign in the underlying claim").

federal rules conflict with state law.[94] I have already suggested that modern theories of choice of law are not necessarily the same as constitutional objections.[95] And this remains true regardless of whether those objections are framed as federalism, separation of powers, or procedural due process.

Internal complications also arise in transferring choice-of-law principles from contexts that involve coequal states to those that involve the United States and its constituent entities. For example, the federal sovereign might claim a *Swift*-era interest in minimizing injustice and inefficiency in its own courts. Similar principles are used by some states to justify application of "forum law" and to support various "public policy" exceptions.[96] Moreover, the federal sovereign has an arguable interest in any disputes that arise on United States soil or involve United States citizens. With respect to *Swift*-era cases of federal general common law, the federal sovereign might lack a *differentiated* or *geographically specific* interest that would be comparable to the interests of otherwise relevant states. Nevertheless, the bare *existence* of a federal governmental interest seems clear.

Against this backdrop, it seems hard to see how applying *Swift*'s federal general common law violated constitutional due process.[97] *Swift*-era litigation adhered to conventional standards of fairness

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94. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) ("[W]hen there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision."). It seems possible but not necessary that choice-of-law scholars' concern with sovereignty and sovereign interests might corroborate arguments of separation of powers theorists who criticize federal courts' application of customary international law. On one hand, if the United States lacks a cognizable interest in its citizens' and residents' tort and contract suits, its interest in suits concerning such persons' human rights might be similarly dubious. On the other hand, perhaps the United States' interest in human rights litigation could derive directly from the international sphere, where a federal sovereign might be at least theoretically accountable for some of these violations of international law.

95. *See supra* notes 48-53 and accompanying text.

96. *See* Albert A. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 637-38 (1960) (explaining that the law of the forum is the law primarily applicable).

97. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (limiting the application of state law when the state lacks any interest in the dispute); Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion) ("[F]or a [s]tate's substantive law to be selected in a constitutionally permissible manner, that [s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").

and impartiality, for example, and it respected applicable standards for personal jurisdiction.[98] Insofar as the applicable law was *federal* general common law, federal courts applied it—nonpreemptively—based on their own legal judgments.[99] Any due process "problem" in this context would require a form of constitutional rights that is absent from familiar precedents and that lacks roots in the historical traditions and notions of popular justice that dominate modern constitutional jurisprudence.

I should be explicit that my concerns with the pedigree of such choice-of-law objections do not imply substantive disagreement. The misguided impetus to constitutionalize *Erie* stems from two separable sources. As a historical matter, Brandeis blazed the trail by insisting on a constitutional basis for rejecting *Swift*'s common law.[100] For modern intellectuals, a "constitutional *Erie*" may also be attractive because of its broad applications to other legal doctrines.[101] By contrast, I think that Brandeis's opinion was terribly misguided, a path to be avoided not followed, and I am highly skeptical of "Big *Erie*" theories. The next Part will explore how the latter premises might produce an affirmative exposition of *Erie*'s meaning.

III. WHAT SHOULD *ERIE* HAVE SAID?

Professor Jack Balkin has edited essays offering alternate justifications for two important and controversial judicial decisions: *Brown v. Board of Education* and *Roe v. Wade*.[102] These essays were not the first or the last to try rewriting such doctrinal icons,[103] but

98. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-19 (1945).

99. *See supra* notes 15-18 and accompanying text.

100. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938).

101. *Cf.* PURCELL, *supra* note 4, at 296 ("*Erie*'s Kaleidoscopic quality resides in the fact that it addressed or implicated a stunning range of fundamental legal issues.").

102. *See* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001); WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005).

103. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381-83 (1985); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-31 (1959).

they illustrate a crucial fact about American legal practice. Some cases are so fundamental in United States law that they cannot be taken simply at face value, with all of their corresponding virtues, defects, flaws, and warts.[104] These iconic decisions are touchstones for the legal order's basic values, securing some normative positions against attack and offering a credible basis for legal reform. Collections of *Erie* essays may be less marketable than those concerning *Brown* and *Roe*, yet ongoing debates over the earlier decision's meaning reveal how much cultural power remains vested in its famous name.

One can imagine a full intellectual history of how *Erie* has been used over time, which would reveal a great deal about the decision's relevance for debates within and outside the legal community.[105] Even absent such research, however, it is clear that the case retains prominence primarily as a matter of practice, not theory. Diversity is the oldest form of federal subject-matter jurisdiction, and it yields a large number of federal cases today.[106] Despite persistent, perhaps unanswerable questions about why Congress originally created diversity jurisdiction,[107] *Erie* is what made such jurisdiction safe for a twenty-first-century audience. Indeed, without *Erie*, modern diversity cases would seem intolerable. The wavy line that once separated "local" legal issues from those that are "general" seems more problematic than ever. It would seem indefensible today—as it often did eighty years ago—for litigants to receive better or worse substantive treatment based on idiosyncrasies of their state citizenship.[108] Story's vision of federal courts as beacons of legal wisdom might or might not materialize in modern times, with some

104. *See* J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993) ("Styles of legal argument, theories of jurisprudence, and theories of constitutional interpretation do not have a fixed normative or political valence. Their valence varies over time as they are applied and understood repeatedly in new contexts and situations. I call this phenomenon 'ideological drift.'").

105. Freyer's work has accomplished something like this with respect to *Swift*, FREYER, *supra* note 4, at 45-100, and Purcell has studied *Erie*'s historical transitions, especially among legal academics, PURCELL, *supra* note 4, at 195-308.

106. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 46 tbl.C-2 (2011) (documenting that litigants filed over 100,000 federal cases in 2010-2011 based on diversity jurisdiction).

107. *See, e.g.*, Friendly, *supra* note 36, at 481-88 (describing the beginnings of diversity jurisdiction at the Constitutional Convention).

108. *See supra* notes 66-68 and accompanying text.

analogy to "parity" debates concerning civil rights claims in state and federal courts.[109] Yet it seems certain that a twenty-first-century regime of federal general common law would, on balance, be politically poisonous and unsustainable.[110]

Why did *Erie* not just say that: why not simply reverse an old and pedigreed precedent, *Swift*, that had become desperately unworkable? Without hindsight, *Erie*'s majority could not know how federal courts' role would be transformed by, for example, cases involving civil rights and civil liberties.[111] And perhaps the Court was loathe in the late 1930s to explicitly and swiftly retreat from precedents simply because the latter were seen as politically and socially intolerable.

These are only partial answers, however, and though we may never fully understand *Erie*'s perceived need for a constitutional rationale, I think one other factor was the Court's misreading of *Swift* itself. Both the *Erie* majority and Justice Reed's concurrence characterized *Erie* as necessarily grounded upon either the Rules of Decision Act or the Constitution. As Reed explained: "To decide the case now before us and to 'disapprove' the doctrine of *Swift v. Tyson* requires *only* that we say that the [Rules of Decision Act's] words 'the laws' include in their meaning the decisions of the local tribunals."[112] Brandeis and the majority adopted the same framework,

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109. *See* David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1267 (2007) ("As evidenced by *Swift*, Justice Story was perhaps the nineteenth century's greatest proponent of this role for federal judges. Story intended that the federal courts would serve as expositors of a national commercial law and thereby help immunize the national economy from provincial regulation."); *cf.* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607-08, 611-21 (1981); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977).

110. *See* Marcus, *supra* note 109, at 1279 ("The 'course pursued' under *Swift* led federal courts to usurp both state and congressional power. The product of this usurpation—the general common law—was authored by a judiciary that many believed shared a procorporate bias that interfered with state regulatory efforts.").

111. *See generally* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 971-72 (2005) ("The Civil War and the Reconstruction Amendments reoriented the Bill of Rights ... toward protecting individuals and minorities against ... controlling majorities. The civil rights movement solidified this transformation, exalting the 'countermajoritarian' protection of individual and minority rights as the primary purpose of constitutional law." (footnote omitted)).

112. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 91 (1938) (Reed, J., concurring) (emphasis added).

but they held that stare decisis could not be overcome by a mere question of statutory construction, which demands the highest level of precedential stability.[113]

I do not agree that the Court's only choices for overruling *Swift* were Reed's approach of reinterpreting the Rules of Decision Act or Brandeis's misinterpretation of the Constitution. Recall that *Swift*'s statutory analysis of the Rules of Decision Act was only a *defensive* argument: that Congress did not require federal courts to follow state law.[114] Regardless of whether Story was right or wrong, his narrow legislative analysis was about congressional silence and acquiescence. Story did not and could not argue that Congress had statutorily compelled federal courts to create federal general common law.

The *affirmative* basis for *Swift*'s federal general common law was not statutory in origin but common law.[115] Just like many other choice-of-law doctrines, *Swift* rested on the Court's own judgment about what sort of law should govern a case that was unquestionably properly before it. From this viewpoint, *Swift* construed federal common law rules concerning choice of law in order to authorize the creation of substantive commercial law as a matter of federal general common law.

What all of this means for *Erie* is that the Court did not need to be so dismayed about reversing its prior practice. Many state courts changed their choice-of-law doctrines in the late twentieth century by adopting parts of the Second Restatement of Conflicts.[116] And in substantive areas of law, states moved from contributory negligence to various forms of comparative negligence, and away from assumption of the risk.[117] Significant changes in common-law doctrines are

113. *See id.* at 77-80 (majority opinion).

114. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842).

115. *See id.* at 19.

116. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 215-47 (1986) (providing an overview of the evolution of modern choice-of-law principles); Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1080 (1981) (defining choice of law as "nearly all judge-made common law").

117. Eleven states adopted comparative negligence regimes via judicial decisions. *See* Christopher Curran, *The Spread of the Comparative Negligence Rule in the United States*, 12 INT'L REV. L. & ECON. 317, 320 tbl.1 (1992) (citing VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 1-27 (2d ed. 1986)). In federal courts, apportionment of damages rules first took hold in admiralty cases. *See* A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative*

indispensable to American legal systems—especially when a challenged doctrine is seen as creating profound "defects, political and social."[118] If the *Erie* majority had recognized that *Swift*'s ruling could be reversed as a mere matter of federal common law, perhaps the Court could have avoided its constitutional errors.

Another benefit of analyzing *Erie* as a common-law, choice-of-law decision is providing flexibility to accommodate modern conflicts scholarship without constitutional analysis or theoretical absolutism. The fact that arguments about "interests" or "sovereignty" do not qualify as constitutional objections does not make them irrelevant.[119] On the contrary, such choice-of-law analysis might properly be decisive if *Erie* were itself reconceived as a choice-of-law decision.

To view both *Erie* and *Swift* as choice-of-law decisions makes sense of the juridical freedom that the Court exercised casually in *Swift* and that *Erie* hid under its constitutional bushel. American judiciaries have continued to change their choice-of-law rules, sometimes radically and sometimes gradually.[120] Such revisions are presumptively acceptable because choice of law typically is not prescribed by legislatures.[121] Political science delegates such lawmaking to courts as a matter of expertise and default.[122]

Unlike constitutional law, choice of law has never been conceived as a highly democratic charter that raises constitutional issues about nonmajoritarian judicial review.[123] Instead, choice of law is an immensely important but technical legal regime that is routinely

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Negligence, 17 CORNELL L.Q. 333, 347 (1932) (discussing *Schooner Catherine v. Dickinson*, 58 U.S. 170 (17 How.) (1854)).

118. *Erie*, 304 U.S. at 74; *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982) (noting that, under traditional judicial lawmaking, "the law could normally be updated without dramatic breaks through common law adjudication and revision of precedents"); Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 475 (1962) ("[I]t is not doubted that it is within the sphere of appropriate judicial action to overrule candidly a precedent that appears to be an anachronism in the light of later doctrinal developments and a different social, economic, and political context.").

119. *See supra* notes 100-01 and accompanying text.

120. *Cf.* Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 522-23 (1982) ("Courts willing to consider the adoption of new choice of law theory in the United States today are faced with a bewildering array of ... theories.").

121. *See* Keeton, *supra* note 118, at 475.

122. Leflar, *supra* note 116, at 1080.

123. *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 15 (2001) (discussing the origins and modern consequences of judicial review).

crafted, revised, and confirmed by judiciaries on their own.[124] Choice of law may ultimately be "for" the people, but it is more immediately "of" and "by" the courts.

Like other judge-made common law, choice of law is designed to be more flexible than some aspects of constitutional law. To twist a famous phrase, we must never forget it is a *choice-of-law* regime we are expounding.[125] Here again, choice of law operates in many ways like ordinary, workaday common-law doctrines. It is created through judicial perceptions of tradition, policy, and policy judgment.[126] And if sitting judges believe that their predecessors' rulings are flawed—whether in light of new factual circumstances, legal theories, political developments, or social realities—then stare decisis is a relatively porous obstacle to reform.[127] None of this makes choice of law unimportant, nor does it mean that stability is not valued in this field. It does, however, mean that the *Erie* Court had more options and also more flexibility than Brandeis and Reed recognized at the time.[128]

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124. *Cf.* Richard Fentiman, *Choice of Law in Europe: Uniformity and Integration*, 82 TUL. L. REV. 2021, 2038 (2008) ("For common lawyers, choice of law is always appropriately (though not invariably) a choice for the judge. As this suggests, the flexibility associated with Anglo-American approaches to choice of law is not a matter of choice-of-law methodology, but a reflection of elemental assumptions about the judicial role." (footnote omitted)); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 306-16 (2002); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2037 (1996) ("Judges create new doctrine all the time ... as a regular part of their job. This process can be described, understood, and justified. It is one of the basic, quotidian elements of our legal system."); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719, 788 (2009) (illustrating the aptitude of judges to craft and implement choice-of-law doctrine).

125. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.").

126. *See* Robert A. Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 323-24 (1971).

127. *See id.* at 325 ("It would be easy to cite ... hundreds of areas in which our common law courts, as the interests and needs of the society changed, have moved the law away from old positions to newer ones that better fit society's new interests and needs.").

128. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 352-53 (1936) (Brandeis, J., concurring) ("This Court, while recognizing the soundness of the rule of stare decisis where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous."); Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 82 (1958) (identifying "uniformity and stability" as priorities in making choice-of-law decisions); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (arguing that stare decisis need not create a presumption against overruling erroneous decisions).

Even amidst the foregoing effort to describe *Erie* as a choice-of-law decision, I am drawn toward methodological questions about how to interpret iconic judicial cases. General intellectual frameworks for interpreting statutes—as well as constitutions—including textualism and dynamism, originalism and structuralism—have proliferated widely during the last four decades.[129] Somewhat strangely, however, less attention has been paid to general methods of interpreting judicial opinions. There are of course disputes over holdings, dicta, and stare decisis. But one seldom hears discussion of whether an interpreter should focus tightly on the "text" of a judicial opinion, try to recapture a decision's "original intent" or "original meaning," give effect to its authors' "purpose," or apply "canons" to resolve ambiguities.[130] To be clear, methodological debates about statutory and constitutional interpretation have hardly produced magical algorithms for interpretation that yield clear and uncontested results. Instead, discussions about textualism, originalism, and dynamism have demonstrated that interpretation can be controversial. But perhaps they have also identified elements that are characteristically relevant to interpretive projects. General frameworks for interpreting judicial opinions probably cannot expect to accomplish anything more than this.

This Article is not the place to propose, much less to evaluate, a general methodological framework for interpreting judicial opinions. Instead, I will use *Erie* to explain in particular why doctrinal originalism, structuralism, precedentialism, traditionalism, canons, and functionalism would be equally or more consistent with a choice-of-law interpretation of *Erie* as with any other approach. Notably, my discussion will omit any analysis of judicial text, even though the language of judicial opinions will often determine a

129. *See generally* Gluck, *supra* note 64, at 1924-68 (discussing both federal and state interpretative methodolgies).

130. A recent example of methodological controversy is the use of Supreme Court briefs from *Brown v. Board of Education* to oppose affirmative action plans, even though those briefs' authors almost certainly would have endorsed such plans, and even though such briefs were not endorsed by the Justices or the deciding Court. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007). One lawyer who participated in *Brown* has sharply criticized the Roberts Court's use of such materials. *See* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), http://www.nytimes.com/2007/06/29/us/29assess.html ("'It's dirty pool,' said [William T. Coleman, Jr.], a Washington lawyer who served as secretary of transportation in the Ford administration, 'to say that the people *Brown* was supposed to protect are the people it's now not going to protect.'").

decision's meaning.[131] With respect to *Erie*, however, I believe that no one can defend the Court's decision as it was written. And in circumstances in which "plain textual" analysis does not work, other factors must be used to support or oppose a particular interpretation. For illustrative purposes, I will consider six such factors.

Comparable to theories of originalism, for example, a choice-of-law interpretation of *Erie* could, for example, claim a serviceable basis in the Justices' *intent* and the case's *political meaning at the time*. *Erie*'s best historian has claimed that the case embodied Brandeis's progressive philosophy and his skepticism toward federal judicial intervention in matters that "should" be controlled by state law.[132] A choice-of-law version of *Erie* would respond to such concerns directly, without any problematic reliance on constitutional federalism or separation of powers. Although the federal sovereign emphatically has some interest in litigation and conduct by citizens within United States territory, that does not mean that federal interests should prevail in federal-state conflicts of law.[133] Instead of constitutional separation of powers, a choice-of-law interpretation would oppose *Swift*'s doctrinal approach based on subconstitutional concerns about federal judicial lawmaking with respect to torts and contracts. The latter argument would seem especially strong with respect to broad fields of human activity in which state judicial lawmakers possess stronger subconstitutional interests in regulation than the federal government.

A choice-of-law interpretation of *Erie* could also find support in the opinion's *structure*.[134] As we have seen, by far the weakest part of the Court's opinion is its last section, concerning the

131. Indeed, this is why lawyers place such importance on quoting judicial opinions. *See* James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367-68 (1995) ("The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns.").

132. PURCELL, *supra* note 4, at 3 ("Brandeis sought to constrain a pervasive if amorphous judicial practice by which the Supreme Court had, for more than half a century, used common law techniques to expand its lawmaking powers and, all too often, to serve anti-Progressive purposes.").

133. *See supra* notes 100-01 and accompanying text.

134. *Cf.* Green, *supra* note 55, at 683-96 (discussing various sorts of structural arguments, including those embraced by Charles L. Black, Jr.'s book *Structure and Relationship in Constitutional Law* (1969)).

Constitution.[135] Other arguments against *Swift*, which the Brandeis opinion deliberately set aside, could be easily incorporated under a choice-of-law analysis. A principal virtue of common law's flexibility is its power to incorporate policy—"defects, political and social"—and theory—"transcendental body of law"—as elements of self-consciously hybrid and institutionally tentative doctrinal rules.[136] A more holistic interpretation of *Erie* would, almost ironically, incorporate more of the Court's reasoning than the constitutional opinion that Brandeis actually wrote.

It may seem strange to use *precedent* to interpret *Erie*'s meaning because, of course, *Erie*'s result was wholly unprecedented.[137] On the other hand, a long string of Supreme Court cases followed *Erie*, and these resemble flexible, common-law adaptations much more than orthodox applications of legal theory or faithful constitutional interpretations.[138] A choice-of-law version of *Erie* is more consistent with the decision's extensive progeny, and such precedential consistency should count in that interpretation's favor.

Likewise, *tradition* could be analyzed from state courts' practice before and after *Erie*. No state court considered the precise doctrinal issue of federal general common law, which arose exclusively in federal court. State courts did, however, confront a wide range of other choice-of-law doctrines, and they generally did so without high jurisprudential theory or constitutional limits.[139] On the contrary,

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135. *See supra* notes 44-64 and accompanying text.

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

137. *See* FREYER, *supra* note 4, at 101.

138. *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 533-40 (1958); Guar. Trust Co. v. York, 326 U.S. 99, 108-12 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); *see also* Philip B. Kurland, *Mr. Justice Frankfurter, The Supreme Court, and the* Erie *Doctrine in Diversity Cases*, 67 YALE L.J. 187, 190-204 (1958) (discussing post-*Erie* choice-of-law decisions that avoided constitutional questions).

139. *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976) (adopting and applying William Baxter's comparative impairment methodology to determine the applicable law in a dram shop liability case between California plaintiff and Nevada defendant); Hurtado v. Superior Court of Sacramento Cnty., 522 P.2d 666, 669-71 (Cal. 1974) (applying governmental interest analysis to determine applicable law in wrongful death suit involving a plaintiff from Mexico and defendant from California); Burr v. Beckler, 106 N.E. 206, 208-09 (Ill. 1914) (applying law of the state where contract was executed in property dispute and concluding the seller lacked capacity to enter contract for sale of land); Schultz v. Boy Scouts of Am., 480 N.E.2d 679, 683-87 (N.Y. 1985) (basing determination of the applicable law in a charitable immunity case on whether the rule to be applied was loss allocating or conduct regulating); Haag v. Barnes, 207 N.Y.S.2d 624 (N.Y. App. Div. 1960) (applying a "most significant

choice of law was conventionally viewed as judge-made law at the time *Erie* was decided, and it has largely retained that character ever since.[140] Although one could perhaps interpret *Erie* as a categorical deviation from American traditions concerning choice of law, that result should not be presumed too quickly.

Canons of interpretation, like those articulated in *Ashwander*, are typically used only to interpret ambiguous texts.[141] Yet the values served by such canons could be applied to cases like *Erie* that are not supported by their opinion's language. Consider Brandeis's instruction in *Ashwander* that "[c]onsiderations of propriety, as well as long-established practice, demand that [courts] refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of [their] judicial function."[142] In circumstances like *Erie*, in which the Court's stated reasoning is not defensible, it may be appropriate to prefer an interpretation that avoids constitutional arguments if subconstitutional reasoning will suffice. Such considerations would again favor a common-law interpretation of *Erie*.

Finally, *policy and function* might recommend an interpretation of *Erie* under which doctrinal details remain changeable and tailored to current circumstances. No matter how solid and seemingly perfect current views of "law," "efficiency," and "propriety" may appear, the historical trajectories of federal courts and legal theory from *Swift* to *Erie*—and from *Erie* to the present—demonstrate that

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contacts" test to settle a child support dispute between residents of different states), *aff'd*, 175 N.E.2d 441 (N.Y. 1961); *In re* Dorrance's Estate, 163 A. 303, 309-11 (Pa. 1932) (finding Pennsylvania residency law applied for Pennsylvania estate tax when parties disputed decedent's state of domicile); Poole v. Perkins, 101 S.E. 240 (Va. 1919) (applying principle of *lex loci contractus* to reach finding that a valid contract was made between residents of two different states); Lanham v. Lanham, 117 N.W. 787 (Wis. 1908) (refusing to recognize marriage celebrated in Michigan based on a public policy exception to Wisconsin law); BRILMAYER, *supra* note 116, at 215-47 (providing an overview and analysis of conflict of law).

140. *See supra* notes 120-24 and accompanying text.

141. In *Ashwander*, plaintiffs challenged the constitutionality of energy distribution associated with the Wilson Dam and the Tennessee Valley Authority (TVA). Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 315-19 (1936) (plurality opinion). A plurality of the Court refused to address the plaintiff's facial challenge to the program's constitutionality and affirmed Congress's authority to create the TVA. *Id.* at 339-40. In a concurrence, Justice Brandeis articulated seven rules that represented a doctrine of avoidance of constitutional questions. *Id*. at 346-48 (Brandeis, J., concurring).

142. *Id.* at 341 (Brandeis, J., concurring).

legal systems and cultures can change dramatically over time.[143] There is no categorical benefit to inflexible choice-of-law rules in the face of such changes. And it seems at least likely that a common-law approach would provide a more functional balance of stasis and change than any version of *Erie* that is based on more rigid and uncompromising categories of law.[144]

IV. CONCLUSIONS

This Article has no delusions of producing a singular and fully persuasive interpretation of *Erie*—too much water has flowed past dams and bridges for that. Instead, I have recharacterized the main challenge that confronts both my view of *Erie* and the views of other commentators: How should any interpreter analyze a foundational decision that cannot be explained by the Court's proffered reasoning? Because I view both *Swift* and *Erie* as doctrinal efforts to solve practical juridical problems, it makes all the more sense to interpret *Erie*'s solution as itself a pragmatic, common-law decision.

By comparison, some interpreters view *Erie* as a separation of powers decision that restricts courts' undisciplined lawmaking.[145] But those arguments ironically rely on interpretations of both *Erie* and separation of powers that are themselves judicially and intellectually invented. Other interpreters oppose *Swift* because it depended on untethered "nonlegal" abstractions.[146] But those arguments' abstract and theoretical architecture was constructed by no sovereign lawmaker except the federal courts—much like the *Swift*-era decisions that are under attack.

Even if readers cannot accept my own interpretation of *Erie*, perhaps debates over *Erie*'s meaning will illustrate common problems with interpreting iconic decisions. *Erie* may be an extreme example, but many jurisprudential icons do not by their literal terms measure up to their significance in modern legal culture. Competing interpretations of such cases may seek justification either by reference to the decisions' specific historical contexts, or by

143. *Cf.* PURCELL, *supra* note 4, at 195-308 (discussing transformation in the United States' culture and legal system since *Erie* was decided).

144. *See* Kurland, *supra* note 138, at 214.

145. *See supra* notes 73-75 and accompanying text.

146. *See supra* notes 85-88 and accompanying text.

reference to general interpretive elements that are used for other legal materials. Either route—and both when possible—may distinguish particular interpretations of iconic cases as more or less persuasive. *Erie* might be the perfect occasion to consider such interpretive questions. Although the Court's own opinion almost invites broad-stroked, lightly supported arguments based on legal theory and the Constitution,[147] I believe that such invitations are ones that judges and scholars are best served to decline.

147. *Cf.* PURCELL, *supra* note 4, at 195 ("[*Erie*'s] abstract, abbreviated, and to some extent purposely misleading reasoning invited multiple interpretations.").