

**BACK TO THE FUTURE: THE NEW GENERAL COMMON LAW**  
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**I**  
**INTRODUCTION: TOWARD A GENERAL THEORY OF *ERIE***

I believe that a general theory for *Erie Railroad Co. v. Tompkins*<sup>1</sup> is within our reach. I propose to construct that theory here.<sup>2</sup> I will show how we can generalize *Erie* so that it controls state as well as national power, governs in state as well as federal courts, and authorizes federal as well as state common law. The key to a general theory lies ready to hand in well developed bodies of Supreme Court jurisprudence on *due process*.

The need for a general theory has become rather more urgent than might have been anticipated. It confronts us in the work of some of the most interesting and imaginative scholars writing today. Astonishingly, these writers, in varying degrees of explicitness, and with some modifications, are proposing a return to pre-*Erie* understandings. Of course such a proposal presents constitutional and theoretical difficulties, and I identify and explain them here. But I do not do so to meet any real danger. Rather, I use the (2004) **J. Mar. L & Com. 524** hypothesis of a return to pre-*Erie* understandings to illustrate the workings and the strength of an improved post-*Erie* theory.

In this paper I will show how we can unify and extend over both sets of courts *Erie*'s constitutional proscription against general common law. Preliminarily and only in part, I base this unification of constitutional theory on considerations of governmental power, as Justice Brandeis did in *Erie*, building on and expanding Justice Brandeis's point. Brandeis was concerned about the limitations of national power in the context of the narrow question raised in *Erie*: whether "the course pursued"<sup>3</sup> by federal courts under the doctrine of *Swift v. Tyson*<sup>4</sup> was

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\* Holder of the Bates Chair and Professor of Law, the University of Texas. This paper is a write-up of a talk I gave at the annual meeting of the Association of American Law Schools in Atlanta, Jan. 5, 2004; I hope some of the intellectual fun for me of that occasion survives in the paper. I would like to thank Ernest Young for the hospitality of his AALS panel, and to acknowledge the many valuable insights supplied by my co-panelists, Hon. William Fletcher and Jonathan Gutoff. An early draft of this paper was presented at a faculty workshop at the University of Texas Law School, May 11, 2004. I would like to thank Mitch Berman for the hospitality of the Drawing Board Lunch. I should also acknowledge useful remarks, conversations and other helps and supports from David Anderson, Joe Dellapenna, William Forbath, Mark Gergen, Jack Getman, David Robertson, Michael Sturley, and Pat Woolley.

1. 304 U.S. 64 (1938).

2. I am building on here on the theoretical groundwork I have been laying out, e.g., in Louise Weinberg, The Article III Box, 78 Tex. L. Rev. 1405-1431 (2000); Louise Weinberg, The Power of Congress Over Courts in Nonfederal Cases, in Symposium, 1995 B.Y.U. L. Rev. 731-817 (1995); Louise Weinberg, The Federal-State Conflict of Laws: "Actual" Conflicts, 70 Tex. L. Rev. 1743-1798 (1992); Louise Weinberg, The Curious Notion that the Rules of Decision Act Trumps Supreme Federal Common Law, 83 Nw. U. L. Rev. 860-875 (1989); Louise Weinberg, Federal Common Law, 83 Nw. U. L. Rev. 805-852 (1989); Louise Weinberg, Choice of Law and Minimal Scrutiny, 49 U. Chi. L. Rev. 440-488 (1982).

3. *Erie*, 304 U.S. at 77.

4. 41 U.S. (16 Pet.) 1 (1842) (holding that in matters not purely local, or governed by state statute, federal

constitutional. I reconceptualize *Erie*'s dependence on the limits of the lawmaking power of *Congress*, and provide a more general understanding of the limits of the lawmaking power of governments. My argument about the limits of governmental power, although preliminary to my main constitutional argument, is related to my main argument at a deep level.

My more fundamental constitutional argument reconceptualizes *Erie*'s positivism as a basic requirement of due process.

Comprehensive constitutional arguments of this kind were not being made at the time *Erie* was decided. By 1938 the Court had glanced at the due process issue in a different—but analogous—context, in cases on the legislative jurisdiction of a state.<sup>5</sup> The Court was only just beginning to pitch such cases on due process in addition to full faith and credit. But today the full faith and credit argument has lost currency<sup>6</sup> and interstate choices of law are chiefly under due process control.<sup>7</sup> In 1938, any analogy between the interstate choice-of-law problem and the choice-of-law problem presented in *Erie* would have been much more obscure than it need be today. In our time, the proposition that the minimal requirements of due process should be relevant in both contexts, although novel, might seem clearer to us than Brandeis's argument that Congress had no power. Brandeis meant that Congress had no power to do what the federal courts were doing under the doctrine of *Swift v. Tyson*, and therefore the federal courts had no power to do it. But some lawyers have never been comfortable with the idea that Congress lacked power to enact law for the *Erie* case itself, since Congress (2004) **J. Mar. L. & Com. 525** does have power over interstate rail transport, including the personal injuries rail transport might cause, and has occasionally exercised some of that power. Perhaps the most familiar example is the Federal Employers' Liability Act.<sup>8</sup> It is not surprising, then, that lawyers continue to have trouble grasping Brandeis's point. The puzzle solves itself, of course, once it is remembered that although Congress obviously has power to make federal law, and courts have power to make federal rules of decision, no federal statute or rule of decision was involved in *Erie*, and therefore

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courts were not bound by the case law of the relevant state, but were free to apply general common law rules of decision, based on their independent judgment).

5. To use common "Restatement" terminology, "adjudicatory jurisdiction" is the power to try a case; "legislative jurisdiction" is the power to prescribe law for it. See, e.g., American Law Institute, Restatement (Third) of Foreign Relations Law of the United States § § 401 (a), (b).

6. See *infra* notes 95-97 and accompanying text.

7. See *infra* notes 88-104 and accompanying text.

8. 28 U.S.C. § 1346(b). What was struck down in *Erie* was not authentic federal case law, which of course must displace anything in state law to the contrary notwithstanding. Rather, the Court struck down cases decided in federal courts as a matter of *general* common law. "The general rule" was applied or fashioned by federal courts without regard to otherwise applicable law. General common law was neither state law nor federal law. Indeed, Justice Brandeis was explicit that either federal or state rules of decision would have passed constitutional muster: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State." *Erie*, 304 U.S., at 78 (Brandeis, J.) [emphasis supplied]. Concededly, Brandeis here excepts only legislated federal law; but his reference to state law is without limitation to case law, and in the next sentence he forcefully declares that it is no business of a federal court to put state case law at a discount. From this it seems plausible to infer that it is no business of any court to put authentic applicable case law, including federal case law, at a discount. Of course the Supremacy Clause has the same effect. Authentic federal common law therefore survives *Erie*. Indeed, identifiably federal common law could emerge with clarity only *after Erie*, when the sources of law lost their ambiguity. That federal common law survives *Erie* is also made plain by the fact that the very next case handed down *after Erie* is held exclusively governed by federal common law, in an opinion also by Justice Brandeis. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (holding that federal common law governs a dispute between private owners over an interstate water boundary between their two properties).

no federal law or rule of decision could have been struck down. What was struck down was the displacement of otherwise applicable state law with law that was *not* federal. Obviously Congress has no power to displace otherwise applicable state law with legislation that is not federal—and *a fortiori* the nation’s courts have no such power. What was struck down in *Erie* was not a federal rule, but a *general* rule—something that ought never to have been thought authoritative in any court.

We can achieve a more easily grasped as well as a more comprehensive theory based on common understandings of the requirements of due process. This more general theory will work in a unified way for both decisional and statutory law, and for both federal and state law, in both federal and state courts. Concededly, in *Erie* itself, a due process theory would have gone beyond the strict necessities of the case. But in my view *Erie* would have been put on a much firmer footing, and the post-*Erie* position would have been much clearer, had the *Erie* Court been willing or able to pitch the case on the readily generalizable ground of due process. I would hope that the current Court would feel no constraint in beginning to inform its decisions with this improved thinking.

**(2004) J. Mar. L & Com. 526** Today, in our post-*Erie* world, it should be clear that, to accord with due process, law in American courts must be positivistically attributable to a relevant sovereign, a sovereign with a legitimate interest in governing the particular issue presented in the particular circumstances. When an American court fails to apply law that is attributable to some identified sovereign, or fails to reflect the identified sovereign’s actual policy concerns in the context of the issue to be decided, there is a violation of due process. When federal courts make these sorts of mistakes, there is offense to the Due Process Clause of the Fifth Amendment. When state judges make these sorts of errors, there is offense to the Due Process Clause of the Fourteenth Amendment.<sup>9</sup> (Neither the source of the law displaced nor the source of the law applied matters to this distinction.) In sum, failure to apply the law and policy of *some* government with relevant legislative jurisdiction should be recognized as arbitrary and irrational, an offense to due process in either set of courts, whether relevant governance resides in the nation, another nation, or some state.

There is a well developed body of Supreme Court jurisprudence placing the judiciary’s interstate choices of law under due process control.<sup>10</sup> The Court’s current thinking also leaves some room for “dormant” Commerce Clause argumentation, and arguments about extraterritorial overreaching.<sup>11</sup> But due process is the underlying theory that ought to inform all such

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9. Cf. Weinberg, *Federal Common Law*, supra note 2, at 819 (arguing that just as there is no federal general common law, there is no state general common law either).

10. See infra notes 88-104 and accompanying text.

11. The fundamental requirement of due process tends to be obscured in transnational cases by an established rule that, absent instructions from Congress to the contrary, the Constitution and acts of Congress should be construed as devoid of extraterritorial effect. This can seem simply an expression of uninstructed formalism, or at worst an invitation to lawlessness; but it is often thought justified by some principle of comity. In *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the United States stood on this dubious ground, but the Supreme Court held that the detainees at Guantanamo Bay were entitled to a hearing in federal district court on their petitions for habeas corpus. Unfortunately *Rasul* does not disembarass us of our spurious concerns about extraterritoriality; rather, I believe it holds only that our military base at Guantanamo Bay is United States territory. For a particularly unfortunate example of Supreme Court refusal to enforce an act of Congress violated abroad, even as between an American employer and employee, see *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (“*Aramco*”). For detailed criticism of *Aramco*, see Louise Weinberg, *Against Comity*, 80 *Geo. L.J.* 53, 73-75 (1991). *Aramco* was so wrong that Congress overrode it, albeit prospectively. Civil Rights Act of 1991 § 109, Pub. L. 102-166, 105 Stat. 1071, 42 U.S.C. § § 2000e(f), 2000e-1(b)-(c)). Other special wrinkles intrude in transnational cases. For example, federal law

arguments. (2004) *J. Mar. L. & Com.* 527 As for federal/state choices of law, the possibility of due process control in that context has been obscured by *Erie* on the one hand and the Supremacy Clause on the other. Absent statutory guidance, decision of a federal/state conflict of laws is commonly effected these days under the current Court's doctrines of "conflict preemption" or "field preemption."<sup>12</sup> Arguably, however, there is also an implicit requirement of due process, one which should come into play, for example, when there is no rational basis for the application of the law chosen, whether federal or state, or perhaps when there is no rational basis for the choice of governance, either federal or state, or when facially relevant law, federal or state, cannot rationally apply in the circumstances.

In this paper I conclude that general common law in either set of courts—unless and until adopted as "the articulate voice of some sovereign that can be identified"<sup>13</sup>—should be understood as unconstitutional because it is not the process that is due. This is in contrast to identified *federal* common law, which in itself, like *state* common law, can offend no constitutional principle when it is the process that is due. I further conclude that, when courts fashion law for a case, identification of the governing sovereign, without more, will not necessarily satisfy either *Erie*'s positivistic command or due process. A case decided without consideration of the policies and interests of the identified sovereign is only so much general common law.

## II

### THE DUBIOUS ATTRACTIONS OF A RETURN TO PRE-ERIE UNDERSTANDINGS

#### A. A Retrograde Development in Legal Theory

We are witnessing a strange development in legal theory, as perplexing as it is intriguing. A new school of writers has emerged, improbably proposing (2004) *J. Mar. L. & Com.* 528 the revival, more or less, of the general common law.<sup>14</sup> By "the general common law" these writers

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may preempt if the case trenches on foreign policy concerns; cases are dismissed in all courts if questioning the validity of a foreign act of state; and motions to dismiss for forum non conveniens are encouraged when the underlying events occurred abroad. In admiralty, there are the obsolete but persistent *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953) (making abstract evaluations of hypothetical physical contacts that might exist between a nation and a case in admiralty, and making equally abstract evaluations of factors which might be taken into account, all ex cathedra, so that the case would thenceforth block any effort to develop a more rational choice-of-law analysis in admiralty); and *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959), justly the butt of the classic Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1 (1959).

12. See *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990) (setting out a typology of preemption cases). See, for trenchant recent criticism of preemption doctrine in admiralty, Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (Part III), 30 *J. Mar. L. & Com.* 85 (1999). For the view that *Jensen* should give way to "*Erie*," see Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 *St. Louis U. L. J.* 1349 (1999); but see, for a defense of *Jensen*, Joshua S. Force, *Sprietsma v. Mercury Marine: The Supreme Court Misses the Boat on Maritime Preemption*, 27 *Tul. Mar. L. J.* 389 (2003).

13. *Jensen*, 244 U.S. 205, 222 (Holmes, J., dissenting).

14. In this group I would include Professor Young and Judge Fletcher. See, e.g., Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 *J. Mar. L. & Com.* 469 (2004); Ernest A. Young, *Preemption at Sea*, 67 *Geo. Wash. L. Rev.* 273 (1999); Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 *St. Louis U. L. J.* 1349 (1999); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of*

are referring to the freewheeling sort of law that, in (2004) **J. Mar. L. & Com. 529** *Swift v. Tyson*, the Supreme Court thought should continue to be available in federal courts for the decision of nonfederal questions “of a more general nature.”<sup>15</sup> With the blessing of *Swift*, federal courts went on cheerfully and ever more expansively displacing state law. The law they applied instead, “the general common law,” was not state law, but it was not federal law, either. It was,

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Marine Insurance, 97 Harv. L. Rev. 1513 (1984). Also in this group might be included Professors Clark and Allen. See, e.g., Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 Geo. Wash. L. Rev. 91 (2003); Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321 (2001); Craig H. Allen, Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III), 30 J. Mar. L. & Com. 85 (1999). Reference must also be made to the determined opposition of Justice Stevens to admiralty preemption, if not to federal common law in admiralty. See, e.g., *Am. Dredging Co. v. Miller*, 510 US 443, 458, 1994 AMC 913, 924- 25 (1994) (Stevens, J., dissenting): “In my view, Jensen is just as untrustworthy a guide in an admiralty case today as *Lochner* ... would be in a case under the Due Process Clause.” See also, e.g., Justice Stevens’ opinion for the Court in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 1978 AMC 1059 (1978) (refusing to interpret a supplementary remedial statute, the Death on the High Seas Act, as either supplementary or remedial, even at the cost of further reimporting pre-*Moragne* “anomalies” into the administration of wrongful death in admiralty).

Among the defenders against this new challenge, we might include Professors Force, Friedell, Goldstein, Gutoff, and now, I suppose, me. See, e.g., Robert Force, Deconstructing *Jensen*: Admiralty and Federalism in the Twenty-First Century, 32 J. Mar. L. & Com. 517 (2001); Robert Force, Choice of Law in Admiralty Cases: “National Interests” and the Admiralty Clause, 75 Tul. L. Rev. 1421 (2001); Robert Force, An Essay on Federal Common Law and Admiralty, 43 St. Louis U. L. J. 1367 (1999); Jonathan M. Gutoff, Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty, 61 U. Pitt. L. Rev. 367 (2000); Jonathan M. Gutoff, Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto, 30 J. Mar. L. & Com. 361 (1999); Steven F. Friedell, The Diverse Nature of Admiralty Jurisdiction, 43 St. Louis U. L. J. 1389 (1999); Joel K. Goldstein, Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange, 43 St. Louis U. L. J. 1337 (1999). I place Professor Casto somewhere between these two groups. See William R. Casto, The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates, 37 Am. J. Legal Hist. 117 (1993); William R. Casto, The *Erie* Doctrine and the Structure of Constitutional Revolutions, 62 Tul. L. Rev. 907 (1988).

It would be a mistake to conclude from these writings that the debate is a narrow one limited to admiralty. In England the proposition that the general maritime law should be allowed to intrude upon common law rights and defenses fueled very ancient controversy, but the common law was “general” to every part of the kingdom. Our own debate over the propriety and legitimacy of federal common law goes back, not to the Supreme Court’s federalization of admiralty law in such cases as *The Lottawanna*, 88 U.S. (21 Wall.) 558, 1996 AMC 2372 (1874), and *S. Pac. Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917), but to the founding era, and the controversy over federal common law crimes, more particularly federal criminal libel. This great debate is reflected in the later debate precipitated by the Court’s endorsement of the general common law in federal courts in *Swift v. Tyson*, and in the current debate over general or customary international law. This last needs to be distinguished from American case law on the foreign relations of the United States, which, like admiralty case law, has been federalized by the Supreme Court; in each of these latter fields federal governance is held to be wholly preemptive. *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964) (holding that the field of foreign relations completely preempts state law and embraces a federal common law of foreign relations); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917) (holding that inchoate federal governance in admiralty cases completely preempts state law). What may distinguish these from other fields of federal common law is the force and completeness of federal preemption that characterizes them, a departure from the dual governance otherwise familiar in American law. See Weinberg, “Actual” Conflicts, *supra* note 2, at 1749-50.

15. 41 U.S. at 71-72 (Story, J.): “It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation .... where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the ... just rule furnished by the principles of commercial law to govern the case.” The “section” referred to was the Rules of Decision Act, then as now mandating state law as the rule of decision in federal courts, in cases in which state law “applies.” Judiciary Act of 1789, ch. 20, § 34, 1 Stat 73, 92, today at 28 U.S.C. § 1652.

you might say, “brooding omnipresence” law.<sup>16</sup> This was the peculiar “course pursued” that the Supreme Court finally denounced as unconstitutional almost a hundred years later in 1938 in *Erie Railroad Co. v. Tompkins*.<sup>17</sup>

Any theorist toying with the nostalgic notion of restoring general common law to our courts has to bear a very heavy burden of justification.<sup>18</sup> After all, the Supreme Court thought it so necessary to rid the country of general common law that it was willing to trash practically the whole of the Federal Reporter, indeed, the great mass of federal decisions from 1789 through 1938 on questions we would today characterize as questions of state law.<sup>19</sup> Notwithstanding doubts about the constitutional basis of *Erie*, with our post-*Erie* eyes it is hard to read those old cases without seeing that there is *something* wrong with them. One can find federal judges relying on cases from irrelevant states, ignoring the case law of relevant states, ruling by their own lights, as a matter of what they took to be right reason and sound policy, upon such questions as the validity of a common contract or even a local mortgage.<sup>20</sup> Such opinions can have no authority today. But the unambiguously federal and state decisions, both before and after *Erie*, are intelligible to us, and many of them are still good law. How, then, could writers seriously argue for a return of the general common law?

The admirers of general common law rise to the challenge. They correctly point out that although *Swift* authorized *federal* courts to continue applying (2004) J. Mar. L & Com. 530 the general common law, the general common law was applied in *both* sets of courts, both before and after *Swift*. State courts only very gradually forsook general common law for a common law they would call their own.<sup>21</sup> These writers argue that when the general common law flourished, we had a golden age in which all courts worked harmoniously together, not only to refine the common law substantively, but also to make it more uniform, and that in fact a decent level of uniformity was achieved.<sup>22</sup> This level of success, they point out, has not been matched by the post-*Erie* regime.

This golden age must have been of very brief duration. Around the time of *Swift*, law reports had only recently become sufficiently accessible to displace Blackstone, and very shortly thereafter the states would begin to develop a clearer idea that their own decisions, even on general commercial questions, should enjoy a distinct authority, at least in their own courts. Then, in *Murdock v. Memphis*, in 1875, the Court declined to administer the general common law in cases coming up to it from state courts.<sup>23</sup> After all, as Justice Brandeis was to

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16. Cf. *Jensen*, 244 U.S. at 222, 1996 AMC at 2008 (1917) (Holmes, J., dissenting).

17. *Erie*, 304 U.S. at 77-78.

18. But see *id.* at 77-78 n.22: “The doctrine has not been without defenders.” [citing authors].

19. The diversity jurisdiction of federal courts was lodged in the circuit, not the district, courts, until the Judicial Code Act of 1911, § 289, 36 Stat. 1087, 1167. Opinions in these pre-1911 federal circuit court cases were reported in the Federal Reporter.

20. I do not mean here such clearly federal cases as, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The doubtful cases are those in which legal questions are decided under law and policies the sources of which are ambiguous and detached from either the nation or a particular state.

21. For an elaboration of this point, see Fletcher, *The Example of Marine Insurance*, *supra* note 14. Judge Fletcher’s view is in accord with the views of some Panglossian pre-*Erie* writers. See, e.g., Henry Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 Ill. L. Rev. 533 (1910). Also recounting the history of general common law in both sets of courts, see Weinberg, *Federal Common Law*, *supra* note 2, at 822-31 (reviewing the respective histories of federal common law, state common law, and general common law, as applied in both state and federal judicial systems).

22. See the discussion in Fletcher, *The Example of Marine Insurance*, *supra* note 14, at 1557-58.

23. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). In *Murdock*, the petitioner sought Supreme

acknowledge ruefully some sixty years later in *Erie*,<sup>24</sup> the experience of general common law in *federal* courts was not so good. The consequence of *Murdock*, however, was that, from 1875 on, the general common law became an increasingly acute embarrassment of *federal* courts, and increasingly two different sets of case law governed state-law issues.

Disuniformity, manipulation, and discrimination were the inevitable consequences of the failure of the *Swift* Court to federalize general commercial (2004) **J. Mar. L & Com.** 531 law. This failure to federalize is quite understandable, especially given the limited understanding, at the time, of the scope of the national commerce power. Who can blame the *Swift* Court for not federalizing commercial law? We still have not done so. But the un-federalized law the federal courts were applying could not bind the states under the Supremacy Clause, precisely because it was not federal law. Notwithstanding the great prestige of the Supreme Court, state judges came increasingly to understand that they were free from federal superintendence in matters of “general” law. They could ignore the advice federal courts were so officiously offering and decide cases by their own best lights. Writing in *Erie*, Justice Brandeis complained of this disregard. “Persistence of state courts in their own opinions on questions of common law prevented uniformity ...” and “rendered impossible equal protection of the law.”<sup>25</sup>

Still, those nostalgic for general common law make the point that displacements of state law are occurring at least as frequently and abrasively under authoritative, post-*Erie*, federal common law, as under pre-*Erie* general common law. Moreover, judges have resisted the fashioning of federal common law, preferring to fall back on state law when they can. They have doubts about the legitimacy of federal common law, perceiving problems of federalism and separation of powers. There are also occasions when state law may offer a little more “justice” to plaintiffs than federal law does.<sup>26</sup> One can see this phenomenon of falling back upon state law in the Supreme Court’s late admiralty cases. One thinks of the plausible but grateful resort to state law in such cases as *Sprietsma v. Mercury Marine*,<sup>27</sup> *Yamaha Motors Corp. v. Calhoun*,<sup>28</sup> and

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Court review of an adverse state court judgment, and, since state law was unfavorable to him, argued that the general common law should be applied to his case instead. Although it had always been understood that the Court would hear only federal questions, a recent amendment to the Supreme Court’s jurisdictional statute suggested that general common law questions coming up from the state courts might thenceforth be brought before the Supreme Court. As a matter of statutory construction, the Court declined the invitation, confining its supervision of the general common law to cases coming to it from the federal courts. This *Erie*-like stance was prudent, but the general common law thereafter increasingly had its only existence when federal courts decided state-law questions, and this federal general common law increasingly diverged from the state common law administered in state courts. Although interstate disuniformity is tolerated as the price paid for a robust federalism, intrastate disuniformity can produce two sets of laws directly governing the same “primary conduct,” *Hanna v. Plumer*, 380 U.S. 460, 476 (1964) (Harlan, J., concurring), a situation that seems deficient in elementary due process, and open to manipulation. In addition, there was a dawning realization that there was no national power of supplanting state law with law that was not federal. See *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

24. 304 U.S. at 74-75.

25. *Id.* at 74.

26. See, e.g., *Exxon Co., U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 1996 AMC 1817 (1996) (holding that contributory negligence bars recovery in admiralty when it is a superseding cause, or the sole proximate cause, of the harm, even though the blameworthy conduct of the defendant was the cause in fact, and notwithstanding the admiralty principle of comparative fault).

27. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 2003 AMC 1 (2002) (holding that the Federal Boat Safety Act does not preempt state tort law, including state actions for survival, notwithstanding the Act’s express preemption clause).

28. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996) (holding that state remedies remain applicable in wrongful death and survival actions in either set of courts arising from accidents to nonseamen in territorial waters).

*American Dredging Co. v. Miller*.<sup>29</sup> This sort of thing is precisely what has produced the confusing patchwork of governance in admiralty of which we all complain. After all, admiralty is a field that is supposed to be completely preempted by federal law.<sup>30</sup>

**(2004) J. Mar. L & Com. 532** These criticisms do strike home. But they also suggest that this new writing is about more than mere nostalgia for a fancied golden age. What we are seeing, I think, is really the latest entry in the long, great debate over federal common law. Like earlier writers opposed to *federal* common law, these writers give the impression of a conservative point of view. They tend to believe that federal judicial lawmaking is a bad thing. Federal common law is activist and counter-majoritarian, especially in our age of statutes, and violates their conception of separation of powers. And it violates their conception of “*Erie*,” a word they use interchangeably with “federalism,” or “state law.” In this sense, these new-fangled writers are old fashioned. Their disdain for federal common law is unsullied by the practical political consideration, so present to less staid conservatives, that the power of fashioning federal case law is now in the hands of an increasingly conservative judiciary that can deploy it to further substantive conservative aims.<sup>31</sup>

From another perspective, these writers share a strikingly new outlook. A singular feature of their thinking is their conviction that general common law should be available to displace *federal* case law, too—the Supremacy Clause notwithstanding. They ask us to think of the new general common law as the law of an extra state.<sup>32</sup> Moreover, they are arguing that displacements of governing law, state or federal, should be entirely at the state’s option.<sup>33</sup> When federal courts apply the general common law it would only be because the state court would.

In time, these proposals might produce a situation somewhat resembling the situation obtaining before *Swift*. Each set of courts would be more or less free to disregard the other. Oddly, of course, this time round, with our post-*Erie* eyes, we would *know* the damage we were doing. We would see quite clearly that general common law in both sets of courts would unpredictably displace the positive law of either the state or the nation. This time round we **(2004) J. Mar. L & Com. 533** would blame it on state rather than federal courts. In state courts this displacement would be chosen with some freedom. In federal courts, it would be chosen based on what the state court has done, or on predictions, sometimes artful, of what a state court “would” do. In time these two kinds of inauthentic law would stand a good chance of diverging

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29. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 1994 AMC 913 (1994) (holding that federal admiralty law favoring dismissals for forum non conveniens in transnational admiralty litigation in federal courts does not preempt state law affording greater access to state courts).

30. See John W. DeGravelles, *Harbor Tug & Barge Co. v. Papai*: Another Turn in the Labyrinth, 10 S. F. Mar. L. J. 209 (1998); for a telling early complaint, see David Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex.L.Rev. 973 (1977); see also the much cited David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Search Mess,”* 1960 Sup. Ct. Rev. 158, 163 (1960).

31. The best example remains Justice Scalia’s enthusiastic federal common lawmaking on behalf of defense industries in *Boyle v. United Techn. Corp.*, 487 U.S. 500 (1987). But Justice Scalia is complex. Since *Boyle*, Justice Scalia has occasionally reverted to a restrictive position on federal common law, see, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001). But he has also taken a liberal federal common law position on behalf of plaintiffs; see, e.g., *Norfolk Shipbuilding & Dry Dock Corp. v. Garris*, 532 U.S. 811, 2001 AMC 1817 (2001).

32. *Young, It’s Just Water*, supra note 14, at 505.

33. *Id.* at 508: “Although *Erie* would require federal courts to decide the case as a state court would, the federal court could look to general maritime law as long as it were convinced that a state court would also do so. The key point is that ‘general law’ would be applied in this instance only by virtue of its persuasive authority. That law would, in other words, have exactly the same ‘authority’ as, say, this article. There can hardly be anything unconstitutional about that.”



from each other.

In short, the new critics of federal common law are as eager to put *state* common law at risk as federal, whatever the costs to the legal system. They distrust state common law as much as federal, even in the hands of an increasingly conservative state judiciary, even as constrained by increasingly conservative state legislation. You and I may sense, either with satisfaction or regret, that the common law has become less remedial than it was twenty or thirty years ago. But to our revisionist colleagues, judge-made law will always be too remedial. It can never be conservative enough. Most exasperatingly, it will always be judge made. In their view, the common law is activist and counter-majoritarian, federal common law no more so than state common law. (This is a point I have made myself, in attempted extenuation of federal common law,<sup>34</sup> but it turns out to have been a two-edged sword.) It is unclear just why the *general* common law should strike these writers as less of a threat to either federalism or separation of powers than the common law we have got. But whether the common law is federal or state, these writers are saying, in effect, “A plague on both your houses.”<sup>35</sup> They are happily rediscovering a *third option*—the general common law.

### *B. Ironies of the position*

These writers have produced a body of thoughtful and interesting work. But one comes away from it with an impression that they must be feeling some cognitive dissonance. These new-style critics of federal common law are suddenly finding themselves having to attack *Erie v. Tompkins*—their old friend! That is the sheer logic of their situation. If the aim is to restore something like the pre-*Erie* regime, *Erie* has got to go. It is a further irony of their position that, to the extent they contemplate the application of general law in either set of courts, state law will not be applied. So they now must acknowledge—at last—that there is *no* “principle of federalism,” in *Erie* or anywhere else, that somehow requires state law *no matter what*. Of course there never could have been a principle of federalism that would require state answers to federal questions.<sup>36</sup>

**(2004) J. Mar. L & Com. 534** Although the revisionists remain staunch foes of federal common law, they are advocating common law of some kind. So it is another irony that they now have to concede—at last—that there are *no* principles of separation of powers<sup>37</sup>—no democratic or majoritarian values, in *Erie* or anywhere else—that limit “the province and duty of the judicial department to say what [federal] law is,”<sup>38</sup> or that delegitimize case law generally, or limit lawmaking to legislatures. Indeed, *Erie* held that case law cannot be set at a discount. Justice Brandeis was emphatic on this point. It simply is no business of the enforcing court, he insisted, whether the law of the governing sovereign “shall be declared by its Legislature in a statute or by its highest court in a decision ....”<sup>39</sup>

Professor Young’s description of his proposal would be very hard to reconcile with this last point, a point of legal positivism central to *Erie*. Young says that “the revisionist proposal in admiralty would require applying state law in almost all maritime cases that do not implicate

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34. Weinberg, Federal Common Law, *supra* note 2, at 805.

35. Cf. William Shakespeare, *Romeo and Juliet*, Act III, Scene 1.

36. See generally Weinberg, *The Curious Notion*, *supra* note 2.

37. But see, e.g., Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 *Tex. L. Rev.* 1321 (2001).

38. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).

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

federal statutes.”<sup>40</sup> But this is the same as to say “Let us delete the supremacy of free standing federal case law by calling it ‘general common law’ instead, so that the states will become free to disregard it.” Proponents of such views are thumbing their noses at Justice Brandeis, and insisting, “Yes, contrary to what Brandeis may have thought, it is the business of the enforcing court to put case law at a discount. Let us go on applying acts of Congress, but let us deny the courts power to furnish federal answers to the federal questions posed by mere case law.”

It is true that *Erie* is very narrow. If read narrowly and literally, in its own terms, *Erie* may seem inadequate to block a restoration of general common law. Justice Brandeis chose—I think deliberately—to limit the rationale of *Erie* to the precise problem confronting the Court, the problem presented by *Swift*: Was it proper for federal courts to disregard the otherwise applicable law of a state, and to substitute for it law that was not federal? Justice Story’s answer to this question in *Swift v. Tyson* was that such displacements were only to be expected, since what was displaced was merely the states’ case law on general questions, and when it came to general questions, all courts were free to take an independent view of what the best general answer must be. In choosing to limit *Erie* to a reconsideration of *Swift*, Justice Brandeis may have been concerned about the dangers of too big a change. He must have understood that even a narrow decision in *Erie* would be a drastic one. (2004) J. Mar. L & Com. 535 Far from a simple overruling of the single case of *Swift v. Tyson*, *Erie*, decided as it was on narrow grounds, scuttled much of the Federal Reporter. Prudence, and perhaps his brethren in the majority, would have recommended to Brandeis that he focus narrowly upon the task at hand. That would have seemed the safest course and the best judicial process.

Moreover, although four rationales had been previously developed for overruling *Swift*, all of which Brandeis deployed,<sup>41</sup> only one was squarely based on the Constitution, and this rationale was precisely fitted to the narrowest view of the question the case presented. I am referring to Justice Field’s compelling argument that the federal courts, in applying an unfederalized version of state law, were fashioning rulings operative only in one set of courts and only within a single state, rulings that Congress itself could not have enacted, since acts of Congress must be uniform and supreme.<sup>42</sup> The other three arguments available to Brandeis were related to Field’s argument and to each other. These last could be unpacked from Justice Holmes’s thinking. But they did not rise to the constitutional level. They were at best pure legal theory, having to do with the nature of the common law. Holmes’s first point was about legal positivism. His second point was about legal realism. His third was a consequence of the first two. Holmes’s positivistic point was that law exists only if there is some definite identifiable sovereign behind it.<sup>43</sup> Thus, there was no “general common law,” there was only the law of some identifiable government articulated authoritatively in its highest court. Holmes’s legal-realist point was that judges are not oracles who find law; they make it up as they go along.<sup>44</sup> This conclusion underscored that the common law was not some brooding omnipresence in the sky. Rather, it was only a collection of decisions by particular judges, trying to advance the policies and interests of a concerned sovereign. Holmes’s third point was that the obligation of courts to apply the law of an identified definite governing authority does not lessen when applicable law is case law. Just as legislation is the codified policy of the sovereign, case law is the sovereign’s

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40. Young, *It’s Just Water*, supra note 14, at 508.

41. All four are argued in the one operative, but brief section of the case. *Erie*, 304 U.S. at 78 (Part “Third”).

42. *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

43. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372 (1910) (Holmes, J., dissenting).

44. *Erie*, 304 U.S. at 78 (quoting Holmes).

“articulate voice.”<sup>45</sup> “ This point underscored that the case law of the relevant sovereign could not be displaced by any arbitrarily determined rule, simply on the ground that what was displaced was merely case law. The ultimate conclusion to be drawn from these arguments was that case law that is not uniform and supreme is not federal law; and, therefore, if the general common law was not to be rubbish, it must be state law.

**(2004) J. Mar. L & Com. 536** But it is hard to see why *Erie*’s narrow arguments about state law, federal courts, and case law, should not be true of all governments, all courts, and all law. Indeed, these arguments become more true as they become more general, precisely because *Erie* was decided on grounds that are too narrow for our dual-law, dual-court system. The long, unhappy experience under *Swift* should have taught us that a legal principle, even an arguably procedural one, which is applied only in federal courts, is bound to lead to trouble. Apparently for some such reasons the Court from time to time has struggled to modify constitutional or statutory provisions that, read literally, apply only to federal courts. The Court’s preferred method has been to extend the unfortunate text to *both* sets of courts by a judicial *coup de main*, no matter what the text actually says. We saw this happening, for example, in *Alden v. Maine*, when the Court in effect extended the bar of the Eleventh Amendment to state as well as federal courts.<sup>46</sup> We saw this happening, to take a statutory example, in the *Keating* case, when the Court willfully extended the Federal Arbitration Act<sup>47</sup> to state courts, commanding them to enforce agreements to arbitrate when the said agreements fell within the national commerce power.<sup>48</sup> For even more compelling reasons, constitutional limits on governmental power, once believed by the Court to be applicable only to the nation<sup>49</sup> are now held applicable to the states,<sup>50</sup> and vice versa.<sup>51</sup>

We cannot say that Justice Brandeis’s opinion in *Erie* was a model of clarity, given persistent confusion about just what it was that was struck down, **(2004) J. Mar. L & Com. 537** and what it was that was unconstitutional about what was struck down. But at least the opinion is explicit. It was the general common law that was struck down, as applied in federal courts, to displace otherwise applicable state case law. The general common law was struck down because

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45. *Jensen*, 244 U.S. at 222, 1996 AMC at 2088 (1917) (Holmes, J., dissenting).

46. 527 U.S. 706, 712, 758-60 (1999) (holding that Congress lacks commerce power to impose liability on a state in the state’s own courts for a violation of federal law; striking down, as against a state employer, the private cause of action provision of the Fair Labor Standards Act for violation of the requirement of “time and a half for overtime.”). For commentary see, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 Notre Dame L. Rev. 1113 (2001); William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 Notre Dame L. Rev. 843 (2000); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 Notre Dame L. Rev. 953 (2000); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011 (2000).

47. 9 U.S.C. § 1 et seq.

48. See *Southland Corp. v. Keating*, 465 U.S. 1, 11-17 (1984) (holding that the Federal Arbitration Act, though intended to govern only in federal courts, is binding in all courts for all contracts in interstate commerce). For extended analysis see Weinberg, *The Power of Congress*, supra note 2.

49. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights is without force as against state governments).

50. It appears that the “incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment is now substantially complete, with the prudent exceptions of the Fifth Amendment right to indictment by grand jury, and the Seventh Amendment right to trial by jury in civil cases.

51. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (recognizing “reverse-incorporation” of the equal protection component of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment).

the nation, and therefore its courts, had no general nonfederal lawmaking power.<sup>52</sup> As Brandeis rather opaquely put this, “Congress has no power to declare substantive rules of common law applicable in a State.”<sup>53</sup> If there was any displacing of state law to be done, Congress, and therefore the federal courts, had power to do it only with *federal law, applicable in the nation*.

Consistent with this last point, it would seem that the state courts, like the federal courts, should have no power to declare substantive rules of general common law which arbitrarily would displace otherwise applicable authentic case law. Neither set of courts should have any power (and under the Supremacy Clause, of course, they do not) to declare a rule of general (or state) common law to be applicable to a federal question, without adopting such a rule as a federal rule.

### III THE ATTACK ON AMERICAN LEGAL POSITIVISM

Since, however, the constitutional basis of *Erie* apparently remains obscure to them, the new critics of federal common law are attacking *Erie*'s philosophical—rather than its constitutional—underpinnings. They are not **(2004) J. Mar. L. & Com. 538** simply challenging *Erie*'s ideal of evenhandedness,<sup>54</sup> and not simply broaching the questions whether Supreme Court review and the supremacy and uniformity of federal law are good things, or achievable, or even *matter*, although they are indeed challenging all of those assumptions.<sup>55</sup> More particularly, these writers are trying to undo the American legal positivism that *Erie* inscribed upon the Constitution.<sup>56</sup>

As Professor Young outlines the proposal, a court would be free to apply either state law or general common law whenever it is confronted by a non-statutory federal question. According to Young, a federal court, under the compulsion of *Erie*, would apply general common law when the state court would. The state knows it is free, because the federal courts can apply only what

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52. See, for a classic explanation of the point, John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 704 (1974). Alternative interpretations of *Erie* seem to disregard the structure of the opinion. The operative part of *Erie*, Brandeis's part “Third,” deals with this question of national power, and with the necessity of a positivistic view of case law. *Accord*, Casto, *The Erie Doctrine*, supra note 14, at 928 n. 137. The preceding discussion of the problems experienced under *Swift*, problems of forum shopping and unequal protection, does not conclude that these problems rendered unconstitutional the course pursued under *Swift*. Rather, Brandeis's part “Second” concludes only that the situation had been unjust and confusing. “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.” He then ends his part “Second” remarking that if it were only a question of tinkering with the statutes the Court on this basis would not strike down a century old case like *Swift*. But the unconstitutionality of the course pursued compels the Court to do so. Then that section ends without stating what the unconstitutionality was, leaving that explanation to Part “Third.” The problems of “injustice” and “confusion” described in Part “Second” have nothing to do with the constitutional basis of *Erie*. The unconstitutionality is explained only in part “Third.” 304 U.S. at 77-78.

53. *Id.* at 78.

54. *Id.* at 75: “Thus, the doctrine [of *Swift v. Tyson*] rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.” Cf. *Hanna v. Plumer*, 380 U.S. 460, 469 (1965) (Warren, C. J., describing the “twin aims” of *Erie* as limiting intrastate forum shopping, and furthering equal protection of the laws).

55. See, e.g., Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. Rev. 1612, 1679-80 (2002) (questioning the need for federal uniformity and contrasting it with state-by-state diversity).

56. See, e.g., Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 Va. J. Int'l L. 365, 486-99 (2002) (questioning the value of American legal positivism).

they *think* is state law, and the states are not bound by what federal courts think state law is. So every court would have a choice of its own versions of state or general common law, except for the obligation of federal courts to try to decide both as the state court would. And all courts may also engage in federal statutory interpretation.<sup>57</sup> But freestanding federal case law would no longer be fashioned. Existing federal case law would be displaceable.

How would this proposal ameliorate the patchwork of governance over federal questions that we have now? The likely consequence, rather, would seem to be an unpredictable governance by three instead of two legal regimes. Presumably the new critics of federal common law are attracted to nonfederal answers to federal questions, irrational as such governance may be, because elimination of freestanding federal common law would *pro tanto* eliminate nonstatutory federal preemption of state law (i.e., that *bête noir*, *Southern Pacific Co. v. Jensen*<sup>58</sup>). But since *Jensen* has resulted in no dearth of state law, but rather a devil's own mess, a patchwork of governance, what would be gained by adding more patchwork?

**(2004) J. Mar. L & Com. 539** “American legal positivism”—that Austinian idea that all law, even case law, must emanate from some sovereign<sup>59</sup>—is at the heart of *Erie*.<sup>60</sup> Case law can be the law of the nation, a state, some identifiable country—but in American courts it must be “the articulate voice of some sovereign that can be identified.”<sup>61</sup> Under *Erie*, then, case law cannot be the law of some imaginary extra state or any other general source that is neither state nor federal. This core insight of those who protested against “the course pursued” under *Swift*, most notably Justice Holmes,<sup>62</sup> became the central teaching of *Erie*. *Erie*'s positivism retrospectively provided an intellectual foundation for the Supreme Court's definitive federalization of admiralty law in 1917, in *Southern Pacific Co. v. Jensen*.<sup>63</sup> After *Jensen*, when admiralty lawyers refer to “the general maritime law” they do not mean a kind of pre-*Erie* general common law. They mean *federal* common law.

In *Jensen*, the Supreme Court held that sheer inchoate national lawmaking power completely preempts state authority in admiralty cases. Justice Holmes penned a dazzling but mistaken

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57. Young, *It's Just Water*, supra note 14, at 504. I pass over the difficulty of sorting cases into these two neat categories. Even in freestanding federal common-law cases, courts consider the bearing of legislation, and even in statutory cases, courts fashion rules of decision.

58. 244 U.S. 205, 1996 AMC 2076 (1917) (holding the field of admiralty completely preempted by federal law).

59. See John Austin, *Lectures on Jurisprudence* 82 (Robert Campbell ed., 1913). See also John Austin, *The Province of Jurisprudence Determined* (1832). It is important to distinguish American legal positivism from English legal positivism. The former, made part of the Constitution in *Erie R.R. Co. v. Tompkins*, endows the judiciary with power to fashion law that will have the force of legislation, and thus implies a legal realist perspective that judges are not the oracles of preexisting law, but make it up as they go along. The latter is a principled but apologetic and, to an American sensibility, unappealing position that judges must enforce unjust laws. See, e.g., 1 William Blackstone, *Commentaries* 91 (1765) (facsimile ed. 1979) (acknowledging the view that judges will not enforce an unreasonable act of Parliament, but taking the reluctant personal position that judges have no choice but to enforce such an act).

60. See Casto, *The Erie Doctrine*, supra note 14, at 908 (terming *Erie* an “intellectual revolution” and remarking, “The general acceptance of positivism in this century virtually dictated the overruling of *Swift v. Tyson* ...”). But see, for an apositivistic reading of *Erie*, Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 Va. L. Rev. 673 (1998).

61. *Jensen*, 244 U.S. at 222, 1996 AMC at 2088 (Holmes, J., dissenting).

62. See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1910) (Holmes, J., dissenting) (criticizing the general common law administered under *Swift* on the ground that it did not have some definite government authority behind it).

63. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917).

dissent in *Jensen*, famously complaining, “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign that can be identified.”<sup>64</sup> Yet the *Jensen* Court had indeed identified the general maritime law to some sovereign—the nation. Five years after *Jensen*, in *The Western Maid*,<sup>65</sup> Justice (2004) **J. Mar. L & Com. 540** Holmes seemed to get at least this point right, memorably emphasizing the sovereign authority of the United States in admiralty cases in our courts: “[H]owever ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow.”<sup>66</sup> This is glittering prose, but when the sparkle dust settles, the operative word is “adopted,” and the identified sovereign in admiralty is “the United States.” In admiralty, it had been understood long before *Jensen* that the general maritime law in American courts was federal common law. That understanding, crystallized in *Jensen* in 1917, had been spelled out in *The Lottawanna* in 1874,<sup>67</sup> and is as much a part of earlier admiralty cases as of earlier cases on the Constitution. But it was only with *Erie* in 1938 that *Jensen*—and indeed all judicial federal lawmaking power—became part of a larger theory.<sup>68</sup>

In downplaying *Erie*’s American legal positivism, the new critics of federal common law are seeking to downplay the authority of courts to pronounce identified federal common law. They may find it difficult to persuade (2004) **J. Mar. L & Com. 541** us, though, that it would be advantageous to make departures from the real world of the positivistic present. Do we really want a world in which applicable state decisional law might not reliably apply? A world in which

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64. *Id.* at 222, 1996 AMC at 2088 (Holmes, J., dissenting).

65. 257 U.S. 419 (1922). Holmes’s position in *The Western Maid* denigrating admiralty’s traditional personification of a ship, a position earlier elaborated in his book, Oliver Wendell Holmes, Jr., *The Common Law* 33 (1881) (1963), has not served the needs of admiralty and thus has not withstood the test of time. Although of course the personality of a ship is a legal fiction, it is the ship that establishes venue, that is arrested, that furnishes security, that insures, that in the final analysis is responsible for the torts of those aboard her and for the wages of the crew, that is forfeit and thus the limit of her own liability, and so forth. None of these roles can be filled by the shipowner in the same way. Thus, the better view is that spelled out in, e.g., *The China*, 74 U.S. (7 Wall.) 53, 2002 AMC 1504 (1868), and in Justice McKenna’s dissent in *The Western Maid*, 257 U.S. at 435: “The most prominent and efficient of its [the admiralty’s] remedies is that which subjects its instrumentalities, its ships particularly, to judgment.”

66. *The Western Maid*, 257 U.S. at 432 (Holmes, J.).

67. 88 U.S. 558, 1996 AMC 2372 (1874).

68. Justice Bradley clarified the position in *The Lottawanna*, but failed to endow his positivism with the legal-realist dimension so necessary to the thinking of Justice Brandeis in *Erie*. Bradley saw clearly enough that a “general” proposition of law “does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States ..., and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treaties on maritime law, or the codes or ordinances of any particular country.” *Id.*, at 574. Bradley went on to say, famously:

“That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend ‘to all cases of admiralty and maritime jurisdiction.’ ... One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.”

*Id.* at 575. Bradley’s theory clashes with our modern understandings only when he says, *id.* at 576-77: “But we must always remember that the court cannot make the law, it can only declare it.” This, of course, is an example of the “fallacy” to which Brandeis adverted in his part “Third,” the operative section of *Erie*.

the law applied to federal issues will not be trumps nationwide? This latter revisionist suggestion does have some textual support, since Article VI makes federal law supreme—anything in state law to the contrary notwithstanding. Article VI is silent on general law. In argument and adjudication, would we trade both federal and state law for some vague idea of something broader, existing only in the minds of the judges? Should the judges, whose discretion is always controversial in any event, be loosed from their moorings in authoritative precedent? Are we ready to pull up the stabilizing anchor of the governing sovereign’s policies and interests, discernible in analogous acts of its legislature, and set sail, perhaps in defiance of those expressions of legislative will, for some misty utopia of our own concocting, where we think things are done better?

#### IV

### CONSTITUTIONAL BASES FOR THE POST-*ERIE* REGIME: NEWER THINKING

#### A. *Generalizing Erie’s Power Rationale*

The most serious task now facing the proponents of general common law is to confront the constitutional issues. First, of course, there is the fact that *Erie* struck down the general common law as unconstitutional. In doing so, the Court relied on the constitutional limits of national power. The nation has no general lawmaking power, and therefore Congress could not enact general law, and therefore federal courts had no power to fashion it.<sup>69</sup> Furthermore, this means that, today, given *Erie*, even Congress could not authorize the courts, state or federal, to fashion rules of general common law to displace law otherwise applicable, whether state or federal. State legislatures certainly have no power to delegitimize federal common law.

The national impotence is at least as emphatic now as it was at the time of *Erie*. The Rehnquist Court has been vigorously reminding us that we are a nation of limited powers.<sup>70</sup> Specifically, there is no national power, and there (2004) **J. Mar. L & Com. 542** never has been any national power, to *receive* the general common law. As Chief Justice Rehnquist pointed out in *Lopez* in 1995, a consolidated national governance over all things great and small, general and local, would undermine our federalism utterly.<sup>71</sup> It has always been a bedrock article of our national faith that we would *not* have a national “police power,” nor would our courts, state or federal, preside over a general common law of crimes and torts, contracts and trusts, wills and estates. That would be the sort of national consolidation we have always feared and guarded against.<sup>72</sup> In *Gibbons v. Ogden*, Chief Justice Marshall, nationalist though he was, recognized

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69. 304 U.S. at 78.

70. For the novel view of a critic of federal common law that the Supremacy Clause should be read as a limit on national power, see Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. Rev.* 91 (2003). For my position on the Rehnquist Court’s federalism cases, see Louise Weinberg, *This Activist Court*, in Symposium, 1 *Geo J. L. & Pub. Pol.* 111 (2002); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 *Notre Dame L. Rev.* 1113 (2001); Louise Weinberg, *Fear and Federalism*, in Symposium, 23 *Ohio N.U. L. Rev.* 1295, 1334 (1997).

71. *United States v. Lopez*, 514 U.S. 549 (1995) (Rehnquist, C. J.): “To uphold the Government’s contentions here, we would have to ... convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”

72. *Lopez*, 514 U.S. at 566: “The Constitution ... withhold[s] from Congress a plenary police power.” See the excellent discussion of the police power of the states in Randy Barnett, *The Proper Scope of the Police Power*, 79 *Notre Dame L. Rev.* 429 (2004); Weinberg, *Fear and Federalism*, *supra* note 70, at 1334 (discounting the probability of a “consolidation catastrophe”; relating the idea of national consolidation to the misunderstood idea of a national

vast state powers exercisable in an “immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government.” Marshall viewed these massive state powers as serving the best interests of the nation, pointing out that in their nature these are powers that “can be most advantageously exercised by the States themselves.”<sup>73</sup>

*Erie*, then, was about the lack of national power over matters that had not been held to come within the nation’s legitimate sphere of governmental interest. *Erie* held only that there is no national power over the internal concerns of a single state. For the nation to interfere with the state’s governance it would have to *federalize* the particular issue. Then federal law, supreme and uniform, would govern that issue nationwide. Both Congress and the courts have the option of federalizing an issue and either fashioning new federal law for it, or referring to the law of a relevant state to furnish the content of federal law. But these acknowledgments of underlying federal governance require a finding that the subject falls within the nation’s substantive powers. And this, in turn, requires identification both of the national interest in governance of that issue and of the nature and direction of national policy.<sup>74</sup> In *Gibbons*, Chief Justice Marshall explained, “If the legislative power (2004) **J. Mar. L & Com. 543** of the Union can reach them [the general objects of state law], it must be *for national purposes*.”<sup>75</sup> Of course when the nation acts, limited as it is to national purposes, it acts supremely. “[T]he government of the Union, though limited in its powers, is supreme within its sphere of action.”<sup>76</sup>

A second constitutional difficulty inheres, as the reader must already have seen, in the revisionists’ proposal. They have simply made no room for federal supremacy. Authentic federal case law is treated by them as illegitimate, and inauthentic *general* law is approved to displace authentic federal case law. But federal supremacy is not some unanchored idea dreamed up by wild-eyed radicals; it is Article VI of the Constitution of the United States. In sum, after *Erie*, and, given federal supremacy, neither Congress nor the state legislatures can have any general lawmaking authority over each others’ laws. And neither Congress nor the state legislatures have power to administer a general law not identifiable to any sovereign.

We can now begin to see the relation between the want of power with which the operative “Third” section of *Erie* commences, and the “fallacy” with which it concludes. We can also see that the revisionists have yet to internalize the lessons of *Erie*’s positivism and its rejection of the fallacious reasoning on which the general common law rests. The apositivistic pre-*Erie* conviction that the federal judges had power to displace state law with law that was not federal had been based on a fallacy, a belief that law could exist without some definite authority behind

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“police power”).

73. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

74. See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (declining to fashion a right to contribution between joint tortfeasors in antitrust in the absence of policy guidance from Congress); ironically, in attempting to avoid a policy decision, the Court inadvertently made the policy decision that there should be no contribution between joint tortfeasors in antitrust. See also, e.g., *In re Agent Orange Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980) (identifying underlying federal governance of a products liability claim by Vietnam veterans for harms sustained in Vietnam from use of the defendant’s defoliant, but declining to acknowledge federal subject-matter jurisdiction because unable to determine whether national policy was protective of government contractors or protective of those serving in the armed forces).

75. *Id.* at 203-04 [emphasis supplied]. These national “purposes” are the “legitimate end[s]” famously insisted upon in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.): “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.” With this, compare Justice Brandeis’s dissent in *Dodge* to very similar effect, excerpted *supra* note 89.

76. *McCulloch*, 17 U.S. at 405.



it. In insisting that only federalization of an issue can legitimize displacements of state law otherwise applicable to that issue, *Erie* strongly suggests that American legal positivism is itself constitutionally required.

The advantage of this position of constitutionalized positivism is that it has the potential of making *Erie* less narrow and more generalizable. Constitutionalized American legal positivism implies that general common law is as unconstitutional in state courts as in federal.<sup>77</sup> Of course each state retains general plenary power over all questions within its legitimate sphere of governmental interests, unless preempted. But, if American legal positivism (2004) **J. Mar. L & Com. 544** is constitutionally required, state and federal courts alike must reason only from some identified sovereign's policy, applying only some identified sovereign's law. Today, these understandings have become so deeply ingrained that a state court applying a general common-law rule will be *assumed* to have adopted the general rule as its own. And a court applying a general maritime rule will be taken to have applied federal common law.

However, there exists an even more solid and more fundamental basis for constitutionalized American legal positivism than *Erie* or Article VI can provide.

### *B. Toward a More General Theory*

*Erie*, of course, speaks only of the obligations of federal courts, and it speaks only of the positivistic nature of state case law. Thus far, we have been able to generalize *Erie* only to require that identified law be applied in all courts. And *Erie* itself assimilates case law to statute law, in insisting upon the equal obligation of courts to apply both. But today there are important additional constitutional arguments that do not appear in *Erie*. These newer arguments more clearly extend the thinking reflected in *Erie* to both sets of courts and both sets of laws, and support *Erie*'s assimilation of case law to statute law as well. These arguments are arguments of *due process*.<sup>78</sup>

On the same day that *Erie* was decided, April 25, 1938, the Court also handed down the *Carolene Products* case. *Carolene Products* was the great watershed case—the keystone of what we might call the New Deal settlement—that at last gave Congress the Court's assurance that ordinarily legislation would be subject only to minimal judicial scrutiny for mere rationality.<sup>79</sup> Justice Stone, the author of *Carolene Products*, reserved only in a footnote—*Carolene Products*' famous “footnote 4”—a higher tier of scrutiny for legislation affecting fundamental rights, or affecting the rights of minorities unlikely to find protection in the political process.<sup>80</sup> The facts that both *Erie* and *Carolene Products* were decided on April 25, 1938, and that Justice Brandeis (2004) **J. Mar. L & Com. 545** played the seminal role in the earliest cases on due process and

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77. I have argued this previously; see, e.g., Weinberg, *Federal Common Law*, *supra* note 2, at 819-21, 828.

78. For extended discussion of this function of due process in the dual court/dual law system, see Weinberg, *The Federal-State Conflict of Laws*, *supra* note 2 (arguing that due process limits the choice of federal as well as state law); Weinberg, *The Power of Congress*, *supra* note 2 (arguing that the Due Process Clause of Fifth Amendment is the limit on federal jurisdiction and the Due Process Clause of the Fourteenth Amendment is the limit on state jurisdiction; pointing out that Article III is not similarly generalizable); Weinberg, *The Article III Box*, *supra* note 2 (same).

79. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (Stone, J.): “[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”

80. *Id.* at n.4.

choice of law,<sup>81</sup> suggest to me that Justices Stone<sup>82</sup> and Brandeis, at least, may have been ready to decide *Erie* on due process grounds, but might have had trouble cobbling together a majority for a broad rationale.<sup>83</sup>

For some time after *Carolene Products*, rational-basis scrutiny was taken as a virtual *carte blanche*.<sup>84</sup> Today, however, rational-basis scrutiny is understood very differently. These days, judicial scrutiny for the rational bases of law can be very meaningful indeed; rational-basis scrutiny has become rather more protective of both economic and personal rights than might have been anticipated. Rationality is understood, and insisted upon, as a basic *requirement* of American law. This newer understanding is associated most closely with the constitutional concept of due process.

Rational-basis scrutiny today can have real bite, for example, in civil rights cases, whether as a matter of equal protection or due process.<sup>85</sup> Even in some regulatory cases there may be less difference than is generally supposed (2004) **J. Mar. L & Com. 546** between rationality review and higher levels of scrutiny. The rational bases of law are lodged in legitimate governmental purposes, policies, and interests, on particular facts. This being so, it is difficult to exclude from consideration of the rational bases of law arguments that in the past have characterized a higher tier of judicial scrutiny, arguments pointing to an unnecessarily sweeping coverage, given the alleged objectives of a statute or rule; or to a field of application too selective to satisfy those objectives; or to a less restrictive alternative that could accomplish those objectives. I suspect

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81. See infra notes 89-90 and accompanying text. By 1938 Brandeis's positivistic position on state case law, spelled out in *Erie*, was mirrored by an equally positivistic position on federal case law, seen in his opinion in a case handed down, like *Carolene Products*, on the same day as *Erie*: *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (Brandeis, J.) (pointing out that although the parties were only private parties of diverse citizenship, since their dispute concerned the lay of an interstate water boundary, the case could have arisen in the Court's original jurisdiction in an action between the two states, and explaining that, since in such cases federal common law would apply, courts should therefore apply federal common law to interstate boundary disputes between private parties). *Hinderlider* immediately follows *Erie* in the law reports. It is true that Brandeis joined Holmes's dissent in *Jensen*, 244 U.S. at 255; and *Jensen*, for all the controversy it continues to generate, is good law. Justice Holmes, dissenting, did recognize obvious national lawmaking power, and in that sense must have understood that the Court had identified the nation as the relevant sovereign, notwithstanding his adjuration to the Court that the common law was "the articulate voice of some sovereign that can be identified." 244 U.S. at 222. Holmes's mistake was in insisting that the common law was always the law of "some state" unless and until Congress addressed the issue. The concept of complete preemption of a field by inchoate national policy was not satisfactory to him or Brandeis at that time in that context. But complete preemption of a field is the concept the mature Brandeis relied on as a matter of course when he identified the exclusive federal common-law power that governed *Hinderlider*.

82. Cf. Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution* 101 (2000) (remarking that Brandeis counted primarily on Stone's support for the opinion in *Erie*).

83. As it was, Justice Reed was unwilling to join the opinion in its entirety, *Erie*, 304 U.S. at 90, and Justices Butler and McReynolds dissented. *Id.* at 80.

84. For classic examples of the Supreme Court's originally generous view of rationality in law, see *New Orleans v. Dukes*, 427 U.S. 297 (1976); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

85. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (holding, in part under the Due Process Clause, that the state's antimiscegenation law was not based on any legitimate governmental interest of the state: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Id.* at 11. Cf. *Romer v. Evans*, 517 U.S. 620 (1996) (Kennedy, J.) (under the Equal Protection Clause, striking down a state constitutional amendment stripping homosexuals of the special protections of civil rights laws): "[The amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632.

that counsel are unlikely to refrain from making available arguments that shed this much light on the rationality of law. And courts that might have brushed such arguments aside in the past, I suspect, will be less likely to ignore them as time goes on.

If the first aspect of due process is the *rationality* of the law applied, the second, intimately bound up with the first, is its *relevance*. Not only must law in American courts be applied only in furtherance of a rational policy concern of the particular governing sovereign; it must also reflect a legitimate governmental interest in its application on the particular facts. Law cannot be applied unless the application will vindicate an identified governmental interest. In other words, the parties and the facts must be within the purposes of the law applied to them. We may think of this principle more as a basic tool of legal analysis, or a problem of standing, than as a requirement of due process, but of course it is. Consider, for example, the fundamental rule of due process that courts may not punish for a crime other than the crime alleged in the indictment.<sup>86</sup>

I raise these two intertwined due process requirements of the law applied in courts—requirements of *rationality* and *relevance*—in order to introduce a crucial third requirement: that the identified government have a *legitimate governmental interest*. Of course a statute forbidding the stealing of government property is rational. If the defendant is alleged to have stolen government property in violation of that particular statute, the law will have some facial relevance as well. But if the statute is not a statute of the state from which the defendant allegedly stole the property in question, but a different state, application of that statute to the case will be irrelevant, arbitrary, and irrational. The defendant's crime needs to be tried under the law of a relevant state—that is, a state with a legitimate governmental interest in having its law enforced as against this defendant on the facts of the particular case, **(2004) J. Mar. L & Com. 547** and the identified sovereign whose law is sought to be applied to an issue must itself be relevant to that issue. A charge to a jury under the law of Alaska could not be due process in a case wholly internal to Massachusetts. A state cannot be allowed to govern a case in which it has no legitimate governmental interest. But the law of a state that does have such an interest can be applied in any court.

This latter understanding, that the governing sovereign itself must be chosen rationally, has been developed in a substantial body of Supreme Court cases on due process. These cases address the problem of choice among conflicting state laws. The position that a legal issue should be governed only by the law of sovereign with a legitimate governmental interest in that issue, based on significant connections with the case, is not only the constitutional position; it is, in effect, the common-law position of most American courts, reflected in modern choice-of-law methods.<sup>87</sup> That a rational basis for the application of law is a fundamental requirement of due process was recognized even before the development of modern choice-of-law methods.<sup>88</sup>

The requirement that the choice of the governing sovereign itself be relevant began to

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86. See currently, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that due process requires that factors in aggravation of a penalty, here that the crime was a hate crime as defined by state statute, be alleged in the indictment and proved to the jury beyond a reasonable doubt); see also *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (state sentencing guidelines struck down as a violation of the defendant's *Apprendi* rights).

87. See the interesting late discussion of choice-of-law methods in transnational cases, treated exclusively as a methodological and not a constitutional problem, and limited by spurious notions of extraterritoriality, in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). For a description of the relation between choice-of-law methods and the way the Constitution controls choices of law, see Weinberg, *Minimal Scrutiny*, *supra* note 2.

88. For this history, see Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 Mich. L. Rev. \_\_\_\_ (forthcoming May 2005).

develop as a special concern of due process in the 1930s. At that time, we were beginning to understand that, just as the forum could not try a case if it did not have *jurisdiction to adjudicate*, the forum could not apply its own law unless it also had *jurisdiction to prescribe*. This power of governance would arise on a showing that there was a nexus of facts linking the case to the forum. Indeed, it came to be understood that the forum could apply the law of any state with legislative jurisdiction. It was felt that a state should have power to govern facts connected with the state in some way. Conversely, it was argued that the parties should not have to submit to the governance of a state lacking a reasonable nexus, some substantial physical contact, with them and their case. Eventually, physical contacts between the state and the case were seen to be significant only insofar as they generated state interests. The constitutional position now is that it is arbitrary and unreasonable to subject the parties to the laws of a sovereign having little or no legitimate governmental interest in the issue to which its law is sought to be applied.

These broad constitutional understandings were emerging before *Erie*. Interestingly, the two seminal opinions were authored by Justice Brandeis, (2004) **J. Mar. L & Com. 548** the author of *Erie*. The modern role of the Constitution in controlling choices of law begins with Brandeis's 1918 dissent in *New York Life Insurance Co. v. Dodge*,<sup>89</sup> and his groundbreaking 1930 opinion for the Court in *Home Insurance Co. v. Dick*.<sup>90</sup> With *Dick*, we came to understand that the state chosen to govern an issue had to be relevant to that issue. Then, with *Erie*, it was borne in on us that American courts do have to *choose* law, and may not displace relevant law with irrelevant law. The upshot, as I have argued elsewhere,<sup>91</sup> is that the "rational-basis" scrutiny with which American courts test the constitutionality of substantive law is very nearly the same as the "significant contacts" scrutiny or "governmental interest analysis" with which American courts choose law, and is very nearly the same as the Supreme Court's test of the choice for constitutionality. Since 1930, the Court has developed a substantial jurisprudence in which interstate choices of law are submitted to due process scrutiny under precisely such tests.<sup>92</sup>

It seems ironic that the author of the *Dodge* dissent and the *Dick* case, the earliest grand classics of the field, cases squarely pitching the constitutionality of a choice of law on due process, was also the author of *Erie*, yet either did not see a due process issue in *Erie* or decided not to raise it. *Erie*'s narrower reasoning might well have seemed the path of prudence to a Court taking the momentous step of delegitimizing much of its past jurisprudence, and consigning

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89. 246 U.S. 357, 377 (1918) (Brandeis, J., dissenting). ("The test of constitutionality to be applied here is that commonly applied when the validity of a statute ... is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end legitimate? Are the means appropriate to the end sought to be obtained? If so, the act must be sustained ....")

90. 281 U.S. 397 (1930).

91. See Weinberg, *Minimal Scrutiny*, *supra* note 2.

92. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). These interest-analytic due process cases can scarcely be distinguished from "dormant" Commerce Clause cases, which are equally interest-analytic. The question is substantially the same whether the extraterritorial reach of a state's laws is tested under the Due Process or Commerce Clauses. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (sustaining under the Commerce Clause a state anti-takeover law notwithstanding its effect on nonresident shareholders, based on the interests of the state with significant contacts with the target corporation). I pass over such control of extraterritorial governance as is occasionally found in the dormant Commerce Clause or in construction of the transnational reach of American law.

much of its future caseload to a position of almost abject subordination. But by now it has become much clearer to us, and the Supreme Court has held over and over again, that a choice of law must meet a due process standard.

**(2004) J. Mar. L & Com. 549** Under due process scrutiny, judicial review of choices of law is interestanalytic. That is a consequence of the fact that a “rational basis” for governance inevitably takes the form of a “legitimate governmental interest.” Thus, in 1935, in *Alaska Packers*,<sup>93</sup> the Court first stated the test now familiar to us in its modern form, that the state must have “a legitimate public interest” in the application of its law.<sup>94</sup> Justice Stone, the author of the Commerce Clause case of *Carolene Products* and its seminal description of a legitimate governmental interest as a “rational basis,” was the author of *Alaska Packers*, as well. *Alaska Packers* was also important for another crucial insight. The Court there held that no full faith and credit obligation could attach to laws, as opposed to judgments.<sup>95</sup> As Justice Stone explained, “A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever ... conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”<sup>96</sup> The Supreme Court endorsed this view again only last Term.<sup>97</sup> The net effect of *Alaska Packers* was to empower the interested state to apply its own law in its own courts. The other side of that coin, the *Dick* case, was that the state *without* the requisite interest could *not* apply its own law in its own courts.

Today the test of constitutionality of an interstate choice of law, as enunciated in *Allstate Insurance Co. v. Hague*<sup>98</sup> and *Shutts v. Phillips Petroleum Co.*,<sup>99</sup> is whether the chosen sovereign has sufficient contacts with an issue to generate legitimate governmental interests, such that application of its law will be neither unreasonable nor fundamentally unfair.<sup>100</sup> Any number of states may have this kind of contact with a given issue, and a choice of any **(2004) J. Mar. L & Com. 550** of them to govern the issue would pass constitutional muster.<sup>101</sup> But, to satisfy due process, the identified sovereign *source* of law in American courts must be a relevant source.

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93. *Alaska Packers Ass'n v. Indus. Accident Comm'n.* 294 U.S. 532 (1935).

94. *Id.* at 542.

95. See also *Milwaukee County v. White Co.*, 296 U.S. 268 (1935).

96. 294 U.S. at 543.

97. See *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (holding that Nevada had sufficient interest in applying its law to the liability of a California agency to a Nevada resident for intentional torts partly occurring in Nevada, and was not obliged to give full faith and credit to California law cloaking the agency with sovereign immunity); see also *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that California had sufficient interest in applying its law to the liability of a Nevada state university for a tort committed on California resulting in personal injuries to a California resident, and was not obliged to give full faith and credit to Nevada law, under which the sovereign immunity of the defendant University of Nevada was waived, but only for tort actions in Nevada courts and only for damages not exceeding \$25,000). Cases of this kind have established that whether argument is offered under the Full Faith and Credit Clause, Art. IV, § I, or under the Due Process Clause of the Fourteenth Amendment, the analysis is the same.

98. 449 U.S. 302, 312-13 (1981).

99. 472 U.S. 797, 818 (1985) (quoting *Hague*).

100. *Hague*, 449 U.S. at 312-13 (Brennan, J.) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State 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.”)

101. *Pac. Employers Ins. Co. v. Indus. Accident Comm'n.*, 306 U.S. 493 (1939) (holding that either the place of injury or the seat of the parties’ contractual relationship could govern the availability of workers compensation to an employee claimant, in a case in which legitimate governmental interests could be discerned in both states). See also, in admiralty, *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953) (pointing out the existence of several possibly significant contacts which might connect more than one concerned sovereign with a case).

Thus far I have been talking about the familiar jurisprudence controlling “horizontal” choices of law—choices among state laws or the laws of foreign countries, or between a state and a foreign country, and so forth. As yet there exists no jurisprudence reflecting comparable due process control over choices between federal and state law. Choices between federal and state law have not needed due process analysis because a choice of state law for primary governance, at least in federal courts, is thought to rest on *Erie*, and a choice of federal law, at least for primary governance, is thought to rest on the Supremacy Clause. When the Supremacy Clause requires federal law, but state law is approved anyway, it is done prudentially—as a kind of “benevolent gratuity,” as Holmes remarked in his *Jensen* dissent.<sup>102</sup> And yet there is nothing in the due process reasoning of the choice-of-law jurisprudence to suggest that it need be limited to its original interstate context. Generalizing that thinking could improve our theoretical understanding of the constitutionality of “vertical” as well as “horizontal” choices of law. *Carolene Products* is a help here. *Carolene Products* was a typical case testing the constitutionality of a regulatory act of Congress—albeit under the Commerce Clause, not as a matter of due process. Under *Carolene Products*, the test of constitutionality of an act of Congress is whether Congress had some rational basis for enacting the legislation.<sup>103</sup> This is essentially the same test as is applied in evaluating the constitutionality of a choice of state law in an interstate case. Indeed, in *Carolene Products*, Justice Stone proceeded to examine Congress’s “rational basis” by exploring the likely *governmental* interests reflected in the legislation. In this, Justice Stone inevitably resorted to the same kind of purposive reasoning described in early Marshall Court cases on federalism, in which the Court rightly concerned itself with the “legitimate ends” of governance.<sup>104</sup>

The limit upon governmental power found in *Erie* has relevance for state legislatures as well as Congress. Just as Congress has no power to enact general nonfederal law, a state legislature has no power to enact general law that is not the law of that state. The positivistic mandate of *Erie* seems as legitimizing (2004) **J. Mar. L & Com. 551** to federal as to state decisional law. That is, when federal law clearly applies it applies, whether it is federal case law or federal statute law, just as state law applies when it applies, whether it is case law or statute law. If we add to this the effect of the Supremacy Clause, the position becomes even clearer.

The positivistic mandate of *Erie* should be as delegitimizing to the general common law in state as in federal courts. State as well as federal courts have no power to fashion law not identifiable to a particular sovereign. The basic concern of *Erie* was that law that is applicable to an issue—because relevant and within the chosen sovereign’s legitimate sphere of governmental interest—not be displaced by law having no significant governmental connection with that issue. That is the very rule that has been held repeatedly, if without any recognition of its analog in *Erie*, to govern interstate choices of law in either set of courts, as a matter of due process. The avoidance of arbitrary governance should be of equal concern to courts whether confronted with “vertical” or “horizontal” choices of law. This suggests the propriety of a due process analysis parallel to, and supporting, the existing frameworks, whether of supremacy, conflict preemption, field preemption, *Erie*, or reverse-*Erie*.

The basic concern of due process is only that law be administered rationally. Irrelevant law cannot constitutionally displace the law of a relevant state. The Due Process Clauses of the Fifth and Fourteenth Amendments stand available to vindicate the fundamental concerns of American

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102. *Jensen*, 244 U.S. at 530.

103. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 153 (1938).

104. See *supra* notes 73-76 and accompanying text.

law with rationality in substance and relevance in administration, reminding us that those concerns are important in both sets of courts, whether they are engaged in the federal-state or the interstate or the international choice-of-law process.

The due process concern with rational choices of law ought to have had its great moment in *Erie Railroad Co. v. Tompkins*, when the Supreme Court definitively struck down the general common law as unconstitutional. Modern Supreme Court jurisprudence imposing a standard of due process on interstate choices of law provides an alternative way of thinking about *Erie*. If *Erie* had been decided this year, it might well have been decided under a due process rationale. The general common law held up to us today out of the past as a model for the future, and as a substitute for relevant federal law as well as relevant state law, remains as unconstitutional now as it was then. Unified thinking based on due process helps us to see this. The requirement of due process is a serious impediment to any quaint proposal to restore a general common law to our courts. The proponents of this retrogression need to explain how law the source of which is no particular sovereign, (2004) *J. Mar. L & Com.* 552 and how law that reflects only vague “general” policy concerns, and how law that arbitrarily displaces the relevant policy of the only interested sovereign, is the process that is due. They are going to have to convince us to jettison *Erie*’s constitutionalized legal positivism, which today means that they are going to have to surmount the requirements of due process. This hardly seems a realistic programme.

## V

### ON GOVERNMENTAL POLICIES AND INTERESTS

Due process requires that an American court, when fashioning law for a case, not only identify the sovereign in whose name it is fashioning law, but also consult the relevant policies and interests of the identified sovereign. American lawyers will argue, and American courts will try to glean, the purposes underlying law. But such analysis, however necessary, may not be sufficient. The chosen sovereign cannot rationally, and therefore cannot constitutionally, “govern” an issue, if it has no interest in applying its particular law to that particular issue on the particular facts.

We commonly speak of courts “applying” law, as if some preexisting rule will decide a litigated issue. But of course the common law emerges as an end product of adversarial processes. The settled rules upon which everyone agrees are not litigated, except perhaps to unsettle them. The law about which adversaries do litigate is law that will come into being.<sup>105</sup> Their forum will have before it at least two possible positions, which it will take as if well-argued. With at least two well-argued positions between which to decide, we cannot predict how the court will, in fact, decide. While a given issue is under decision, what “governs,” the only possible sources of governance, are the inchoate policies and interests of some sovereign fit to govern that issue. Good briefs, arguments, or judicial opinions, all find and work with these policies and interests because law applied abstractly, without relevant policy analysis, is only so much general common law. As such it will be arbitrary and irrational. It cannot be due process.

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105. For discussion of this phenomenon, and the consequent role of inchoate governmental policy, see Weinberg, *The Power of Congress*, supra note 2, at 771, 803; see also Louise Weinberg, *Mass Torts at the Neutral Forum*, in Symposium, 56 *Alb. L. Rev.* 807, 818 (1993); Weinberg, *Federal Common Law*, supra note 2, at 817 (arguing that in cases not yet decided, what is “supreme” under Article VI is more likely to be inchoate federal policy than federal law); *id.*, at 833 (finding the accurate description of the phenomenon of freestanding federal law as “cases decided exclusively under inchoate national policy”); *id.*, at 836-38 (on the role of the Supremacy Clause in the fashioning of federal common law); see also Weinberg, *The Curious Notion*, supra note 2, at 872.

Due process, in short, (2004) **J. Mar. L & Com.** 553 requires an American court to make good-faith inquiry into the relevant policies and interests of the sovereign in whose name it purports to rule.

This does not mean that judicial discretion is unguided. Indeed, American courts tend to stick closely to the arguments of counsel, and appellate courts also consult the opinions below, written, in turn, in response to arguments of counsel. Lawyers tend to find the direction of relevant governmental policy in legal materials. The concerns of a state or nation can be found in its analogous cases, judicial language, relevant analogous legislation, and so forth. If counsel, and therefore courts, draw their policy arguments from other states or nations, they need either to argue positivistically that the law of that other state or nation should govern the issue of its own force, or to argue, equally positivistically, that the forum should adopt the law of that other state or nation as its own. The requirement of due process should alert the courts, and certainly the Supreme Court, to the fact that simply identifying the source of a general common-law rule as “federal,” although seeming to satisfying *Erie*’s constitutionalized positivism, cannot, without more, satisfy the minimal due process requirement of rationality in the application.

Regrettably, important recent decisions in admiralty, while purporting to declare law that is “federal,” have nevertheless, as far as I can see, declared only general common law. I am thinking in particular of the Supreme Court’s modern jurisprudence on products liability in admiralty.<sup>106</sup> It must be acknowledged that these cases have fashioned solidly traditional law, in line with the positions of the majority of states and the Restatement (Second) of Torts. It should

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106. See, e.g., *East River S.S. Corp. v. Transamerica Deleval, Inc.*, 476 U.S. 858, 1986 AMC 2087 (1986) (in admiralty, hewing to the general rule that the purchaser of a defective product has no action in tort for harm to the product itself, even where fault can be shown); *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 1997 AMC 2212 (1997) (extending the principle of *East River* to cases in which “the product itself” is the ship). The Court traces these principles to the opinion by Justice Holmes in the case of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 1928 AMC 61 (1927), a pre-*Erie* case of general common law, recognized as such in *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 627, 1994 AMC 2705, 2712 (1st Cir. 1994) (observing that *Robins Dry Dock* was not intended as an admiralty principle at all, but was rooted in general tort principles characteristic of the time in which it was written). It is an example of the sort of work Holmes did in the Supreme Judicial Court of Massachusetts. Cf. Louise Weinberg, *Holmes’ Failure*, 96 Mich. L. Rev. 691, 700-02 (1997). Although the *East River* Court explicitly identified the law it fashioned as “federal,” *East River* and *Saratoga Fishing* join *Robins Dry Dock* as cases making no attempt to discern or address the special requirements of national maritime policy. Recent acts of Congress suggest that *Robins Dry Dock* is no longer national policy, if it ever was. Oil Pollution Act of 1990, 33 U.S.C. § § 2701-61, § 2702(B), (E); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9601-57, § 2702(b)(2)(E).

Even without these developments *Saratoga Fishing* makes scant sense as an item of national (rather than general) maritime (rather than state) tort policy. There is no conceivable national interest in encouraging the distribution of defective equipment to a ship, or protecting distributors who do it, and their insurers, from bearing the full economic course of their torts. The reasons that support admiralty jurisdiction itself, even at its furthest reaches, the concern for the safety both of navigation and of maritime commerce, support full liability in products cases proving harm to the product itself when the product is the ship itself, and liability over for harms caused by the resulting unseaworthiness of the vessel, and clearly would support recovery for economic losses associated with interference with the vessel’s ability to complete her voyage. Consider in this connection earliest analogous admiralty policy in such cases as, e.g., *The St. Iago de Cuba*, 22 U.S. (9 Wheat.) 409 (1824) (Johnson, J.) (declaring that the purpose of proceedings *in rem* with priority of payment to privileged creditors is “to furnish wings and legs to the forfeited hull, to get back [to sea] for the benefit of all concerned; that is, to complete her voyage.”). In any of the Court’s past cases, *The Apollon*, *infra* note 108; *Robins*, or in its new products cases, *East River* and *Saratoga Fishing*, had the Court given even the briefest consideration to national maritime policies and concerns, it seems inconceivable that it would not have made a sharp departure from the inappropriate general common-law rules it so hastily adopted.



also be acknowledged that it is often the wisest course for any court to follow long-established principles. To do so must be counted a virtue, especially in a field like products liability, in which the novice can quickly (2004) *J. Mar. L & Com.* 554 become entangled in interwoven interacting complexities.<sup>107</sup> But it can hardly be a virtue to decide a products case in admiralty, purporting to do so as a matter of federal common law, without analysis of the requirements of current national maritime policy. Policies desirable and coherently administrable in American admiralty may be very different from policies guiding the Reporter of the Restatement (Second) of Torts. With the advantage of modern policy analysis the Supreme Court, which has power to write on a *tabula rasa*, certainly need not perpetuate the mistakes of its own past, tainted as that past is with a body of unconstitutional general common law.<sup>108</sup> It is not (2004) *J. Mar. L & Com.* 555 news that close consideration of existing national interests and concerns can, and often should, lead the Court to abandon seemingly fixed long-established past positions. Within living memory, to take an admiralty example, the Supreme Court has fashioned a federal common-law claim for wrongful death cognizable in admiralty,<sup>109</sup> even though throughout Anglo-American history claims for wrongful death had always been statutory. To take another admiralty example, within living memory the Supreme Court has jettisoned the ancient admiralty rule of divided damages.<sup>110</sup> Attention to the national maritime interests of this country can also lead to advantageous departures from the laws of *other* maritime nations. So, for example, on policy grounds, the Supreme Court long ago rejected the English rule exonerating a ship for the torts of a compulsory pilot.<sup>111</sup> Consideration of the requirements of national maritime policy can even

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107. Products liability seems more multifaceted than might be supposed, perhaps more than any other area of tort law. It becomes impossible to understand it in one of its aspects without understanding some other, in part because the issues that arise are often alternative ways of stating the same question. The issues include whether in the particular case liability lies in tort or in contract or both; whether the harm is to the plaintiff or to her property or to a thing or place not her property, but on which her future well-being or livelihood depends, or whether the harm is to the defective product itself; whether, in this last case, the harm is to property or is merely an economic loss, thought to be unrecoverable; whether, if the harm is to the product itself, the plaintiff should be limited to her warranty claim—ordinarily only for repair or replacement of the product or the defective part; whether the “product” is the defective part or the assembled thing sold; whether a plaintiff should be held to a warranty even if not in privity of contract with the defendant; whether a limited warranty is unconscionable; whether a plaintiff not in privity of contract with the defendant is the intended third party beneficiary of the original contract; whether if not in privity a plaintiff may nevertheless sue in tort; whether, in cases of consequent economic loss, like lost profits, opportunities, or expectancies, the harm is too consequential, and the defendant’s conduct, with or without fault, too remote from the harm to be the proximate cause of it; whether, in cases alleging consequential damages, the claim is really one of tortious interference with advantageous contractual relations, and, if so, whether that tort requires a showing of intentional rather than negligent interference; whether, in cases claiming economic harms it should make a difference that there are also harms to persons or to the product itself or to other property; whether recoveries should be limited where liability is strict and fault cannot be shown; whether it should make a difference that in fact fault has been shown, even if liability is strict; or that the case is one of personal injuries, and so forth.

108. Cf. *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824) (applying a rule similar to that for which *Robins Dry Dock*, supra note 106, is cited, a rule against recovery in marine tort for economic losses). The Court in *The Apollon* simply announced the rule as a settled one, without suggesting any reasons of national maritime policy that could support importing such a rule into admiralty.

109. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 1970 AMC 967 (1970). See, recently, *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 2001 AMC 1871 (2001) (Scalia, J.) (extending the *Moragne* action for wrongful death based on unseaworthiness to actions based on negligence).

110. See *United States v. Reliable Transfer, Inc.*, 421 U.S. 397, 1975 AMC 541 (1975).

111. See *The China*, 74 U.S. (7 Wall.) 53, 2002 AMC 1504 (1868) (departing from the English view of the responsibility of a vessel for the fault of a compulsory pilot on the ground that American maritime policy requires a realistic remedy for those injured by a vessel).

lead to the judicial scrapping of written federal law, as, for example, when the Supreme Court interpreted a maritime treaty as requiring only that American admiralty case law continue to develop without regard to the treaty.<sup>112</sup> Notwithstanding the boldness of all of these cases, they have a legitimacy which far more restrained cases of general common law can never have, simply because, however daring, the former were expressions of considered national policy. They became genuine federal common law by virtue of their consideration of the requirements of sound national policy. Decisions that deal with federal questions, if reached without reference to the specific policies, interests, purposes and concerns of the nation, are only so much general common law, and cannot be due process. It is one thing for a court to say it is applying federal law; it is quite another for a court actually to apply it.

Analysis of national maritime policy will, in any event, naturally tend to yield more traditional than revolutionary answers. Earlier admiralty cases can provide invaluable insights into the nature of traditional admiralty policy. In an excellent article on the nature of admiralty litigation in the colonial and founding periods, Professor Casto argues that the traditional “humane and liberal”<sup>113</sup> maritime policies of remediation and safety may not be as traditional **(2004) J. Mar. L. & Com. 556** as we have imagined.<sup>114</sup> He points out that a large part of early litigation in admiralty was public law litigation, involving disputes over capture and prize. But I believe he would not deny that there was considerable private litigation as well.<sup>115</sup> In *Miles v. Apex Marine Corp.*,<sup>116</sup> Justice O’Connor rightly pointed out that ours is an age of statutes, and it is Congress that sets national maritime policy: “We no longer live in an era,” she wrote, “when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.”<sup>117</sup> Professor Allen has described the proliferation of maritime statutes in useful detail.<sup>118</sup> But legislation generally does not obliterate underlying traditional policies. Legislation is interstitial, and must be read against the broad background of the common law. To ignore traditional policy, such as the “humane and liberal” policies of American admiralty law, might be to risk chronic mistakes of statutory interpretation. In admiralty something of the sort seems to have occurred, for example, in *Mobil Oil Corp. v. Higginbotham*, a 1978 case authored by Justice Stevens.<sup>119</sup> There, legislation—the Death on the High Seas Act<sup>120</sup>—had been enacted to fill a remedial gap, and therefore was narrowly tailored for that special purpose. Yet Justice Stevens read the fact of the statute’s narrow coverage woodenly, as if its purpose were to *limit*

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112. See *Warren v. United States*, 340 U.S. 523, 527, 1951 AMC 416, 419 (1951) (holding that the aim of the Shipowners’ Liability Convention of 1939 “was not to change materially American standards but to equalize operating costs by raising the standards of member nations to the American level.”)

113. See *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578) (Chase, C.J., sitting on circuit).

114. See Casto, *Age of Privateers*, supra note 14; but see Gutoff, *Original Understandings*, supra note 14.

115. Defining “private” as not involving prize, wreck, or salvage, I queried Westlaw for the year 1792. Westlaw is showing approximately 20% of federal admiralty litigation as wholly private litigation in 1792. But for the year 1802, Westlaw is showing federal admiralty litigation as almost entirely private.

116. 498 U.S. 19, 1991 AMC 1 (1990).

117. *Id.* at 27, 1991 AMC at 6.

118. For Professor Allen’s recent work on this extensive project, see Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (Part IV), 31 *J. Mar. L. & Com.* 15 (2000).

119. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 884, 1978 AMC 1059 (1978).

120. 46 U.S.C.A. § § 761-767.

maritime remedies for wrongful death, rather than to supplement them.<sup>121</sup>

Legislation is particularly important in helping courts abandon venerable but bad rules—rules not consonant with the traditional “humane and liberal” purposes of American admiralty, yet previously believed to be fixed and inflexible. Admiralty lawyers are understandably averse to tampering with **(2004) J. Mar. L & Com. 557** age-old principles, however seemingly unjust. They are custodians of a complex heritage, and they know from experience that even the smallest alteration can disturb innumerable understandings. But even so it would be well for them to recall Holmes’s aphorism: “[It] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>122</sup> Few legal resources can furnish more persuasive analogous indications of what is current national policy than legislation, especially recent legislation. For example, Congress has spoken recently and clearly, in the special context of pollution claims against ships, jettisoning two related rules of the greatest antiquity in our admiralty courts. However admirable a feature of state tort law, and however seemingly integral to its innumerable interworkings, these venerable principles can seem patently unjust to those not accustomed to thinking of them as settled. Congress in this special context of pollution by a ship tossed overboard the ancient admiralty rule against recovery for economic losses.<sup>123</sup> That rule seems unjust when a livelihood is destroyed because of negligent damage to the environment. In this same special context, Congress also jettisoned the related rule requiring a proprietary interest in the thing physically impacted by the defendant’s negligence as a precondition to recovery for economic harms.<sup>124</sup> Congress rightly saw it as unjust that the livelihood of shellfish harvesters should be wiped out on account of damage to the environment, without a remedy against the ship at fault. Without this legislation such a loss could fall on the innocent harvesters, for the irrelevant reason that they often do not own the maritime environment in which they make their living.

In interstate choice-of-law cases, already under due process control, it has been clear for some seventy years that due process requires close examination of the policies and interests of the particular state, as reflected in its laws, as applied in the particular circumstances of the case, on the particular issue. That familiar exploration of the policy concerns of government is becoming an increasingly familiar feature of preemption cases as well.<sup>125</sup> **(2004) J. Mar. L &**

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121. With this compare, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (creating a federal common-law survival action against a federal penitentiary official for a violation of the Eighth Amendment proscription of cruel and unusual punishment, resulting in the death of a prisoner; holding this action supplementary to, rather than foreclosed by a recent amendment to the Federal Tort Claims Act providing a remedy against the United States for intentional constitutional violations).

122. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

123. See *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824); but see Oil Pollution Act of 1990, 33 U.S.C. § § 2701-61, § § 2702(B), (E) (providing damages for economic losses occasioned by negligently caused oil pollution). See Cameron H. Totten, Note, *Recovery for Economic Loss Under Robins Dry Dock and the Oil Act of 1990: Sekco Energy, Inc. v. M/V Margaret Chouest*, 18 Tul. Mar. L. J. 167, 174-75 (1993).

124. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9601-57, § 9607(h) (providing that a shipowner shall be liable “in accordance with this section, under maritime tort law ... notwithstanding ... the absence of any physical damage to the proprietary interest of the claimant”) [as amended 1986].

125. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (considering the extent to which Massachusetts’ sanctions against Myanmar were in conflict with Congress’s sanctions against Myanmar, and preempting the Massachusetts law). The purposive functional reasoning characteristic of cases of implied conflict preemption like *Crosby* can be found as far back at least as Chief Justice Marshall’s great opinions explaining the nature of national power and its relation to state power. See *supra* notes 73-76 and accompanying text. See generally Weinberg, *Actual Conflicts*, *supra* note 2.

## VI CONCLUSION

It is often assumed, or at least said,<sup>126</sup> that some vague principle of federalism emanating from *Erie* inhibits the displacement of state law with federal. But the general common law is unconstitutional not only because it can be disregardful of the policies of the state, but also because it can be disregardful of the policies of the *nation*.

Under the unified theoretical understandings proposed here, the general common law cannot constitutionally displace federal law any more than it can displace state law. Moreover, the general common law is unconstitutional not only in federal but also in state courts. In addition, the positivist obligation to apply the law of some identified sovereign imports a further obligation to fashion law in the light of that sovereign's governmental interests. This is as true of statute law as of case law, and as true for courts engaging in statutory interpretation as for courts confronted by a question calling for a judicially-fashioned rule of decision. Governance by the law of a sovereign that has been identified, but one that has no legitimate governmental interest in the circumstances, whether that sovereign is the nation, a state, or a foreign country, will be arbitrary and irrational, a violation of due process.

These unified understandings are reflected in the theory underlying Supreme Court cases on constitutional control of interstate choices of law. Due process controls "horizontal" interstate choices of law, and should also be understood as controlling similarly "horizontal" transnational choices of law. Although "vertical" federal/state choices of law resulting in the application of federal law do so under the Supremacy Clause, and those resulting in the application of state law do so under *Erie*, a clarified and unified general theory further reveals that, in the limiting case in which an allegedly concerned sovereign has no legitimate governmental interest in the application of its law to the facts, that sovereign's law may not govern; and, further, that the more fundamental basis of the lawmaking power of courts, as of legislatures, **(2004) J. Mar. L & Com. 559** is the identified sovereign's legitimate governmental interest. Without this rational basis law is not law. Without this rational basis law is not the process that is due. When courts apply law without reference to the policies and interests of the governing sovereign, there is offense to this fundamental requirement of due process. The Fourteenth Amendment provides due process control over such unconstitutional choices of law in state courts, as the Fifth Amendment does in federal courts, regardless of the law chosen.

The practical effects of these unified understandings are, first, to clarify that both *Erie* and

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126. See, e.g., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004) (Souter, J.). But see *id.* at 2773-74 (Scalia, J., concurring in part):

Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law. The Court masks the novelty of its approach when it suggests that the difference between us is that we would "close the door to further independent judicial recognition of actionable international norms," whereas the Court would permit the exercise of judicial power "on the understanding that the door is still ajar subject to vigilant doorkeeping." The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. Federal common law is a new door. The question is not whether that door will be left ajar, but whether this Court will open it.

due process require American legal positivism. That is, courts must *choose* law, the law of some identifiable, governing authority. Second, due process requires that whether a court chooses a particular state's governance using prevailing due process analysis, or chooses federal governance, using one of the prevailing analyses of supremacy or preemption, the court must have a rational basis for the choice. Third, in fashioning a rule of decision a court must take into account the policies and interests of the identified concerned sovereign, with respect to the particular issue in the particular circumstances. It will not be sufficient for a court to make a positivistic choice of governance. The content of the chosen law itself must be rationally applicable to the issue at bar. Decisional law is only so much general common law if it is not fashioned to vindicate the chosen sovereign's own policy concerns. These inchoate policies are what "govern" before law can be fashioned in light of them.

The general common law—law that displaces the law of a relevant identifiable sovereign, or law that is identified to a relevant sovereign but fashioned without reference to the policies and interests of that sovereign—is unconstitutional within *Erie's* mandate of positivistically identifiable and relevant law. It is also unconstitutional in any court because it is not the process that is due.

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