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**\*805 FEDERAL COMMON LAW\***

83 Nw. U. L. Rev. 805 (1989)

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**INTRODUCTION: A PARADOX**

In this fifty-first year of *Erie Railroad Co. v. Tompkins*,<sup>1</sup> the legitimacy and the propriety of federal common law remain uncertain. The current debate is a vigorous—and inconclusive—as it has ever been.<sup>2</sup>

I take it that there are no fundamental constraints on the fashioning of federal rules of decision. I will call this “the true posi- \*806 tion.” I hasten to acknowledge that national policies of comity, federalism, and deference to the legislature are rightly (and as a matter of course) taken into account when federal questions are decided.<sup>3</sup> But these burdens

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

2. Interesting recent writings include Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Gibbons, *Federal Law and the State Courts 1790-1860*, 36 RUTGERS L. REV. 399 (1984); Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985) [hereinafter Jay I]; Jay, *Federal Common Law: Part II*, 133 U. PA. L. REV. 1231 (1985) [hereinafter Jay II]; Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573 (1985); Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980); see also Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 912-30 (1988). The important earlier work is well cited by these writers.

3. These issues are concerns of national policy, whether they counsel deference to Congress or to governance by the state. They inform the choice-of-law process at a second stage of decisionmaking, a stage reached only after the question for decision has been identified as a federal one. Thus, in cases in which these concerns predominate, and state law is chosen, state law does not operate of its own force under the mandate of the Constitution, but operates as incorporated law, furnishing the content, for the time being, of a federal rule of decision. See *infra* Part 8, “Supremacy, Inchoate Policy, and choice of Law,” notes 177-90 and accompanying text.

upon the decision of federal questions, however distinct from analogous burdens upon the decision of state questions,<sup>4</sup> seem to me not disqualifyingly heavier ones.

My difficulty lies elsewhere. What I have just called “the true position is indeed the clarified modern position,<sup>5</sup> “so beautifully simple, and so simply beautiful.”<sup>6</sup> But it is not the actual position. Almost, but not quite. The problem is that “the true position” is not the *official* position of the Supreme Court. Like that favorite of logicians, the liar who insists he cannot speak truth, judge-made federal law tells us that judges cannot make federal law.

There may be some comfort in this paradox. It should mean that there is agreement, at least, that the body of judge-made federal law delegitimizing the federal common law is itself illegitimate. Some should think it illegitimate because it is judge made, and others, like myself, because it is wrong.

Nevertheless, many readers will think it is right. Even those who might concede much of what I am about to say might worry about courts making law not incrementally, but by big jumps—or, as Justice Holmes put it, by “molar,” instead of “molecular,” motion.<sup>7</sup> For them, the judicial fashioning of wholly new federal causes of action is especially suspect, although the link between these and Holmes’ “molar” motions may not be as strong as they imagine.<sup>8</sup> But, especially as to these big jumps, they would argue that the jurisprudence of the illegitimacy of federal common law has stronger roots in American political theory<sup>9</sup> than any analogous concerns about state common law. They

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4. State courts administering state law must choose which state’s law to apply. A state court will generally defer in the interest of comity to the law of a state with more significant contact with the parties or the occurrence. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Moreover, a court administering state law will generally defer to legislation.

5. The original position is of historical interest only. Because the original position was prepositivist and prerealist, the modern position cannot be derived from it. *See infra* Part 4 on “The History,” notes 89-128 and accompanying text.

6. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964).

7. *Southern Pac. R.R. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

8. *See infra* Part 12, “The New Politics,” notes 240-52 and accompanying text, and “Conclusion: Two Cheers for the Federal Common Law” (new federal defenses may be more intrusive than new federal claims).

9. *E.g.* M. REDISH, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 553-555 (2d ed. 1989) [hereinafter M. REDISH, FEDERAL COURTS]; M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980) [hereinafter M. REDISH, TENSIONS]; Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

believe that state common law has a legitimacy in cases like *MacPherson v. Buick Motor Co.*<sup>10</sup> that federal common law lacks in cases like *Illinois v. Milwaukee*.<sup>11</sup>

So I intended at first to focus on the problem of “implied” federal rights of action. But it was harder than I thought to disentangle this inquiry from the general problem of federal common law. Because the Supreme Court has said so much about federal common law that seems unsound to me, and because so much has been written by others that \*807 seems simply muddled, I try here to rederive what I began by calling “the true position.” This discussion has relevance, of course, for judicially-fashioned federal causes of action.

Before beginning, let me clarify what I mean by common law. To my mind there is no useful theoretical dividing line that would let us say with confidence, “On this side we have the common law, and on that we have statutory interpretation.” In all cases along the continuum, courts obviously glean what they can from legislative action or inaction.<sup>12</sup> It is a waste of time to try to isolate the former as somehow “legitimate” in a way that the latter is not.

Similarly, I do not find it useful to distinguish the “constitutional” common law, identified by Professor Monaghan,<sup>13</sup> from the rest of federal case law. I go beyond his suggestion and take all federal case as my subject, whether or not Congress theoretically can or cannot override a decision. For my purposes, little turns on whether Congress can override. Judicial lawmaking theoretically free from legislative revision no doubt presents a special case. But as a practical matter, the theoretical lack of legislative override of constitutional decisions only marginally affects the powers of Congress to furnish legislative guidance. For this and other reasons, judicial process is sufficiently similar in all cases to make unnecessary, for present purposes, a separate category for “constitutional interpretation.”<sup>14</sup>

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10. 217 N.Y. 382, 111 N.E. 1050 (1916) (action for negligence will lie at state common law against manufacturer of dangerously defective product, although the plaintiff is not in privity of contract with the manufacturer).

11. 406 U.S. 91 (1972) (action for interstate water pollution will lie at federal common law when a state is a party), *overruled on other grounds*, 451 U.S. 304 (1981).

12. *Accord*, Field, *supra* note 2, at 890; Westen & Lehman, *supra* note 2, at 332 (“The difference between ‘common law’ and ‘statutory interpretation’ is a difference in emphasis...”). For discussion of this point as “both true and misleading,” see *infra* note 176 and accompanying text.

13. Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

14. See *infra* note 217 and accompanying text. For a critique of even Monaghan’s view as insufficiently scrupulous about the differences between constitutional

I should also remind the reader of what I have called “the official position.” It would be sufficient to paraphrase, rather than review, the Supreme Court’s paradoxical jurisprudence. Its very familiarity is what makes it appear so (deceptively) sound. It is always a pleasure to hear an old refrain; the reader may want to hum along:

“Ours is a nation of limited delegated powers. Federal courts are courts of strictly limited jurisdiction<sup>15</sup> and lawmaking powers.<sup>16</sup> Unlike \*808 state courts,

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interpretation and common-law adjudication, see Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978).

15. See *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting) (“When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.”). Justice Powell’s argument that new causes of action expand jurisdiction, though specious, has often been perceived as a serious issue. It was dealt with repeatedly and somewhat disingenuously in admiralty cases, under the special stress of both constitutional and statutory grants of jurisdiction over “all” maritime cases. U.S. CONST. art. III, § 2; 28 U.S.C. § 1333 (1982); see, e.g., *The Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1951). In *The Genesee Chief*, the Court sustained the constitutionality in admiralty of cases arising on internal navigable waters in addition to cases arising on the high seas and within the coastal tidewaters. The Court had previously construed the jurisdiction as limited to tidewater. *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). But the Court reasoned that *The Thomas Jefferson* had read too narrowly article III’s grant of jurisdiction over “all” cases of admiralty and maritime jurisdiction.

By 1981, when Chief Justice Burger raised a similar issue in *Texas Industries*, it should have been quite clear that subject-matter jurisdiction is not impermissibly expanded when newly cognizable claims fall within the subject matter. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

16. In *Bush v. Lucas*, 462 U.S. 367 (1983), Justice Stevens, for the court, minimized this position with his characteristic way of framing an issue as a search for *via media*:

We might adopt the common-law approach to the judicial recognition of new causes of action and hold that it is the province of the judiciary to fashion an adequate remedy for every wrong that can be proved in a case over which a court has jurisdiction [citing Marshall’s reference to Blackstone in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)]. Or we might start from the premise that federal courts are courts of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress [citing Justice Black’s dissent in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 428 (1971) (Black, J., dissenting)]....

Our prior cases, although sometimes emphasizing one approach and sometimes the other, have unequivocally rejected both extremes.

*Id.* at 373.

which have plenary “general” common-law power,<sup>17</sup> federal courts have only “special” common-law powers. That is, they can fashion federal common law only in a few discrete, narrow areas,<sup>18</sup> where uniquely federal interests are at stake.

“To overstep these bounds would be to interfere with governance by the states, and thus with principles of federalism. Congress, acting within its delegated powers, can supersede state governance by federalizing an area of law, but courts cannot do so without also breaching the separation of powers which ensures representative rule in a democracy.<sup>19</sup>

“In particular, judges should not lightly fashion new federal causes of action. These raise the most acute challenges both to principles of federalism and to the separation of powers. When Congress has enacted a law, federal courts may not imply rights to sue under the act unless that is the clear intention of Congress.<sup>20</sup> When Congress has created a comprehensive scheme for enforcement of either statutory or constitutional rights, Congress cannot have intended a supplementary judicial remedy.<sup>21</sup> When an act of Congress expressly saves rights at common law, under proper construction the rights saved are state-law rights; federal common-law rights, \*809 on the other hand, are pre-empted.<sup>22</sup> When Congress has not acted at all, it is not for courts to legislate rights to sue, except perhaps

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

18. *See, e.g., id.*; *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 640 (“the Court has recognized the need...in some limited areas to formulate...’federal common law.’ These instances are ‘few and restricted’....” (citations omitted)); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966).

19. *But see, e.g., Boyle v. United Technologies Corp.*, 108 S.Ct. 2510 (1988). *See infra* notes 241-45 and accompanying text.

20. *Touche Ross & co. v. Redington*, 442 U.S. 560 (1979).

21. *Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981).

22. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

directly under the Constitution.<sup>23</sup> Courts cannot create federal rights without determining national policy, a task for the legislature.<sup>24</sup>

Some of this is not a venerable as the rest of the refrain. The latter verses are fairly recent accretions. But the whole continues to sound sufficiently off-key to keep alive the scholarly debate. Curiously, the terms of the debate have scarcely shifted in the half-century since Erie. Perhaps, with some refreshed perspectives, we can gain a clearer view.

In this essay I touch upon twelve frequently underemphasized or misunderstood clusters of ideas that are important to a clarified modern understanding of federal common law: (1) empowerment and interest; (2) federalism; (3) positivism; (4) the history; (5) the history, continued: what went wrong; (6) the “pure” federal common-law action and jurisdictional grants; (7) legal realism; (8) supremacy, inchoate policy, and choice of law; (9) judicial process and the refusal to make law; (10) separation of powers; (11) legislative intent; and (12) the new politics.

In a final section, entitled “Two Cheers for the Federal Common Law,” I conclude that issues of substantive national policy should be decided overtly, rather than through gratuitous rulings on the supposed infirmities of judicial federal lawmaking power.

## **(1) EMPOWERMENT AND INTEREST**

What empowers a sovereign to make and apply laws on a particular subject matter? Set to one side, for the moment, the question of legislation versus case law.<sup>25</sup> Let us focus on the nature of lawmaking power itself. We can then begin to think about the lawmaking power of the nation on the one hand and of a state on the other.<sup>26</sup>

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23. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); see also *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

24. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). (Existing test for new causes of action under federal statutes “allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch.”).

25. On the respective lawmaking roles of courts and legislatures, see *infra* part 10, “Separation of Powers,” notes 206-30 and accompanying text.

26. On the respective lawmaking roles of courts and legislatures, see *infra* Part 10, “Separation of Powers,” notes 206-30 and accompanying text.

The Supreme Court has recognized for at least half a century that the raw lawmaking power of a sovereign is co-extensive with the sovereign's sphere of interest.<sup>27</sup> In this sense, the *source* of sovereign lawmaking power—not the limits on that power—is the sovereign's sphere of legitimate governmental interest. Whether the Court reasons under the commerce clause,<sup>28</sup> the due process clause,<sup>29</sup> the equal protection clause,<sup>30</sup> the contract clause,<sup>31</sup> or the full faith and credit clause,<sup>32</sup> the requirement remains constant. A state has presumptive power to govern a matter by its laws if it has an interest in doing so. It is the state's governmental interest that the Court refers to when it finds the "rational basis" that enables a law to survive minimal constitutional scrutiny.<sup>33</sup>

A state lacking the requisite governmental interest in an issue has no power to govern it. Justice Brandeis, the author of *Erie*, was among those clarifying this modern position.<sup>34</sup> A state attempting to govern a matter in which it has no legitimate governmental interest acts arbitrarily, irrationally, and without due process. Thus, those who insist that federal lawmaking requires special justification<sup>35</sup> in the clear requirements

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27. *E.g.*, *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (rejecting challenge, under full faith and credit clause, to remedial power of place of worker's injury, notwithstanding exclusive jurisdiction in the workers' compensation board of the state of the employment contract, under its own law).

28. *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (state has police power over matters of local policy concern).

29. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

30. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

31. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

32. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939).

33. Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982) (identifying constitutional review of choices of law as minimal scrutiny for rational basis—that is, for legitimate governmental interest—and arguing for theoretical unification of constitutional conflicts cases with other minimal scrutiny cases).

34. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (Brandeis, J.); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 382-83 (1918) (Brandeis, J., dissenting) ("The test of constitutionality to be applied here is that commonly applied when the validity of a statute limiting the right of contract is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end legitimate?... If so, the law must be sustained...").

35. *See, e.g.*, Field, *supra* note 2, at 899 ("Federal judges...can fill in a gap only if some enactment permits them to do so; otherwise the area is not one for federal rule at all, but is left to the states. ...[T]here must be a source of authority for any given exercise of federal common law power."). Ultimately, Field finds the authorizing enactments in various sources, including federal jurisdictional grants, apart from the grant of diversity

of national policy are, of course, correct. But they should understand that state lawmaking also requires special justification in the clear requirements of state policy.

We can take other insights gleaned from our consideration of state power and apply them to the problem of national power. What is within the sphere of legitimate national governmental interest? The preamble to the Constitution of the United States, as it happens, makes that plain. \*811 The nation is empowered<sup>36</sup> to provide for the general welfare (which seems logically to include, as well as be given direction by, the other concerns of the preamble—the goals of a more perfect union, and the securing of the blessings of liberty). The reference, importantly, is to *our* general welfare, “We the People of the United States.” Thus, Congress is not authorized to make a law that does not provide for our general welfare.

Suppose, to take a too-well-known example, that to provide for the welfare of potential tort victims in Pennsylvania, Congress enacted a statute purporting to regulate the Pennsylvania tort duties of railways operating in Pennsylvania. Unless the statute were grounded on some national policy, the law would be unconstitutional. Congress lacks power to create rules of decision applicable in a state.<sup>37</sup> Congress can provide only for the general welfare of the people of the United States.

Or, to take another example, suppose Congress enacted a law purporting to regulate the landscaping by English companies of English government buildings in England. That law, too, would be *prima facie* beyond the power of Congress. Congress is given power to provide for the general welfare of “the People of the United States.” Just as in the example of a Congressional statute governing torts in Pennsylvania, it is hard to see how the English landscaping law comes within the terms of national empowerment.

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jurisdiction. *Id.* at 982-83. But this does not seem enough to explain the power of *state* courts to fashion federal rules of decision in the first instance; the argument would probably have to rely for any general force on the theoretical link to supreme Court review. That link seems to lack the explanatory power of identified national interest, against the background of the supremacy clause. The state courts have the power because they have the duty under article VI to conform themselves to the national interest; the duty of federal courts is the same, as is the power. *See infra* Part 6, “The ‘Pure’ Federal Common-law Action and Jurisdictional Grants,” notes 155-63 and accompanying text.

36. Jay II, *supra* note 2 at 1271-90, makes plain how different what I call the “clarified modern position” or “true position” is from the original position. Among other difficulties, there would be a reluctance to reason from the preamble rather than from text within the four corners of the Constitution, and there would be no notion that governmental interest is the source of lawmaking power. Thus, even had the prevailing outlook been positivistic and legal-realistic, the modern position would still have been unavailable in the late 18th and early 19th centuries.

37. *Erie*, 304 U.S. at 78 (Brandeis, J.) (“Congress has no power to declare substantive rules of common law applicable in a State....”).



But it must be equally evident that the legislature of Pennsylvania can no more sit as a little Congress, enacting laws purporting to govern the nation or any other country or state,<sup>38</sup> than Congress can sit as a legislature of Pennsylvania or England. In the nature of things, Pennsylvania has no power to provide for the general welfare of non-Pennsylvanians.<sup>39</sup>

What has been said thus far is sufficient to answer one of the oddly persistent questions in the ongoing debate. No one with a basic grasp of the essentials of empowerment would question that *Erie* was constitutionally required. *Erie*'s holding in chief was about the fundamental empowerment of the nation, not of its courts. *Erie* held, precisely, that the nation lacks power to make state law. State law is reserved to the states. The power of the nation is to make federal law only.

There was, of course, no conflict between federal and state law in *Erie*. The Court struck down no federal law or rule. It struck down only an independent view of what *state* law ought to be.<sup>40</sup> Nothing in that holding qualifies national power to make federal law. For example, once Congress federalizes the tort duties of railroads, Congress has every relevant power. Congress has used part of that power to address the tort duties of railroads, as employers, in interstate commerce.<sup>41</sup> We now understand, after *The Wheat Case*<sup>42</sup> and *Heart of Atlanta Motel*,<sup>43</sup> that Congress has extensive power even over

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38. Cf. *United States v. Standard Oil Co. of California*, 332 U.S. 301, 307 (1947) (Rutledge, J.) (“[T]here was no purpose...[in *Erie*] for broadening state power over matters essentially of federal character....”).

39. Cf. *Edgar v. Mite Corp.*, 457 U.S. 624, 645-46 (1983) (“Illinois has no interest in regulating the internal affairs of foreign corporations.”). Pennsylvania must, of course, provide for the welfare of visitors to Pennsylvania; it is not possible to provide for the general welfare of Pennsylvanians by creating potholes of danger in Pennsylvania for others. To do so would be irrational and discriminatory. But Pennsylvania cannot provide directly for the *general* welfare of these others.

40. It is often forgotten that the “general federal common law” struck down in *Erie* was not federal law, but was like state law, or simply “general common law.” For this mistake, see, e.g., Field, *supra* note 2, at 924-25 and throughout. For an excruciating late example of this sort of thinking in the Supreme Court, see *Allen v. McCurry*, 449 U.S. 90, 98 n.11 (1980) (Stewart, J.) (“[T]here remains little federal common law after *Erie*....”).

Brandeis and others inserted the word “federal” in the phrase only to convey that the “general common law” authorized by *Swift* was to be available in federal courts, even when the state identified a contrary decisional rule as its own. Under *Swift*, in effect, the federal courts were sitting as superlegislatures of the state.

41. See Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1982).

42. *Wickard v. Filburn*, 317 U.S. 111 (1942).

43. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

intrastate commerce, power it exercises in a variety of other contexts. This power is evident in laws forbidding discrimination in employment, or regulating labor.

If there is a national interest in the regulation of English landscaping of English governmental building in England, Congress could act in that interest as well. Consider this: “If a foreign government denies landscaping contracts to lowest-bidding landscaping contractors who are United States nationals, landscaping contractors who are nationals of that government shall not be eligible to bid on public landscaping contracts offered by the United States.”

So, deferring the questions of courts versus legislatures and of the nation versus the states, we can at least be somewhat clearer about national lawmaking power. We will not be misled by lists of “federal enclaves” chronically offered by courts<sup>44</sup> and writers,<sup>45</sup> lists of discrete topics upon which the nation’s lawmaking power is supposedly confined in its courts. We are told that federal common law may legitimately arise \*813 when the government is a party; in cases involving the foreign relations of the nation; in admiralty; and in a few other areas of uniquely federal concern. Yet, as we have seen, the lawmaking power of a sovereign is coextensive with its sphere of governmental interest. Where a sovereign’s interest ends its power ends, but obviously that will not hamper it in any area of concern to itself.

These truisms leave open, then, for the credulous, only the familiar but bizarre question whether there is any peculiar infirmity that disables *courts* from ruling in the national interest—and then, only from ruling on un-”listed” topics. The rest of us have always understood that our courts are, and must be, courts of coordinate powers. The judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon. Without this principle we cease to be a nation of laws.

Despite these broad understandings of the lineaments of empowerment, occasionally one finds reference in the literature to discredited older doctrines. One hopes that few today think that since the nation is one of expressly delegated powers it can act only within the confines of an express Constitutional grant of power and not upon its

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44. See *supra* note 18.

45. E.g., M. REDISH, TENSIONS, *supra* note 9, at 85-108. Professor Redish’s casebook is also organized in this fashion. See M. REDISH, FEDERAL COURTS 362-423 (1983); *id.*, 484-564 (2d ed. 1989). Professor Field, *supra* note 2 at 887, sees that “enclaves” of power will not describe the scope of judicial federal lawmaking power, but nevertheless repeatedly falls into the trap of fancying state courts to be court of general common-law powers in a way that federal courts are not. See *id.* at 906-82. For my view, see *infra* Part 2, “Federalism,” notes 55-75 and accompanying text.

perceived needs. It is too well understood by now that when the national interest so requires, national lawmaking power will be implied.<sup>46</sup>

Recently, a new confidence seems to inform the literature that there is a need for some sort of authorization before federal common law can be fashioned.<sup>47</sup> Some find this requirement in the structure of a government of separated powers;<sup>48</sup> others find it in the structure of our federalism, in which residual governance is left to the states, and national powers are enumerated.<sup>49</sup>

In every case, however, given the fundamental of empowerment, what justifies an exercise of national lawmaking power is the existence of a legitimate national governmental interest.<sup>50</sup> Courts must act, of course, within their constitutional and statutory jurisdiction. But no other “authorization” is required.

Whenever the Supreme Court tells us that state law must govern a federal question not because the issue is one of state law, but, rather, \***814** because federal common law is not available, the lines of empowerment we have been tracing will become crossed. The Court will be in the dysfunctional position of recognizing the question to be a federal one while simultaneously refusing to give it federal governance. Where pre-emption does not occur, the Court will be in the equally awkward position of referring the national issue to a sovereign that cannot provide national governance.<sup>51</sup> When the issue is whether the judiciary should recognize a right of action for violating an act of Congress, the embarrassment will become acute. In such cases, Congress has declared the subject of the legislation to be a matter of national policy concern. If the Court refuses to make the violation actionable under federal law, it puts itself in the doubly embarrassing position

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46. For example, in *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 214-15 (1917), the Supreme Court held that Congress’ power to legislate in admiralty matters, not found in article I, existed by implication from the article III grant to federal courts of adjudicatory power over all, even intrastate, maritime cases.

47. *E.g.*, Field, *supra* note 2, at 928 (“This Article takes the position that the primary limit on power to make Federal common law is that there must be a source of authority for any given Federal common law rule.”) *But see infra* Part 6, “The ‘Pure’ Federal Common-law Action and Jurisdictional Grants,” notes 155-63 and accompanying text (power flows from national interest; duty flows from supremacy clause).

48. *See, e.g.*, Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 78 NW. U. L. REV. 761 (1989).

49. *See infra* Part 2, “Federalism,” notes 55-75 and accompanying text.

50. *See supra* notes 27-54 and accompanying text.

51. In both *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and *Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Court thought that if common-law rights were saved they must be rights under state, not federal, common law. Yet, in both cases Congress had addressed the subject matter.

of shifting from the nation the task of vindicating legislatively declared national policy and of failing to enforce an act of Congress.

The impropriety of such results will vary, depending on the requirements of the situation for uniformity, administrability under unitary law,<sup>52</sup> or effectuation of national substantive policy.<sup>53</sup> Even in those cases in which the Court quite justifiably adopts state law to furnish an identifiably federal rule of decision, its ruling can only be suspended along a continuum of tentativenesses. At some point along the spectrum of future cases, state policy will so undercut national substantive policy (or the requirements of uniformity) that supreme federal law must intervene.<sup>54</sup>

It is a mistake, in short, to try to reason in the abstract about the availability of national law without an understanding of the power that flows from an identified national interest.

## (2) FEDERALISM

I have said that *Erie* was not a limit on national lawmaking power. No national rule was in conflict with state law there. Congress was said to lack power to make rules of decision applicable in a state, rather than \*815 in the nation. We can also see that the power of the states does not significantly limit the lawmaking power of the nation—certainly not under *Erie*. Justice Brandeis' holding in *Erie* was premised on the lack of power in Congress to make state law, not on the tenth amendment. The problem was Congress' sheer lack of power to act in the interest of some state rather than of the nation.

Nor is the tenth amendment itself necessarily a limit on national power. Obviously, the Supreme Court could make it one again, despite the decision in the *Garcia* case.<sup>55</sup>

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52. Aviation disaster litigation and such cases as *Agent Orange* powerfully evoke these concerns. See *infra* note 224.

53. In *Miree v. DeKalb County*, 433 U.S. 25 (1977), the issue was whether the plaintiffs could sue as third party beneficiaries of a contract between local authorities and the Federal Aviation Agency containing a clause warranting safe operation of an airport. The Court held for the plaintiffs under state law on the theory that although there was a national interest in airport safety, that interest was better vindicated, in this instance, under state law. But what would become of the national interest in another state with law to the contrary?

54. For example, in *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court held that state law would determine whether a federal civil rights suit abates when the plaintiff dies. But Justice Marshall, writing for the Court, acknowledged that state governance might have to give way in a case in which the alleged violation caused the death. *Id.* at 594.

55. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usury*, 426 U.S. 833 (1976)). The net effect is to reduce the tenth amendment, once again, to the "truism" Justice Stone deemed it in *United States v. Darby*, 312 U.S. 100, 124 (1941).

But nothing in the amendment, with its grand tautology,<sup>56</sup> will give the Court any guidance. The problem is that nothing can actually be “reserved” to exclusive state governance that lies inside the sphere of national policy concern and outside any governmental interest of some state.

Yet rather than reasoning from the actual desiderata of governmental power, courts and writers will rely on all sorts of irrelevancies. It will be said that federal courts, unlike state courts, are courts of limited jurisdiction and therefore of limited lawmaking power.<sup>57</sup> This is a *non sequitur*; but even if it were not, it should be obvious that there is no jurisdictional defect unique to the power of the *federal* sovereign. State courts, like federal courts, are limited in their jurisdictions—sometimes even by Congress.<sup>58</sup> A state court, like a federal court, will feel a general obligation of deference to its legislature and indeed to Congress. State judges also can, do, and must fashion federal answers to federal questions and state answers to state questions.

Commentators continue to say (although the debate on this is so stale that sheer boredom ought to have put a stop to it) that there remain constitutional and statutory problems. The argument is that constitutional or statutory constraints, grounded in concerns of federalism, inhibit courts confronted with federal questions from fashioning federal answers. The trouble with this view has always been that none of the legal materials so relentlessly adverted to seem to matter. Perhaps for \*816 this reason, the modern debate is more likely to emphasize separation-of-powers concerns than concerns of federalism.

All the relevant materials are, for starters, tautological. The tenth amendment says that powers not granted to the nation are reserved to the states.<sup>59</sup> But what about powers granted to the nation? *Erie* says that except in matters governed by federal law, state law

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56. See *infra* notes 59-61 and accompanying text.

57. Professor Field, for example, writes, “[S]tate judges we associate with the unimpeded ability to make common law generally sit in courts with general jurisdiction; federal judges’ jurisdiction is limited to what Congress has granted....” Field, *supra* note 2, at 899. The notion that jurisdictional limits would impede a court’s power to decide federal issues in cases properly within its jurisdiction is a primitive fallacy which nevertheless enjoys very broad currency. On the question whether lawmaking power is properly implied from grants of jurisdiction, see *infra* Part 6, “The ‘Pure’ Federal Common-law Action and Jurisdictional Grants,” notes 155-63 and accompanying text.

58. This occurs, for example, when Congress puts a class of claims under the exclusive jurisdiction of federal trial courts.

59. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

governs.<sup>60</sup> But what about matters governed by federal law? The Rules of Decision Act says that the state law shall furnish the rules of decision in federal civil actions, in cases in which they apply.<sup>61</sup> But what about cases in which they do not apply?

It might be argued that the asserted tautologies vanish when one recognizes that all of these materials reserving federal lawmaking power—*Erie*, the tenth amendment, the Rules of Decision Act—do not, in fact, expressly reserve federal *case* law. The national law that is held in reserve is the Constitution, treaties, or “laws”—i.e., statutes—of the United States. But because we now understand that the supremacy clause compels the application of federal case law where it applies,<sup>62</sup> these omissions cannot have any modern meaning, no matter what they may have meant to those who made them.

I do not mean to say that the supremacy clause requires federalization of every conceivably federal issue. There is, of course, a point at which choice remains available, for primary governance, between state or federal law. This point we can think of as “the prefederalized moment.” At the prefederalized moment, the supremacy clause, like a sleeping giant, lies in wait, its force held in suspension. Arguably, at that moment the obeisances toward state law in all of these materials should be frankly \*817 acknowledged and should, with few exceptions, block a judicial decision to federalize.

This argument is appealing, but does not seem to fit the real world. First, no one pretends that Congress should not federalize any matter when it is in the national interest to do so. Thus, this argument depends on a prudential distinction between the judiciary and the legislature that seems irrelevant in any direct way to federalism. Yet federalism is what the tenth amendment and the Rules of Decision Act seem to invoke. The

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60. “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 R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (Brandeis, J.).

61. “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” 28 U.S.C. § 1652 (1982); “[t]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. Judiciary Act of 1789, § 34, 1 Stat. 73, 93.

62. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (even in diversity case, federal law must govern question whether American courts may examine act of a foreign state, notwithstanding that federal rule is a rule of common law only, and notwithstanding that state law in the instant case would yield the same result). *See, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (Pennsylvania court must apply federal common-law rule to case that could have been brought in admiralty). *See also* C. WRIGHT, LAW OF FEDERAL COURTS 273 (4th ed. 1983) (citing *Free v. Bland*, 369 U.S. 663 (1962)); *infra* Part 8, “Supremacy, Inchoate Policy, and Choice of Law,” notes 177-90 and accompanying text.

argument would have to be that our federalism can tolerate encroachment by Congress, but becomes offended only, or mainly, when the courts encroach. As *Erie* helps clarify, though, nothing important to federalism turns on the question whether case law is less legitimate than statutory law.<sup>63</sup>

Second, the argument disregards the inevitability of judicial federalization when inchoate national policy requires it. Indeed, it more accurately describes cases not yet decided to say that *policy*, rather than law, decides them. In this situation, policy rather than law is “supreme” under article VI.<sup>64</sup>

Third, considerations of federalism and comity must always be subordinate to *substantive* national policy. For that reason, these considerations are more likely to be taken into account not at the moment of federalization, but at a later stage. Finally, on the narrow problem of judicial implication of remedies “under” an act of Congress, the moment of decision hardly follows a “prefederalized moment,” since, by hypothesis, Congress has already federalized the subject matter.

The commentators’ continuing fascination with the Rules of Decision Act is especially mystifying.<sup>65</sup> The Supreme Court made it quite clear in *Erie* that the Act was merely declaratory of what federal courts would do in its absence.<sup>66</sup> The Court even said that if *Erie* presented only a question of statutory interpretation the Court would not venture to overrule *Swift*,<sup>67</sup> “injustice and confusion” notwithstanding.<sup>68</sup>

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63. For further development of this reasoning, see *infra* Part 7, “Legal Realism,” notes 164-76 and accompanying text.

64. For further development of this reasoning, see *infra* Part 8, “Supremacy, Inchoate Policy, and Choice of Law,” notes 177-90 and accompanying text.

65. *E.g.*, Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Merrill, *supra* note 2, at 31; Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

66. “The statute, however, is merely declarative of the rule which would exist in the absence of the statute.” *Erie*, 304 U.S. at 72 (citation and footnote omitted). The current version of the statute, at 28 U.S.C. § 1652 (1982), was amended in 1948 to conform to this reading, mainly by the inclusion of equity cases which, as a practical matter, had fallen under the general rule. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 944 (1948); *see also Dice v. Akron, Canton & Youngstown Ry.*, 342 U.S. 359, 368-69 (1952) (Frankfurter, J., dissenting in part and concurring in part) (“[The Act is] a derelict bound to occasion collisions on the waters of the law.”).

67. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

68. “The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. *Erie*, 304 U.S. at 77 (citations omitted).

**\*818** It is time to pay final respects to the Rules of Decision Act. I have already said that the Act, speaking as it does only to federal courts, cannot have any modern meaning. Whatever law applies, it applies in both sets of courts. Isolating the federal courts as repositories of federal law<sup>69</sup> seems particularly blind when so much federal common law is fashioned in the first instance by state courts—notably in their vast jurisdiction over pretrial motions to suppress evidence in criminal cases. State courts of appeal give only fortuitous guidance and the United States Supreme Court provides only improbable final review.

Then there is what I think of as “the spurious state-law imperative.” Writers have a romantic attachment to Professors Hart and Wechsler’s observation that federal law is “interstitial,”<sup>70</sup> operating against a broad background of common-law understandings. A similar nostalgia is bestowed upon Justice Harlan’s almost equally famous vision, cribbed from Hart and Wechsler,<sup>71</sup> that state law governs us in our “primary” relations.<sup>72</sup> Writers under this spell like to posit a presumption in favor of state law.<sup>73</sup> When a little greener, I did so myself.<sup>74</sup> But this romantic vision seems out of focus. It is fanciful today to say that federal law governs “interstitially.” There is nothing interstitial about the Internal Revenue Code.

Arguably, most of our “primary” arrangements are “interstitial” to our federal tax planning: our wills, our domestic affairs, our ownership of home and property. However “primary” the subjects of state governance may be, they are only such homely matters as our marital status (as to which state governance would be ineffectual without the full faith and credit clause federal constitutional law provides to validate our divorces nationwide); our inadvertent, localized, or less interesting wrongs; and, within the constraints of federal consumer protections, our installment payments for things we think we must own. When it comes to protecting the elementary purity of the things we put in our bodies, or to the enunciation of our basic civil and political rights, we look to national governance. When one adds to these that we depend on the nation to underwrite such matters of intensely local concern as the funding of med- **\*819** ical services, welfare payments, and education, the power and pervasiveness of federal governance becomes even more apparent. (I pass over as insufficiently “primary” such things as the integrity of the

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69. Field, *e.g.*, *supra* note 2 at 898-99, lapses into such reasoning, despite some earlier argumentation to the contrary.

70. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953).

71. *Id.* at 616.

72. *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

73. *See, e.g.*, Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

74. Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. PA. L. REV. 594, 598-99 (1974).



investment markets, the battle for a place in world markets, and the defense of the nation.) Much of this-pervasive federal governance is in the form of case law, notwithstanding the typical kernel of statutory or constitutional text that may lie at the core of the jurisprudence. If state governance remains “primary” in some sense, that is a circumstance of diminishing real impact on our lives. We look to the states and localities, in the main, only for delivery of such—admittedly vital—local governmental services as police protection.

But it does not really matter, does it, what is “interstitial” or “primary”? One may believe that state law is somehow “primary,” but how can that affect the resolution of any issue of broad national policy? Can anyone imagine that federalism is strengthened by referring to state law to determine, for example, whether there should be judicial remedy for violation of an act of Congress?<sup>75</sup> The faith that *state* law will be an appropriate residual choice for newly raised questions of *national* policy is, on the face of it, a blind faith indeed.

### (3) POSITIVISM

The power of positivistic thinking by now ought to have carried us even beyond the declaration in *Erie*: “There is no federal general common law.”<sup>76</sup> Surely we can now say, with equal conviction: *There is no state general common law, either.*

Justice Brandeis’ categorical insistence that there “is no federal general common law” spoke directly to the issue the Court was addressing—whether the doctrine of *Swift v. Tyson* should be disapproved. But his grand insight cannot be limited to federal general common law. State general common law must be equally illegitimate. After *Erie*, all law must emanate from some identified sovereign with a legitimate governmental interest.<sup>77</sup>

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75. See Note, *The Federal Common Law*, *supra* note 73, at 1523; but see Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L. J. 1144 (1985).

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

77. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1982); *Nevada v. Hall*, 440 U.S. 410 (1979); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939); *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532 (1935); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). This list of conflicts cases is not exhaustive. In addition, there are innumerable interest-requiring cases under the commerce, contract, and equal protection clauses. For older examples, see *supra* notes 27-32.

Recall that the operative section of *Erie* ultimately focused on the \*820 “fallacy” of the very notion of “general” common law.<sup>78</sup> At the heart of the opinion was the positivistic insight that American law must be either federal law or state law. There could be no overarching or hybrid third option. Although it had been thought, fallaciously, that judge-made law that the common law is not some “brooding omnipresence in the sky,” but “the articulate voice of some sovereign” that can be identified.<sup>79</sup>

In insisting on identified state common law, the Supreme Court inescapably laid the intellectual foundation for identified *federal* common law. As Justice Brandeis insisted, once a court identifies the governing sovereign, whether the governing sovereign’s law is statutory or decisional is not that court’s concern.<sup>80</sup> Both the case law and the statutes of the governing sovereign, if within its sphere of interest, are equally its law. The Court demonstrated this point, famously, on the same day *Erie* was handed down. In another opinion by Justice Brandeis, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,<sup>81</sup> the Court held that only federal—even in an ordinary diversity case between private landowners—could resolve an interstate boundary dispute, even if the only law available is federal case law. The result would have been the same in a state-court suit. Is there any alternative consistent with the supremacy clause?<sup>82</sup>

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78. 304 U.S. at 78-79.

79. These last quotations, are not from *Erie*, but from Holmes’ celebrated dissent in *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

80. “And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” *Erie*, 304 U.S. at 78. *But see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 n.5 (1959) (the word “laws” in 28 U.S.C. § 1331 encompasses maritime statutory, but not decisional, claims). *Romero* has been limited by the Supreme Court to its own context. *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1972) *rev’d on other grounds*, 451 U.S. 304 (1981) (no reason not to give “laws” in 28 U.S.C. § 1331 its natural meaning, and therefore federal common law as well as federal statutory law will ground federal-question jurisdiction under § 1331).

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

82. I am not addressing at this point the option of federal incorporation of state law to supply the rule of decision, or any of its variants. *See infra* notes 179-88 and accompanying text. Rather, I am speaking here to the underlying allocation of primary lawmaking power over an issue. For this, *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918) is very much on point. In that case, it was argued to the Court that the grant of federal jurisdiction over admiralty cases, today found at 28 U.S.C. § 1333 (1982), expressly saved to claimants their rights under state common law. But the Court saw that because federal maritime law pre-empted state governance, *see Jensen*, 244 U.S. 205 (1917), the “saving clause” of § 1333 merely preserved state jurisdiction to adjudicate, with the right to trial by jury. Federal common law would have to govern in those state-court trials. That position is unchanged today.

The due process clause today generally produces the same result. Under modern due process analysis, the general common law is unconstitutional in state-court adjudication of state rights as in federal court adjudication of state rights. On this point, we are all positivists \*821 now.<sup>83</sup> Virtually all the Supreme Court's choice-of-law decisions hold that the parties have a due process right to relevant law, the chosen law of an identified sovereign.<sup>84</sup> We can now see that here, too, there is no special infirmity of *federal* common law. We understand that New York has no more power than the nation to substitute its view of "what Pennsylvania law ought to be" for its view of "what the Pennsylvania Supreme Court would say it is."<sup>85</sup> Just as surely, the nation's law, including its common law, applies when the nation is the relevant sovereign. Indeed, when the nation's law applies, it applies a fortiori, under the supremacy clause.

I pause to note that the true importance of *Erie* is not fully conveyed in the observation that it overruled the venerable case of *Swift v. Tyson*. What made the *Erie* Court use language of reluctance,<sup>86</sup> even as it was reaching for an issue not raised by the parties,<sup>87</sup> was that it was about to trash ninety-six years of federal decisions. State-law cases used to be a much bigger part of federal jurisdiction than they are today. Before 1875, they were the vastly greater part. *Erie* scrapped most of the cases in the old pre-war books—cases in which the source of governing law was ambiguous.

Today, the experience of browsing among the old federal reporters can be unsettling. One may find oneself reacting rather strongly to some of these old cases, with their way of citing a host of detached authorities, and ruling as a matter of no particular law upon such questions as the validity of a common mortgage. One cannot help recoiling: the uselessness—the unconstitutionality—of these unpositivistic cases becomes offensive to

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83. The allusion, of course, is to the familiar aphorism, "we are all realists now." See, e.g., W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973).

84. See *supra* note 77.

85. Georgia apparently follows a mechanism like that of *Swift v. Tyson* in cases in which Georgia's choice-of-law rules point to the law of another state. In such cases, Georgia will apply the statutory law of that other state, but it holds the case law of that state to be mere general common law, as to which its judges may speak with equal authority. Cf. *Frank Briscoe Co. v. Georgia Sprinkler Co.*, 713 F.2d 1500 (11th Cir. 1983) (contract); Rees, *Choice of Law in Georgia*, 34 MERCER L. REV. 787, 784-90 (1983). Apparently this practice has not been challenged on constitutional grounds. (I am indebted to my colleague Russ Weintraub for calling my attention to this oddity.)

86. *Erie*, 304 U.S. at 77 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.").

87. The question whether *Swift* should be overruled was not raised, briefed, or argued by either party. *Erie*, 304 U.S. at 82 (Butler, J., dissenting).

one's post-*Erie* sensibilities. But the unambiguously federal<sup>88</sup> and state decisions, both before and after *Erie*, seem to us now quite in order.

#### **\*822 (4) THE HISTORY**

It is worth recalling what law both state and federal courts were actually applying during crucial moments of dual court history, before and after *Erie*. The historical background clarifies one's understanding of the positivistic position now embedded in the Constitution.

The story can be followed more easily if we break down into categories the kinds of common-law questions that might arise. Let us look at issues which today we might reasonably think of as (1) state issues; (2) federal issues; (3) "maritime" issues; and (4) "international" issues. There would be (5) "foreign" issues, as well, on which the law of some foreign country might be applied, but I omit these from my survey as contributing too little to warrant inclusion.

Imagine, then, that it is 1841, just before *Swift v. Tyson*, and we are considering nonstatutory "state" questions in state courts. Among the (then fewer) states, we find lingering controversy over the extent to which the common law of England, even if formally adopted, must be "received."<sup>89</sup> There is great suspicion of judge-made law, perhaps a vestige of postrevolutionary hostility to the prerogatives of colonial judges.<sup>90</sup> A strong codification movement is afoot.<sup>91</sup> The nature of common-law itself is not well understood, something we know from Justice Brandeis' description in *Erie* of the nineteenth-century "fallacy" that law is found, not made.<sup>92</sup> Few, if any, state-law reporters exist, and often one cannot tell what has been decided in previous cases. A court that hears about a case may not consider it part of the law of some state. Decisional law seems instead to reflect a general law common to all. Judges look to Blackstone or Kent to see what is "the general rule."<sup>93</sup> There is, however, an exception. When a settled rule is understood to be local to a particular state, the judges will follow it in that spirit.

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88. *E.g. Lattimer v. Poteet*, 39 U.S. (14 Pet.) 4, 14 (1840) (India treaty; effect on private holdings a federal question).

89. *E.g., Moore v. Harris*, 1 Tex. 35-36, 39-40 (1846-47).

90. Jay I, *supra* note 2, at 1056.

91. *See* HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 257 (1977).

92. *Erie*, 304 U.S. at 79.

93. *E.g., Stovall v. Nabors*, 1 Ala. 218 (1840) (nature of assumpsit); *Tapley v. Smith*, 18 Me. (6 Shep.) 12 (1840) (remedies available where a house owned by one party is built on land of the other).

Move the state-law issue into federal court and a very similar process is seen. Federal judges, riding circuit,<sup>94</sup> carried a copy of Blackstone and applied “the general common law”<sup>95</sup> in the absence of a known local statute or clear local rule.<sup>96</sup> Thus, all courts applied “the general common law” on most state-law questions.

What about federal questions in state courts? In 1841, there was \*823 little federal legislation, and the young nation had not developed lines of authority rich enough to give guidance on even rudimentary questions that might have arisen under, say, the patent laws.<sup>97</sup> At that time there was no broad federal jurisdiction over federal questions;<sup>98</sup> there were only specialized jurisdictional grants. A novel action raising federal questions probably would have to be brought in state court. A federal question could also come up in state court by way of defense or counter-claim. For example, in an action on a contract for royalties, the defense could argue the invalidity of the patent.<sup>99</sup> In such cases, how would a state court answer a novel federal question? Once the fine threads of analogy were spun out, what would there be to do but pull out the well-thumbed Blackstone? Thus, state judges would apply “the general common law”<sup>100</sup> to questions we think of today as federal.

Now move the federal question into *federal* court, and substantially the same picture emerges. Common law administered by federal judges generated even greater suspicion

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94. The diversity jurisdiction of federal courts was in the circuit, rather than the district, courts. For a description of the circuit riding of federal judges, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 126 (1973).

95. *E.g.*, *Bank of the Metropolis v. Guttschlick*, 39 U.S. (14 Pet.) 19, 28 (1840) (citing Kent).

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

97. Although federal jurisdiction over patent claims is exclusive today, 28 U.S.C. § 1338(a) (1982), at one time state courts had concurrent jurisdiction over infringement suits, Act of Feb. 21, 1793, ch. 11, § 6, 1 Stat. 318, 322; Act of Feb. 15, 1819, ch. 19, 3 Stat. 481; Act of July 4, 1836, ch. 357, 5 Stat. 117, and claims of wrongful procurement, Act of April 10, 1790, ch. 7, § 5, 1 Stat. 109, 111.

98. The outgoing Federalist Congress abortively vested general federal-question jurisdiction in federal courts in 1801, ch. 4, Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92; the incoming Jeffersonians repealed the measure, Act of March 8, 1802, ch. 8, 2 Stat. 132. The general federal-question jurisdiction found today at 28 U.S.C. § 1331 was not given to federal courts until 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

99. State-court actions of this sort include *Geiger v. Cook*, 3 Watts & S. 266 (1842); *Bierce v. Stocking*, 77 Mass. (11 Gray) 174 (1858); *Dunbar v. Marden*, 13 N.H. 311 (1842); *Holliday v. Rheem*, 18 Pa. (6 Harris) 465, 57 Am. Dec. 628 (1851).

100. There is an additional category, consisting of general common-law questions which today are federal questions, but the source of which in 1841 was utterly ambiguous. For the example of marine insurance, see *Fletcher*, *supra*, note 2.

than common law administered by state judges.<sup>101</sup> This attitude may be traceable to the fear of centralized power that characterized the post-Revolutionary period and to the general hostility with which federal courts themselves were regarded. The Supreme Court had already declared that there could be no federal common law of crimes,<sup>102</sup> and even no federal common law of copyright, one of the few areas of recognized federal lawmaking power.<sup>103</sup> Law on novel federal questions most likely was fashioned in as close conformity as possible with general common-law understandings.<sup>104</sup>

As for the law applied in both sets of courts on maritime questions, \*824 why, it was “the general maritime law,” of course.<sup>105</sup> Similarly, the law applied in both sets of courts on international questions was “the general international law.”<sup>106</sup>

Now *Swift v. Tyson*<sup>107</sup> is decided. Even in those exceptional instances when the common-law rule of the state is known, *Swift* frees the federal judiciary from having to apply that rule. Ironically, Justice Story, the author of *Swift*, must have been a positivist. For Story, all law emanated from some sovereign, as surely as it did for Holmes and John Austin. We see this positivism in Story’s 1834 *Commentaries on the Conflict of Laws*, which insists on choice of the law of the territorial sovereign. But Story, with his restlessness and intellectual arrogance, was also an instrumentalist. In *Swift*, he was aiming for uniform commercial law—and better commercial law than he found under the debtor-oriented common law of New York.

Today, we think that there is power in the nation (although that power has not been exercised in a comprehensive way) to impose uniform commercial law upon the states. But Story, for all his brilliance, was a creature of his time. He did not think that there was national power over commercial law. *Swift* was an arrogation of too little, rather

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101. See generally Jay II, *supra* note 2; Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1911, 1196 (1977) (hostility to federal equity).

102. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

103. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (no common-law right of literary property; federal statutory protection is sole source of copyright law).

104. See, e.g., *Stanley v. Hewitt*, 22 F. Cas. 1043 (C.C.E.D.N.Y. 1836) (no. 13,285).

105. See, e.g., the *General Smith*, 17 U.S. (4 Wheat.) 438 (1819) (under the general maritime law there is no lien for supplies furnished to a vessel in her home port); D. ROBERTSON, ADMIRALTY AND FEDERALISM 151-52 (1972) (citing *Hazard’s Admin. v. New England Marine Ins. Co.*, 33 U.S. (8 Pet.) 557 (1834)).

106. See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895) (general international principles governing recognition of foreign judgments); *United States v. Flores*, 289 U.S. 137, 157 (1933) (general international principles governing extraterritorial criminal jurisdiction).

107. 41 U.S. (16 Pet.) 1 (1842).

than too much, power.<sup>108</sup> Far from fashioning a supreme federal common-law rule, binding on New York in the next case, Story hoped only that once the Supreme Court, with its great prestige, formulated a better rule on a commercial issue, uniformity would follow. *Swift v. Tyson* was a noble experiment that failed.<sup>109</sup> Throughout the century, the Court was to struggle with the inconvenient commercial-law rules New York continued to apply.<sup>110</sup>

To make matters worse, given Story's prestige, *Swift* began to undermine the nascent positivism of the states. Some state courts would up \*825 applying the general common law late into the century,<sup>111</sup> and Georgia still applies the actual rule of *Swift v. Tyson*.<sup>112</sup>

With the Civil War, the consolidation of national power the Jeffersonians so greatly feared became a reality. A feeling for the requirements of national policy began to dictate in all courts answers to federal questions which seemed more clearly "federal." Increasingly, too, as reporting systems became more widespread, state common-law rules achieved clearer identity in state courts. But in federal courts, under *Swift* the general common law remained available.

Two rather significant events occurred in 1875. First, as a kind of Parthian shot, the Reconstruction Congress gave federal courts general jurisdiction over federal

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108. This was not Story's first failure to take sufficient federal power. In *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), Story, attempting to draw into federal courts the commerce of the nation (then largely maritime), failed to foresee the need for admiralty jurisdiction over the great inland lakes and western rivers. His effort to remedy this failure in authoring the Great Lakes Act (Act of Feb. 26, 1845, ch. 20, 5 Stat. 726), is recounted in D. ROBERTSON, *supra* note 105 at 111-18; see also Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 121 (1954).

109. "[T]he benefits expected to flow from the rule did not accrue." *Erie*, 304 U.S. at 74.

110. E.g., *Pritchard v. Norton*, 106 U.S. 124 (1882) (refusing to apply New York defense, although New York was the place of contracting, to a contract valid under the law of Louisiana, the place of performance, on the ground that the presumed intention of the parties was to make a valid contract).

111. A clear instance is found in Ohio. In *Alexander v. Pennsylvania Co.*, 30 N.E. 69, 48 Ohio St. 623 (1891), the Supreme Court of Ohio formally jettisoned general common law and adopted identified state common law. The Ohio court held itself bound to follow Pennsylvania precedent on a point of Pennsylvania law with which Ohio decisional law was in disagreement. See also *Mohr v. Miesen*, 47 Minn. 228, 234, 49 N.W. 862, 864 (1891) (general common law applicable to wagering contract in absence of proof of the law of the place of contracting).

112. See *supra* note 85.

questions.<sup>113</sup> The unambiguously federal question was crystallizing rapidly. Second, the Supreme Court decided *Murdock v. City of Memphis*.<sup>114</sup> It had always been assumed that the Supreme Court would review only federal questions in cases coming up through the state-court systems. During Reconstruction, however, Congress tinkered with the Court's jurisdictional statute,<sup>115</sup> disturbing these old understandings. The petitioner in *Murdock* asked for review of his *state-law* question, as well as his federal: he sought a little of that useful federal general common law. But here the Supreme Court drew the line. *Swift v. Tyson* was not working very well.<sup>116</sup> In *Murdock*, the Court held, as a matter of statutory construction, that it would continue to review only federal questions in state-court cases.<sup>117</sup> Thus, with *Murdock*, the "federal general common law" became acutely a problem of federal courts. The prepositivistic intellectual structure was badly shaken.

Then, in 1891, Congress created the circuit courts of appeals and gave the Supreme Court discretion to deny review in diversity cases.<sup>118</sup> The Supreme Court could thus unburden itself of much private litigation, but this meant as a practical matter that there were now nine authoritative sources of federal general common law instead of one. This change undercut the only remaining rationale for putting up with *Swift v. Tyson*—the hoped-for uniformity among state laws.

**\*826** The modern position began to emerge shortly thereafter with real clarity. In 1917, the Supreme Court decided *Southern Pacific Railroad v. Jensen*.<sup>119</sup> Although some remember the case chiefly for Justice Holmes' dissent about the "brooding omnipresence," the truth is that, in *Jensen*, Holmes was wrong.<sup>120</sup> He did not understand the *Jensen*, an admiralty case, raised federal, not state, issues, or that the Court, far from applying the law of a "brooding omnipresence in the sky," had identified the governing sovereign as the nation. (This misunderstanding is probably the reason Justice Brandeis did not use Holmes' *Jensen* dissent in *Erie*. When the time came for Brandeis to pay

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113. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, today at 28 U.S.C. § 1331 (1982).

114. 87 U.S. (20 Wall.) 590 (1874).

115. Act of Feb. 5, 1867, 14 Stat. 385-87, amending Judiciary Act of 1789, 1 Stat. 73-95.

116. *Erie*, 304 U.S. at 73-77.

117. 87 U.S. (20 Wall.) at 628-33.

118. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (1891).

119. 244 U.S. 205 (1917).

120. *Id.* at 218 (Holmes, J., dissenting). I believe I am indebted to Don Trautman for the foregoing remark.



intellectual homage to Holmes' role in revealing the "fallacy" of *Swift v. Tyson*, Brandeis resorted not to *Jensen*, but to two of Holmes' other well-known dissents.<sup>121</sup>

In *Jensen*, the Supreme Court took its first powerful, positivistic step in identifying "the general maritime law" as federal law. More than that, the *Jensen* Court insisted that this common law of maritime cases was genuine federal law, binding on the states; indeed, it was pre-emptive. There was no federal common-law rule on the substantive issue in *Jensen*; nevertheless the court held that this dormant decisional law trumped the *statutory* law. Finally, even though no federal legislation existed for the case, the Court pointed out that there was concomitant power in Congress. Justice McReynolds saw that Congress' persistent habit of maritime legislation must be constitutional, despite the absence of any enumerated maritime power in article I. Congress must have the power, he reasoned, for the same reason the Supreme Court had—the importance to national policy of uniformity and harmony in maritime law. The Court therefore *implied* Congressional power from the article III grant of admiralty jurisdiction to federal courts.<sup>122</sup>

Then, in 1938, the Supreme Court identified as state law "the general common law" as it applied to state-law questions. The case, of course, was *Erie Railroad Co. v. Tompkins*. *Erie* finally furnished the intellectual basis not only for identified state law where it applies, in all courts, but also for *Jensen*, and for identified *federal* law where it applies, in all courts. Thus on the day the Court decided *Erie*, almost as a casual afterthought, it identified as federal the general common law applied in interstate boundary disputes.<sup>123</sup> And, in 1943, in *Clearfield Trust v. United States*,<sup>124</sup> the Court identified as federal the common law applied in actions involving United States commercial paper.

\*827 Finally, in 1964, in the *Sabbatino* case<sup>125</sup> (if one reads *Sabbatino* for all it is worth,<sup>126</sup> and does not mind that the American Law Institute has failed to adopt the

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121. *Erie*, 304 U.S. at 79 (referring to *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (Holmes, J., dissenting); *Black and White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (Holmes, J., dissenting)).

122. *Jensen*, 244 U.S. at 218.

123. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 100 (1938).

124. 318 U.S. 363, 366-67 (1943).

125. *Banco Nacional de Cuba v. Sabbatino*, 375 U.S. 398, 421-27 (1964).

126. For the view that *Sabbatino* is a "mandate" to fashion common law of foreign relations, see Friendly, *supra* note 6, at 408.

position<sup>127</sup>), the Court identified “the general international law” as that of the federal sovereign. Like the rule in *Jensen*, the rule in *Sabbatino* is not simply a federal one, but a *pre-emptively* federal one; courts could not apply state law even if the state rule were the same as the federal one.

Now that the dust of history has settled, we can examine what is left. The good news is that what I call “the true position” is theoretically accurate and seems to correspond with the real world much more closely than the odd jurisprudence of illegitimacy. Federal common law governs federal questions, including maritime and foreign relations questions, in all courts. State common law governs state questions in all courts.

The ghost of *Swift v. Tyson* need not trouble us. Unlike the pre-*Erie* general federal common law, the post-*Erie* federal common law is federal law, not some independent view of state law, and is entitled to supremacy under article VI. This supremacy means that the same law is applied in all courts on the same sorts of questions. Identified federal common law cannot raise the old pre-*Erie* problems of forum shopping and discrimination.

If all federal common law, as clarified, returns us to any historic notion, it is not to the fallacy underlying *Swift*, but to the idea that American courts are courts of coordinate powers.<sup>128</sup> What Congress and the executive can act upon, the courts can adjudicate. If we add to this our modern understanding of the scope of national empowerment, then as an initial proposition, all judges, state and federal, can decide whatever federal issues properly come before them along the whole continuum of national policy concerns—always subject, of course, to the Supreme Court as final arbiter. Courts are not limited to enumerated “enclaves” of federal lawmaking power.

#### **\*828 (5) THE HISTORY, CONTINUED: WHAT WENT WRONG?**

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127. In the RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES (1987), the American Law Institute does not consistently identify any single source of the foreign relations law of the United States. *See id.* § 2 (revision gives fuller expression to general principles of international law; it is not deemed necessary to set out other formal sources of law).

128. *But see* Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974). Professor Mishkin argues that Congress, but not federal courts, could adopt a federal “no-fault” liability rule for interstate traffic. The argument seems spurious. If judicial power in the abstract over this issue looks preposterous, Congressional power in the abstract over this issue probably will look preposterous too. Mishkin had scant excuse for this remark, writing, as he was, after *Illinois v. Milwaukee*, in which the Court recognized a federal common law of environmental tort, even allowing for the prior existence of federal environmental legislation. There is much federal legislation on interstate transportation; Mishkin himself assumes power in Congress.

The bad news is that ever since *Erie*, the Supreme Court has been denying that “the true position” is the law. What went wrong? Why aren’t the clarified modern understandings I have described here more widely shared? Why do these understandings so rarely and grudgingly inform the opinions of the Supreme Court? Historians think that they can explain what went wrong by taking us back to the politics of the early nineteenth century; that legacy, it is true, cannot be disregarded. But surely, in the wake of *Erie*, the Supreme Court could have picked up the power identified as its own with fresh confidence and understanding. Unhappily, the Court began to write in a way that confused the unconstitutional superlaw that federal courts had applied on state issues before that, in the wake of the New Deal, a Court sensitized to the national mood would exercise federal judicial power only with great discretion. Federal common law in the hands of the then conservative federal judiciary had become a political sore point. Thus, the Court proceeded to inject a note of hesitation, confusion, and illegitimacy into the beginnings of the new federal common law. What ought to have been a clarifying and salubrious development became, instead, a hopeless muddle.

The origin of what we now call “the *Erie* doctrine” was unrelated to this political climate.<sup>129</sup> What happened was that the Federal Rules of Civil Procedure arrived on the scene by accident of history also in 1938; that the Supreme Court thereupon produced a line of cases—simply because the issue was presented—about the effect of federal “procedural” law on the applicability of state law in federal courts; and that civil procedure casebooks, almost invariably the only early and required exposure to *Erie* for American law students, quite understandably chose to develop these glamorous Supreme Court materials. The focus shifted from the grand constitutionalized positivism of *Erie* to a rather dreary little side issue.

Two generations of books on federal courts, books which ought to have revealed to students the dual sovereignty system in its majestic out- \*829 lines, fell into the trap

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129. As one writer has remarked:

[I]t is inconceivable that a Court that has rendered nearly the entire Bill of Rights applicable to the states..., that defers to nearly every assertion of national legislative authority, that allows the federal government to condition its enormous spending power on conforming regulation by the federal government to condition its enormous spending power on conforming regulation by the states..., and that creates extensive areas of special federal common law...could simultaneously wring its hands over the employment of federal procedures that might affect the outcome of diversity suits.

Westen, *After “Life for Erie”—A Reply*, 78 MICH. L. REV. 971, 979-80 (1980). Professor Westen finds the explanation for all the fuss in an antidiscrimination principle. That seems to me a sound diagnosis. But it goes to the federal rules problem, not the grand design of the dual sovereignty system. I quote him here for the nice expression of malaise. Professor Westen’s article with Professor Lehman is yet another example of fascination with the procedure cases. Westen & Lehman, *supra* note 2.

begun in civil procedure and wasted massive chapters on diversity jurisdiction and on the federal procedure cases.<sup>130</sup>

*Erie* was cited for a series of absurd propositions. The Court itself referred to *Erie* as if it were a mandate for state substantive law, no matter what, and the Court made this mythical mandate an equally mythical feature of the diversity jurisdiction of federal courts. The earliest expressions set the tone universally heard today. In 1943, for example, in *Clearfield Trust*, Justice Douglas used this now familiar, but odd, formulation: “the rule of *Erie R. Co. v. Tompkins*...does not apply to this action.”<sup>131</sup> Surely *Erie* applies all the time; it is state law that does not apply to questions of federal policy.

In 1947, in the *Standard Oil* case, Justice Rutledge commented that “the *Erie* decision,...related only to the law to be applied in exercise of [diversity] jurisdiction.”<sup>132</sup> Yet each sovereign’s law applies when it ought to, without regard to the name of the court applying it, or to the head of jurisdiction under which the case is being heard. *Sabbatino*, for example, was a diversity case, as was *Hinderlider v. La Plata*; in both cases, the rule of decision was federal. As Justice Black made clear in *Pope & Talbot, Inc. v. Hawn*, *Erie* cannot be used “to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of the parties would depend on which courthouse...a lawyer might guess to be in the best interests of his client.”<sup>133</sup>

Most harmful to a coherent understanding of federal common law has been the gingerly and apologetic tone of even the Court’s most creative federal common-law cases. In *Sabbatino*, a quarter of a century after *Erie*, Justice Harlan felt obliged to assure the country that “there are enclaves of federal common law which bind the states.”<sup>134</sup> Why “enclaves”? Why the notion of a laundry list of exceptions to what must be some general rule of impermissibility?

Justice Harlan was even less forthright in another famous opinion on the federal common law—his concurrence in the *Bivens* case.<sup>135</sup> The Court fashioned at common law a civil rights “act,” as it were, for suits against federal officials. Never quite facing

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130. This wrong turn is revealed by comparing, for example, the first edition of HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953) with the third (3d ed. 1988). See also Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688, 702-03 (1989).

131. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

132. *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947).

133. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411 (1953).

134. *Banco Nacional de Cuba v. Sabbatino*, 375 U.S. 398, 426 (1963).

135. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 398 (1971) (Harlan, J., concurring).

up to the difficulty of “molar” motion the case presented, Justice Harlan argued that injunctive relief always would have been available,<sup>136</sup> and thus that we could assume \*830 a substantive right always existed. He could then purport to view the question as one going simply to the remedy.<sup>137</sup>

Justice Harlan’s true legacy of federal common law is one of “molar” motion in the largest sense.<sup>138</sup> Even so, in 1966 he also bequeathed to us the quite arbitrary hurdles set up in *Wallis v. Pan American Petroleum Corp.*<sup>139</sup> There, his opinion for the Court properly required that before federal common law could be used to decide a question, a clear national interest must be shown. So much is understood. But, on top of this, the *Wallis* Court imposed a fresh requirement of specific conflict with state policy. Of course, in the absence of federal policy to the contrary, state law governs. But if *Wallis* means that state law always must govern where the state and the nation are in substantial agreement,<sup>140</sup> it is, I think, simply wrong. In *Sabbatino*, for example, Justice Harlan himself pointed out that the Court could have reached the same result under state law. But the Court felt “constrained to make it clear”<sup>141</sup> that state law could not be allowed to apply. Instead, the nation had to speak about this issue with one voice, “not...divergent and perhaps parochial state interpretations.”<sup>142</sup>

If *Wallis* means that there is no federal common law until there is a conflict with state law, then it drains all meaning from the concept of pre-emption. The *Sabbatino* situation exemplifies the true meaning of the term “pre-emption:” even in the absence of conflict, the state is forbidden to speak. If federal law displaces conflicting state law, that is simply by operation of the supremacy clause. Thus, Justice Harlan could not have meant, in *Wallis*, to insist on an active policy clash as a precondition of judicial federal lawmaking power.

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136. *Id.* at 400 (Harlan, J., concurring). Justice Harlan was alluding to the pre-*Erie* doctrine of equitable remedial rights, under which it was believed that it lay within the inherent power of federal courts to issue injunctions against violations of federal law or policies. *Cf., e.g., In re Debs*, 158 U.S. 564, 582 (1894) (injunction against striking railway workers to prevent obstruction of the mails).

137. *Bivens*, 403 U.S. at 401-02.

138. Justice Harlan’s concurrence in *Bivens* is joined by his great opinions in *Sabbatino* and in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (creating the first nonstatutory action for wrongful death).

139. 384 U.S. 63 (1966).

140. *Id.* at 68.

141. *Sabbatino*, 376 U.S. at 424-25 (1964) (Harlan, J.).

142. *Id.* at 425.

Taking *Wallis* seriously can lead to serious trouble. Consider Judge Kearse's interlocutory opinion for Second Circuit in *Agent Orange*.<sup>143</sup> The question was whether the trial court had federal-question jurisdiction. *Agent Orange* was a products liability case against certain defense contractors, consolidating the personal injury claims of thousands of Vietnam War veterans from all over the country. The veterans alleged that exposure to a chemical intended to defoliate the Vietnam terrain had injured our own troops. While Judge Kearse acknowledged that *Agent \*831 Orange* invoked federal policy concerns,<sup>144</sup> she nevertheless could not discern the *direction* of federal policy: whether it would protect the defendant military contractors, or compensate the plaintiff veterans and their dependents. Although courts can and do strike policy balances, the Second Circuit thought *Wallis* prohibited striking *federal* policy balances.<sup>145</sup> The court did not have authority to fashion federal law in the absence of a conflict with the state, and could not know whether there was a conflict with the state until it fashioned federal law. So it remanded this quintessential federal case for trial *under state law*.<sup>146</sup>

As wary of federal common law as the post-*Erie* Supreme Court had been, the Warren Court and the early Burger Court nevertheless actively fashioned new federal causes of action not only by "implication" from acts of Congress,<sup>147</sup> but also by "implication" directly from the Constitution<sup>148</sup> and even out of the blue.<sup>149</sup> But in the post-Warren Court era, powerful new constraints have emerged. The Court has refused to federalize obviously federal questions;<sup>150</sup> has refused to allow judicial federal

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143. *In re Agent Orange Prod. Liability Litig.*, 635 F.2d 987 (2d Cir. 1980).

144. *Id.* at 994.

145. *Id.* at 993.

146. *Id.* at 995 (holding on this basis (even more mistakenly) that there was no federal-question jurisdiction).

147. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

148. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (under a fourth amendment); *see also Carlson v. Green*, 446 U.S. 14 (1980) (under eighth amendment); *Davis v. Passman*, 442 U.S. 22 (1979) (under fifth amendment).

149. *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

150. *E.g., Miree v. DeKalb County*, 433 U.S. 25 (1977) (diversity case; question whether third-party beneficiary may enforce agreement between Federal Aviation Authority and local county, wherein county agrees to run airport safely).

lawmaking in areas of law federalized by Congress;<sup>151</sup> and has limited the “implication” of rights to sue for violation of the Constitution and of acts of Congress.<sup>152</sup>

The post-*Erie* history in admiralty was an exception to all this. It was seen more clearly in maritime cases than in general federal-question cases that national decisional rules were called for in all courts.<sup>153</sup> But the post-Warren Court “restraint” in judicial lawmaking now seems to have caught up with the admiralty.<sup>154</sup>

### **\*832 (6) THE “PURE” FEDERAL COMMON-LAW ACTION AND JURISDICTIONAL GRANTS**

The truly stunning event in the history of federal common law in the post-*Erie* era has been the rise, collapse, and annihilation of the phenomenon to the “pure” federal common-law cause of action.<sup>155</sup> By “pure” federal common law, I mean freestanding federal common law, substantially detached from any textual source in an act of Congress, the Constitution, or their penumbras or emanations—law like that sought by the *Agent Orange* plaintiffs.

The temptation is to suppose that power to fashion this kind of law flows by implication from jurisdictional grants<sup>156</sup>—from the naked power of courts to hear federal

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151. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

152. On constitutional claims, see *infra* note 175. On statutory claims, see *infra* note 198.

153. *E.g.*, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (federal common law governs effect of contributory fault in seaman’s personal injury suit in diversity court); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (federal common law governs validity of seaman’s release in state court). It is commonly said that federal common law is authorized in admiralty cases because the grant of power to the nation is expressly given to federal courts in article III of the Constitution. This view is unpersuasive. State law, or French law, must apply in admiralty as in diversity, where applicable. State courts, as well as federal, must vindicate national maritime policy. National lawmaking power, here, as elsewhere, flows from the national interest.

154. *E.g.*, *Mobil Oil*, 436 U.S. 618. See *infra* note 251.

155. See *infra* notes 158-61 and accompanying text.

156. This is not my own view. But many writers seem to have come to some such conclusion. See, *e.g.*, Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L. Q. 469, 503 (1980). Among the exceptions are those who believe lawmaking power cannot flow from a grant of jurisdiction after *Erie v. Tompkins*, an even more restrictive and inaccurate position. See, *e.g.*, Field, *supra* note 2, at 918. Professor Field ultimately limits this view to the grant of diversity jurisdiction. For dishearteningly typical Supreme Court pronouncements, see *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973).

questions. The argument is that jurisdiction to hear identified federal questions. The argument is that jurisdiction to hear identified federal questions necessarily carries with it the power and the duty to decide them.<sup>157</sup>

**\*833** The simpler, and I think more accurate view, available to us under clarified modern understandings, is that the *power* flows from the national interest and the *duty* from the supremacy clause. The power and duty to make pure federal common law, as the national interest may require, are ultimately lodged in the Supreme Court of the United States. And both federal and state courts below share the power and duty to administer federal law in the first instance, whether in interpretation of authoritative text or of inchoate national policy. It is the decision of federal issues “under” inchoate national policy to which I am referring as “pure” federal common law.

Although the lower federal courts have been more active,<sup>158</sup> in only one prominent instance outside admiralty has the Supreme Court created a pure federal common-law

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This tempting characterization would work well for the admiralty grant. The argument would be: We, the people, gave power to federal courts to hear all admiralty cases (U.S. CONST. art. III, § 2); Congress vested the power (today at 28 U.S.C. § 1333 (1982)), but made it, in part, concurrent (“saving to suitors in all cases all other remedies to which they are otherwise entitled,” 28 U.S.C. § 1333(1)). In *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918), the Court held that only the state court, with trial by jury, was thus saved to suitors; the saving of state law would be inconsistent with federal maritime supremacy. Thus, through the grant of concurrent power, Congress imposed obligations, under the supremacy clause, upon both sets of courts to rule at common law in the national interest—to make federal common law. The argument would grow somewhat tenuous when a state court rules on a maritime question in an ordinary state-law case, or when a federal court with a maritime case is sitting in its federal-question jurisdiction (not “saved to suitors,” under the rule of *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959)).

This sort of argument would have to be stretched much further to cover other heads of federal jurisdiction, where there is no express statutory provision granting concurrent power to state courts. It is well settled that grants of power to lower federal courts are concurrent unless expressly exclusive; moreover, there are areas of federal adjudicatory power lodged exclusively in state courts in the first instance. For example, the state courts, with federal diversity courts, have exclusive jurisdiction in the first instance over federal questions not arising on the face of a well-pleaded complaint. It seems a strain to regard such jurisdiction, which essentially is a creature of Supreme Court decisional law, as Congressional “authorization” of federal common-law power for state judges. In any event, linking jurisdiction to choice of law in such insufficiently nuanced ways tends to perpetuate fallacies. *See supra* notes 35, 57.

157. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”) (Marshall, C.J.); *D’Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 469 (1942) (a court is inevitably compelled to decide federal questions even if no statutory answer is available) (Jackson, J., concurring).



cause of action. That was in the case of *Illinois v. Milwaukee*,<sup>159</sup> making cognizable a federal tort of interstate pollution in an action involving a state as a party. The Court demolished this federal common law of nuisance less than ten years later in the same litigation<sup>160</sup> (and, for good measure, annihilated federal common-law environmental rights under virtually any theory shortly thereafter).<sup>161</sup> In order to do this, the Court had to give a strained reading to the language of the Clean Water Act saving common-law remedies. The Court pre-empted federal, but not state, common law.<sup>162</sup> Pure federal common-law actions survive today, as a practical matter, only in courts below.<sup>163</sup>

### **\*834 (7) LEGAL REALISM**

With this background, we can at least begin to understand that in this country the “common law” no longer means what it meant in eighteenth century England. The common law is not the law of general understandings, common to all English-speaking

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158. *E.g.*, *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974) (there is a federal common-law right to contribution between joint tortfeasors in aviation collision cases); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (a federal common-law cause of action for interstate pollution is available in an action by a state); *Ivy Broadcasting Co. v. American Te. & Te. Co.*, 391 F.2d 486 (2d Cir. 1968) (a federal common law of tort and contract is available against interstate telephone company). Today, lower federal courts will rarely create freestanding new federal common-law causes of action of this kind. But *see, e.g.*, the well-known case of *Filartega v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (in effect, federal common-law cause of action against a foreign official for violation of international civil rights).

159. *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

160. *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

161. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court had held that the Civil Rights Act of 1871 gave a private cause of action for violations under color of law of a federal statutory right. The danger was that *Thiboutot* would make actionable statutes the Court would otherwise hold implied no private right. The Court in *Sea Clammers*, reaching for the question, assimilated its analysis under the Civil Rights Act to its “comprehensive Congressional scheme” cases, *see infra* note 175; *supra* note 21 and accompanying text. For an interesting discussion, see Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

162. Section 505(e) of the Clean Water Act, Federal Water Pollution Control Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 889, 33 U.S.C. §§ 1311, 1342 (1982), provided: “Nothing in this section shall restrict any right which any person...may have under any statute or common law to seek enforcement of any...standard or limitation or to seek any other relief...” The Court in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), found the phrase “in this section” to limit § 505(e) to the Act’s “citizen suit” provisions. Justice Blackmun, dissenting, characterized this as an “extremely strained reading.” 451 U.S. at 342 (Blackmun, J., dissenting).

163. *See supra* note 158 and accompanying text.

people. In the United States, today, common law means judge-made law, in equity and in criminal cases no less than in actions at law. It is case law.

To understand American common law, it must also be understood that law in this country is simply a prediction of what judges will say.<sup>164</sup> Our “Age of Statutes”<sup>165</sup> has not substantially affected the validity of this realist insight. Nor is this the anarchic notion supposed today by those who would link it with the Critical Legal Studies movement.<sup>166</sup> Indeed, to a realist there is something naive about the “deconstructionist” discovery of incoherence in the common law. It is hardly news that strong policy claims on both sides of a question tend to yield conflicting lines of authority.<sup>167</sup> Nor is legal realism to be confused with nihilism. The realist position is not that there is no law in this country, or that our judges can say whatever they like about it. Rather, the realist position is a recognition that advice offered a client about the effect of a statute or regulation is tentative until we see what a court says it means, on particular facts. It is a recognition that, even then, this tentativeness does not go away. The client’s case is different, and the lines of authority will diverge. But the fundamental insight is that the common law is *all the law we have*. We read casebooks not, as is sometimes supposed, because we underrate the importance of statutory interpretation, but, quite to the contrary, because we understand that statutory interpretation happens in courts.<sup>168</sup> We are all realists now;<sup>169</sup> we know that a statute gives us only something to go on until we have some pronouncements from the judiciary. And we know that judicial pronouncements, in turn, give us only something to go on until we have more pronouncements from the judiciary.<sup>170</sup>

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164. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

165. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

166. Cf. Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1 (1984).

167. See generally K. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (1988) (P. Gerwitz, ed., M. Ansaldi, trans.).

168. Professor Aleinikoff argues that agencies, more often than courts, interpret statutes. Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 42 (1988). He reasons that the Supreme Court gives deference, though by no means invariably, to agency interpretations. But the Supreme Court also tends to give deference, though by no means invariably, to circuit court interpretations. The authoritative pronouncement will, of course, be made by courts.

169. See *supra* note 83.

170. See G. GILMORE, *THE AGES OF AMERICAN LAW* 77-80 (1977). See generally Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931); Llewellyn, *A*

\*835 If we put these realist insights together with our insights about empowerment and our positivistic recognition that the common law is the voice of an identified sovereign, we can begin to understand that federal common law is simply case law deciding legal issues involving matters of national policy concern. At this moment in American legal history it should be hard even to imagine that we could somehow do without federal common law, or to say with a straight face that we *ought* to do without it.

We can see—and the Supreme Court has helped us to see this, I think—why there is no fundamental difference between statutory interpretation (which is everywhere regarded as legitimate and necessary, despite controversy over how it is to be done), and judicial lawmaking (which is increasingly denounced as improper “activism”).<sup>171</sup> Case law may seem to cleave to legislation more emphatically in our time; judges today seem to feel safer deferring to the legislature. This has been for some time as persistent a feature of state-law adjudication as of federal.<sup>172</sup> The Supreme Court’s own recent struggles with this question remind us that the silence as well as the mandate of the legislature may sometimes require deference; deciding cases in the absence of legislation can be as much a function of legislative intent as deciding them “under” some statute.<sup>173</sup> And we find that what is meant to supplement legislation can be read as an evasion of its limits.<sup>174</sup>

Thus, we find the Court gradually unifying what were once very different approaches to implied constitutional remedies and implied statutory remedies. It is increasingly seen that rights thought to lie directly “under” the Constitution gain or lose legitimacy

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*Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431 (1930). See also 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 544 (4th ed. 1879) (“the childish fiction employed by our judges, that...common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges.”).

171. See *infra* Part 10, “Separation of Powers,” notes 206-30 and accompanying text.

172. See, e.g., *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969) (court would neither create common-law liability nor imply liability under criminal dramshop law, because policy implications too important not to be left to legislature).

173. Into this category would have to fall the late cases refusing to remedy statutory violations when Congress has not expressly provided the remedy. See *infra* note 198 and accompanying text. For the view that Supreme Court refusal to imply a remedy for violation of an act of Congress raises the question whether the states are also prohibited from so doing, see Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L. J. 1144 (1985).

174. See *supra* notes 21-22 and accompanying text; *supra* note 151 and accompanying text.

depending upon the possible intention of Congress,<sup>175</sup> as do rights fashioned “under” a statute, or at “pure” federal common law.<sup>176</sup> The common law lies in the shadow of the legislature.

But to say that all decisional law is statutory interpretation would be at once true and misleading. The cleaner, more direct insight is that courts have inherent power to decide issues and fashion remedies. In their struggle to decide cases our courts do indeed pay enormous attention to the legislature: what its silence may or may not mean; what any analogous action may mean; what bills have failed; what related proposals have been enacted; what related acts may have been repealed. The inquiring beam of light plays over all of these. But that is only part of the effort of a court to see what current policy is.

### **(8) SUPREMACY, INCHOATE POLICY, AND CHOICE OF LAW**

We are now ready to bring the supremacy clause into our analysis. There is more to be understood about the supremacy clause and federal common law than the obvious truths that federal case law governs a federalized question in both sets of courts<sup>177</sup> (just as, after *Erie*, state common law governs an unfederalized question in both sets of courts); that this governance is not compartmentalized (a federal cause of action often is joined with a state theory of recovery); that it is only when state law goes beyond federal policy “floors” or “ceilings” that a federal claim is likely to pre-empt a state law defense;<sup>178</sup> that, for any of the foregoing reasons, it will not “matter” under article VI that federal law is case law only (just as, under *Erie*, it does not matter that state law is case law only). So much is well understood.

The danger is that, examining this position in the abstract, we will posit established federal—or state—common-law rules. The point is that it is inchoate federal policy that has effective supremacy. If federal policy points to some new result, all courts are equally obligated to try to reach it. That is the teaching of the cases in which the

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175. Thus, in both *Bush v. Lucas*, 462 U.S. 367 (1983) (federal employee complaint under first amendment) and *Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988) (social security beneficiary complaint under fifth amendment due process clause), the Court reasoned that the *Bivens* cause of action for constitutional tort could be displaced when Congress provided a “comprehensive” remedial scheme. This rationale appears to be of a piece with the reasoning in cases refusing to permit federal common law “supplementary” to an act of Congress. See *supra* note 22.

176. See *supra* Part 6, “The ‘Pure’ Federal Common-law Action and Jurisdictional Grants,” notes 155-63 and accompanying text.

177. I do not believe that Professor Redish meant to say, as apparently he has said, that the supremacy clause applies to state courts only. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 960 (1980).

178. If a federal claim is pre-emptive, it will, of course, furnish a defense to a state claim. See *infra* note 242 and accompanying text.

Supreme Court reverses a case argued and decided under state law—as it did, for example, in *Sabbatino*. Argued issues of law are issues of first impression, even if the argument concerns only a question whether to depart from a former rule. Thus, there is no pre-existing black-letter provision that will answer an argued question. The question must be answered in light of the implicit policy of the relevant sovereign.

\*837 This notion of the supremacy of mere federal policy *matters*. Take the familiar situation in which, although there is federal power, courts will choose to apply an alleged state rule instead. When state law is chosen to govern an issue of identified *national* policy concern, it cannot be because the preexisting freedom to choose *before* national policy was invoked survives federalization of the issue; the supremacy clause makes that impossible. Either federal or state law must govern, and if federal power over the issue is conceded, state law does not and cannot govern. If state law is chosen, it becomes *incorporated*. State law in such cases is adopted not because *Erie* requires it, but for any one of a number of possible national policy reasons.<sup>179</sup> For example, the national substantive policy concern may be outweighed by the national interest in protecting traditional state governance of the particular issue.<sup>180</sup> Or perhaps state governance would best further federal policies, where familiarity with local conditions would be an advantage;<sup>181</sup> perhaps state law would simply save the court the trouble of fashioning federal law, in a case in which uniformity does not seem important.<sup>182</sup>

Thus, we have, in effect, as other writers have also seen,<sup>183</sup> a two-step process whenever a question is posed whether governance of an issue is state or federal.<sup>184</sup> At

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179. VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1049-59 (1965) (“optional supplementation by reference”) suggest a number of reasons why state law may be incorporated into federal on a given issue, including economy of judicial lawmaking effort, protection of settled local expectations, and a national interest in deferring to state policy on the particular issue.

180. *E.g.*, *DeSylva v. Ballentine*, 351 U.S. 570 (1956) (state law used to determine who is a “child” for purpose of federal copyright renewal).

181. *E.g.*, *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (in the silence of Congress, state regulation of pilotage in local harbors does not unduly burden interstate commerce). *Cooley* could be viewed as such a case, although the rationale I offer in the text is no part of the case.

182. *E.g.*, *Bank of Am. Nat’l Trust & Savings Ass’n v. Parnell*, 352 U.S. 29 (1956) (diversity case, federal law governs question whether government bonds are overdue, but state law may govern question of placement of burden of proof on issue of good faith for purposes of determining whether holder of overdue bonds is holder in good faith for value).

183. *E.g.*, Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 757 (1986); Field, *supra* note 2, at 952. *But see* Merrill, *supra* note 2, at 31 n.136. Westen & Lehman, *supra* note 2, notably at 323-34, seem even less aware of this.

the first stage, if federal power over the issue is recognized (in the sense that the Supreme Court could take jurisdiction to review the decision on the merits), the *Erie* is out of the picture (in the sense that state law will not govern of its own force). At the second stage, the decision is made whether in fact to fashion federal common law for the issue or to apply state law anyway—in effect, to incorporate state law by reference.

Whether state law is applied at the first stage, via *Erie*, or at the second stage, as a “benevolent gratuity,”<sup>185</sup> also turns out to *matter*, at \*838 least in federal courts (although courts are not always careful to clarify whether they are ruling at step one or step two).<sup>186</sup> Most writers do not seem to realize that it matters.<sup>187</sup> In federal courts, the *Erie-Klaxon-Van Dusen*<sup>188</sup> line of cases slides into place if state law is chosen in the first stage; but if state law is chosen at the second stage, federal courts are free to choose among state laws as national policy may require.

I raise these dusty technicalities because I want to illustrate that inchoate national policy itself has supremacy.<sup>189</sup> When a question of federalized, it is federalized before it is answered—before any federal common law has been fashioned for it. A federal *view* of certain matters will be compelled by our positivistic Constitution. Federal law is the supreme law of the land, even though there is no pre-existing federal rule.<sup>190</sup> When the relevant sovereign is identified to be “the nation,” we know that any law for the issue, state or federal, will be fashioned on the basis of, or constrained by limits reflecting, *national* policy concerns. Thus, the fashioning of federal common law, as our dual-law system has evolved, not only cannot be illegitimate, but rather is within the clear contemplation of the supremacy clause.

## (9) JUDICIAL PROCESS AND THE REFUSAL TO MAKE LAW

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184. *E.g.*, *United States v. Kimbell Foods*, 440 U.S. 715 (1979).

185. *Southern Pac. v. Jensen*, 244 U.S. 205, 220 (1917) (Holmes, J., dissenting).

186. *E.g.*, *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Wilburn Boat Co. v. Firemen’s Fund Ins. Co.*, 348 U.S. 310 (1955).

187. *E.g.*, Westen, *After “Life for Erie”—A Reply*, 78 MICH. L. REV. 971, 972 n.8 (1980).

188. *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (in a state-law case transferred under 28 U.S.C. § 1404(a) on motion of defendant, federal transferee court must apply whole law of transferor court, including its choice rules); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (federal court applying state law must apply whole law of forum state including its choice rules); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

189. *See* L. FULLER, ANATOMY OF THE LAW 70-79 (1968) (characterizing judge-made law as “implicit law”).

190. *Southern Pac. v. Jensen*, 244 U.S. 205 (1917) (federal maritime governance held to pre-empt state statute although no federal rule or statute was available to cover the particular case at the time).

It is curious that the debate over the legitimacy of judicial federal lawmaking goes on, while we watch the federal cases piling up. Perhaps the critics intend that we trash the last fifty years of federal and state law reports, as *Erie* trashed the preceding one hundred years of federal reports. At best, the critic of federal common law seems to be saying, as Hamlet said of marriages, “Let all federal decisional answers to federal questions stay. But let no judge decide a new federal question.”<sup>191</sup> The critic and Hamlet have this in common: what they want is, in the nature of things, impossible. An issue of law must be decided.

August members of the lower judiciary will tell you, sincerely, that \*839 they follow the law; they do not make it. They may have taught themselves to believe this, but I do not think we can believe it. Every time a court rules on a contested legal point, the court generates a little law. Parties do not litigate in order to be instructed on well-settled points of law. It may be true the federal common law we see piling up in the law reports is largely incremental, “molecular” lawmaking. But inevitably a court will make a “molar” move as well, in a proper case.

I do not argue that there is always an abdication of legislatively mandated duty when courts try to deny themselves the power of decision.<sup>192</sup> What happens in many such cases is quite different. A court denying itself the power to decide almost invariably *will* decide, whatever it supposes itself to be doing.

Indeed, it is not possible for a court to adjudicate legal controversies without taking a position. When a court refuses to interpret a self-contradictory statute in a way that makes sense of it, purporting instead to defer to some notion of original intent or strict textual construction, the court can generate only disrespect for statutory law. That is because it will have settled the law’s future effect. It will have created a common-law rule of interpretation. Only this will distinguish the new rule from other such rules of decision: it will be perverse and unworkable. Fortunately, this sort of thing has not been a habit with the Supreme Court; the court traditionally has used canons of construction, often in the face of clear language, to preserve the constitutionality or the consistency of legislation.<sup>193</sup>

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191. W. SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* Act III, scene 1 (“I say, we will have no more marriages. Those that are married already—all but one—shall live. The rest shall keep as they are.”).

192. See generally Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

193. See, e.g., *Richards v. United States*, 369 U.S. 1 (1962). In *Richards*, the court saw that the intention of the Federal Tort Claims Act was to provide the same remedy as would be available to an injured plaintiff under state law. But the clear language of the Act mandated the law of the place of wrongful conduct instead of the place of injury—a choice no state then would make. The Court artfully rationalized the legislation by

When a court refuses to rule on an issue of national policy concern, purporting instead to defer to the legislature as the appropriate body for striking policy balances, the court does not always avoid striking a policy balance. It may instead create a rule of decision, striking the very policy balance it sought to evade. This can be seen in its most revealing context when on this ground a court refuses to make cognizable a cause of action.

A good example of what happens when a court exercises “restraint” on these sorts of grounds can be seen in *Texas Industries, Inc. v. Radcliff Materials, Inc.*<sup>194</sup> There, the Supreme Court held that it would not recognize a federal common-law right to sue an antitrust joint tortfeasor for contribution. The court reasoned that it ought not to fashion the remedy (1) because federal courts are courts with very limited lawmaking power \*840 and cannot freely fashion federal common-law; (2) because the question truly involved the striking of formidable but delicate policy balances; and (3) because the separation of power requires deference to Congress. The legal realist will see at once, however, that the Court’s holding in *Texas Industries* did indeed fashion a federal common-law rule. The Court held that there is no contribution between joint tortfeasors in antitrust.

The Court struck the very policy balance it purported to lack capacity to strike. Surely it would have been better openly to address the requirements of national antitrust policy instead of giving us another opinion on the alleged illegitimacy of federal common law. Moreover, as virtually every issue arising under our antitrust laws. The Sherman Act is an open-ended, brief declaration of policy against “restraint of trade.”<sup>195</sup> Our antitrust law is therefore largely federal common law, and courts have been striking balances in national antitrust policy since its inception. The *Texas Industries* Court’s explanation that the Clayton Act is very specific about antitrust remedies seems weak against this background. When a court refuses to fashion a remedy for an injury, it ought not imagine that it has been “restrained”; that it has followed law, not made it; or that it has deferred to the legislature.

One of the oddities of the prevailing approach to the new federal right of action is the view that somehow a court gives due deference to Congress, or to proper notions of judicial restraint, when it lets *state* law, not federal, govern an identified federal question. Recall that in *Agent Orange*, when the Second Circuit, infuriating the trial court, held that the veterans’ suit could not lie at federal common law, it remanded the case for trial under *state* law. There is similar dysfunction when the Supreme Court holds that federal legislation has pre-empted federal, but not state, common law, as it has done in the case

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holding that the Act referred to the *whole* law of the place of wrongful conduct, including its choice rules.

194. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

195. 15 U.S.C. §§ 1, 2 (1970).



of interstate pollution. As Justice Blackmun pointed out, dissenting in *Milwaukee v. Illinois*, it comports ill with our positivism to hold that Congress intends the state—but not the nation—to vindicate a policy concern *we know is a national one precisely because Congress has dealt with it*.<sup>196</sup>

We may see additional dysfunction when, at a second stage of analysis, state law is chosen to deal with a federal question on the ground that state law better advances national policy. This happened, for example, in *Miree v. DeKalb County*.<sup>197</sup> There, the Court, per Justice Rehnquist, chose Georgia law in order to permit suit by a third-party beneficiary of a contract between the defendant county and the Federal Aviation Administration. Justice Rehnquist reasoned that the permissive Georgia rule would better vindicate the national interest in airport safety than would the alleged federal common-law rule against suits by third-party beneficiaries. But what would happen to the identified national concern for airport safety in the next case, in a state that has a rule against third-party beneficiaries? Presumably national policy would displace the state rule. At least, on the question of airport safety, one would hope so. In other words, the identification of national policy in *Miree* pointed the direction of future law, whether or not the Court acknowledged it. In failing to acknowledge it, the Court left open the possibility of frustrating national policy in the future case.

A special set of difficulties is encountered when a court holds that it will not “imply” a remedy for violation of an act of Congress.<sup>198</sup> Courts should not imagine that they defer to legislation by refusing to enforce it. Indeed, the historic position has been that violation of a right at common law is actionable, but that a tort occasioned by violation of a right at common law is actionable, but that a tort occasioned by violation of a *statute* will be remedied with special vigor. Thus, the fact of statutory wrong can shift the burden of proof to the defendant, or heighten the defendant’s burden of proof to the point

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196. *Milwaukee v. Illinois*, 451 U.S. at 334 (Blackmun, J., dissenting).

197. *Miree v. DeKalb County*, 433 U.S. 25 (1977). The *Miree* Court did not use an explicit two-step analysis, although the court did seem to recognize, *id.* at 32, that a federal question was presented; because that recognition is a correct one, and because *Miree* relies on *Parnell*, 352 U.S. 29 (1956) (a two-step case), *Miree* is clarified by viewing it as a two-step case.

198. The Court’s test for implying a private action under a statute was narrowed twice, first in *Cort v. Ash*, 422 U.S. 66 (1975) (finding a right) and then in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (finding no right) and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 560 (1979) (finding a limited right to equitable relief, but no right to damages). The two latter cases had the effect of adopting Justice Powell’s dissent in *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979); *see also California v. Sierra Club*, 451 U.S. 287, 301 (1981) (Rehnquist, J., joined by Stewart and Powell, JJ., concurring). Cases refusing to imply a cause of action to redress a statutory wrong include *Touche Ross*; *Universities Research Ass’n v. Coutu*, 450 U.S. 754 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981); *Sierra Club*; and *Thompson v. Thompson*, 484 U.S. 174 (1988).

where it is almost impossible to overcome.<sup>199</sup> It may create a presumption of liability or yield liability per se. The Supreme Court, however, purporting to defer to Congress, has made federal statutory wrongs *less* actionable than wrongs at common law. Does that sound like deference to the legislature?

This mindless, yet heavily politicized, debate over the legitimacy of an inevitable process of decision of cases is terribly damaging. Members of the Supreme Court candidly acknowledge the former legitimacy of judicial lawmaking now considered improper.<sup>200</sup> Lower courts, struggling to administer a growing backlog of environmental disasters, are engaged at this moment in an elemental but confused struggle with the prevailing myths, and the cases make horrendous reading. Think again of *Agent Orange*. There, on remand, the trial court, pressed to find ad- \*842 ministrable uniform law for an essentially federal case but forced to find law through examination of the choice-of-law rules of each of the states and territories, for each of a number of issues, and as against each of a number of defendants,<sup>201</sup> held, unconvincingly, that under any choice-of-law approach and for virtually all issues in the complex litigation, all states “would” choose rules of decision which would be nationwide in scope.<sup>202</sup> The court invented a source for these rules of decision, calling them “national consensus law.”<sup>203</sup> This, the court said, is federal law, albeit federal law inoperative of its own force. It is national law which “would be” incorporated by all states.<sup>204</sup> The solution may be “bold” and “imaginative,”<sup>205</sup> but is it candid?

For mass disaster cases clearly evoking issues of national policy concern, like *Agent Orange*, like the aviation disaster cases, and like the multistate environmental disaster

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199. This is the federal common-law position in admiralty. See *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873), which has survived *United States v. Reliable Transfer Co.*, 421 U.S. 97 (1975). *Reliable Transfer*, in ending the draconian admiralty rule of divided damages, has jettisoned much of the rest of collision law.

200. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., joined by Stewart, J., concurring).

201. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

202. *In re Agent Orange Prod. Liab. Litig.*, 580 F.Supp. 690, 711-13 (E.D.N.Y. 1984) (Weinstein, J.).

203. *In re Agent Orange Prod. Liab. Litig.*, 580 F.Supp. at 696, 711..

204. *Id.*

205. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987). After paying these compliments, the court added, drily,

[h]owever, in light of our prior holding that federal common law does not govern plaintiffs’ claims, every jurisdiction would be free to render its own choice-of-law decision, and common experience suggests that the intellectual power of Chief Judge Weinstein’s analysis alone would not be enough to prevent widespread disagreement.

cases—matters Congress has repeatedly addressed—the continued withholding of appropriate judicial federal lawmaking power is irresponsible. The demand for judicial restraint in fashioning federal common law on any federal question rests on an unrealistic appreciation of the nature of the judicial process, American legal realism and legal positivism, and the broad lines of empowerment that characterize American federalism.

#### **(10) SEPARATION OF POWERS**

If the notion of separation of powers has any expression in the Constitution of the United States other than in the separation of its first three articles, it is in the language on “cases” and “controversies” in the judicial article, article III. Federal judges (and, as a practical matter, state judges) do not enjoy any roving commission to “legislate.” Rather, they sit to hear disputes, and decide them, issue by issue, one at a time.

The view of judges as “activist” cannot, with any understanding of judicial process, be other than paranoiac if it encompasses a vision of judges somehow reaching out to “legislate” on a topic of interest only to themselves. Courts take the cases assigned to them, within jurisdictions defined by interpreted legislation and constitutional provisions, and deal for the most part with issues raised by the parties.

The perception of “judicial lawmaking” is nearer the mark when a \*843 particular decision or decisions has been “molar” rather than “molecular.” That perception is more likely when a decision has opened up a new theory of liability, or overruled a long-settled rule. But, again, judicial activism in this sense is no special disease of judges administering federal, as opposed to state, common law.

The sudden expansions of common-law understandings that produced such now-discredited law as the fellow-servant rule<sup>206</sup> and such controversial decisions as *Illinois v. Milwaukee*<sup>207</sup> and *Roe v. Wade*<sup>208</sup> will often outrage observers. Those who regret these larger common-law events may attempt, for example, to impose sanctions on lawyers for raising novel legal theories. But there is real consensus that any restraint upon advocates or judges which effectively would have blocked the raising and decision of *MacPherson v. Buick Motor Co.*<sup>209</sup> or *Brown v. Board of Education*<sup>210</sup> should be unacceptable.

The criticism a court evokes when it reaches beyond the narrow issue strictly before it to lay down rules for future cases is also understandable; it is in cases like *Miranda v.*

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206. *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass (4 Met.) 49 (1842); cf. L. FRIEDMAN, *supra* note 94, at 262 (“infamous”).

207. 406 U.S. 91 (1972); *see supra* notes 159-62 and accompanying text.

208. 410 U.S. 113 (1973).

209. 217 N.Y. 382, 111 N.E. 1050 (1916).

210. 347 U.S. 483 (1954).

*Arizona*<sup>211</sup> and *Roe v. Wade*<sup>212</sup> to take federal-law examples, or *Neumeier v. Kuehner*<sup>213</sup> or *Kilberg v. Eastern Airlines*,<sup>214</sup> to take state-law ones, in which judges operate in their most “legislative” mode. Here, too, however, there would seem to be no special impropriety of federal, as opposed to state, common law. Although you and I may not much like this rulemaking by dictum, this practice, too, has its defenders. Why, they ask, ought the high courts to refrain from giving guidance for the future to the bench and bar? The alternative model would be that of Justice Harlan in the *Moragne* case.<sup>215</sup> There, in effect, the Supreme Court created a nonstatutory wrongful death “act” for certain maritime cases. Rather than outline the elements \*843 of and defenses to the new action, Justice Harlan was content to await these questions as they would be posed, one by one, in future cases as they should arise.<sup>216</sup>

Finally, no one doubts that congress has the power of revision when the Supreme Court acts in these “legislative” modes. Even when the Court creates a wholly new cause of action, or rules in other quasi-legislative ways, on violations of statute, national policy, or even the Constitution, there is ample power of oversight by the legislature.<sup>217</sup>

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211. *Miranda v. Arizona*, 384 U.S. 436 (1966) (setting forth detailed procedure required during custodial interrogation, going beyond issues raised by case).

212. 410 U.S. 113 (1973) (setting forth three separate zones of state power over fetus depending on particular “trimester” of pregnancy at time of state’s attempted regulation).

213. 31 N.Y.2d 121, 286 N.E.2d 526, 335 N.Y.S.2d 64 (1972) (formulating set of three rules for all future cases involving guest statutes; only the third applied to the case before the court).

214. 9 N.Y.2d 34, 172 N.E. 2d 526, 211 N.Y.S.2d 133 (1961) (opinion chiefly devoted to guiding choice of law for tort count to be tried on remand; only contract count was before the court, as was held unavailable).

215. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (creating the first nonstatutory action for wrongful death). Because wrongful death had always been statutory, and because wrongful death acts typically contain highly “legislative” materials, including a schedule of statutory beneficiaries, a period of limitations, and limitations or recovery, it was clear that matters generally thought unsuitable for judicial lawmaking would nevertheless require judicial lawmaking under *Moragne*.

216. *Id.*, at 408.

217. For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), the Court fashioned a new federal common-law defense, with “constitutional underpinnings,” in light of national policy. Congress made a partial revision of the defense in the Hickenlooper Amendment, 22 U.S.C. § 2370(e). No one doubts the power of Congress to revise the custodial interrogation “code” devised by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). The new cause of action that was afforded to remedy violations of the constitution in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was held unavailable where Congress

These reflections leave untouched a lingering concern that even if, as appears, courts must make law, at least courts ought not to act more than incrementally. If they are allowed to do so, in this view, their doing so should be confined to a few narrow exceptions.<sup>218</sup> The argument is that legislatures are politically accountable in ways that courts are not.<sup>219</sup>

This objection surely proves too much. We have a judicial branch precise because the legislature is not accountable enough. The traditional view is that it is the courts that protect minority, or unpopular, interests from excesses of majority will. The antimajoritarian feature of courts is part of their reason for being. I would argue further that courts also advance the current majority will against the will of vanished majorities or against the will of narrow, passionate, well-funded minorities.

Courts sit, in part, to make legislation less arbitrary, unfair, or partial. Courts surely need not wait for legislatures to perform the characteristic judicial function of rationalizing the law.<sup>220</sup> Although the Supreme Court waited precisely 100 years from enactment of the Civil Rights Act,<sup>221</sup> and ten years from the renaissance of the Civil Rights Act by the Warren Court,<sup>222</sup> before fashioning a similar remedy that would \*845 lie against federal officials, the rationalizing pressure for *Bivens*<sup>223</sup> required the response the Court eventually provided; we need not look for subsequent symptoms of Congressional ratification to tell us that *Bivens* was correctly decided.

The pressure for federal common law for aviation torts and environmental disasters presents special complexities. Broad but disuniform legislative tort reform, coupled with widespread abandonment of uniform choice-of-law rules, has rendered nightmarish the problem of rational administration of these cases. The difficulty is compounded by

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had provided a comprehensive alternative remedial scheme. See *Bush v. Lucas*, 462 U.S. 367 (1983).

218. For the argument that tolerance of judicial lawmaking power in the exceptional areas undermines the orthodox taboo against judicial lawmaking in every other area of national interest, see Smith, *supra* note 2, at 605.

219. Merrill, *supra* note 2, at 27 (if taken seriously, this argument means that “federal courts are limited to interpreting federal texts (initially understood as a search for the specific intentions of the enacting body) and to fashioning their own procedural...rules....”).

220. See *supra* note 193 and accompanying text; *infra* note 228. This view is shared by Aleinikoff, *supra* note 168, at 35, 65.

221. Civil Rights Act of 1871, R.S. § 1979, today at 42 U.S.C. § 1983 (1982).

222. *Monroe v. Pape*, 365 U.S. 167 (1961).

223. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). If state officials are liable for their constitutional torts under § 1983, *supra* note 221, and federal officials are not so liable, the Bill of Rights would be stood on its head.

complex federal choice-of-law rules<sup>224</sup> and hurdles to class treatment<sup>225</sup> that impede mass adjudication. Yet Congress appears to be at a permanent impasse when it comes to federalizing these cases.<sup>226</sup>

If Congress is in gridlock, must that disable the Supreme Court from rationalizing mass disaster litigation? The inaction of Congress in the face of so much proposed legislation says very little about national policy, save that powerful minorities are likely to be aligned on each side. Unlike legislatures, courts can attempt to strike policy balances on a case-by-case basis, feeling their way toward lines of responsive authority. At the very least, if there are substantive policy reasons why federal governance should continue to be withheld from these problems, the Court should air them. This cannot be done with incantations about the limited jurisdiction of federal courts.

I do not think we can be helped much by the revelations of the public choice theorists and the economists.<sup>227</sup> It is not news that there is logrolling, and that there are other questionable influences on legislative voting patterns.<sup>228</sup> We now know that the

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224. For consolidated and transferred cases in federal courts, the federal common law of choice of law makes the mass disaster virtually unadministrable. *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (in state-law case transferred under 28 U.S.C. § 1404(a) on motion of defendant, federal transferee court must apply whole law of transferor court, including its choice rules) is generally applied in most transfer situations. Judge Weinstein, in *Agent Orange*, felt bound by *Van Dusen*. *In re Agent Orange Prod. Liab. Litig.*, 580 F.Supp. 690 (E.D.N.Y. 1984). The practical effect on the big consolidated litigation is to require an individual choice of law under the separate choice of law approach of each transferor forum, for each issue in the case. Similarly, for the class suit in both sets of courts, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) requires application of the law (and perhaps the choice-of-law approach) of each concerned jurisdiction, on each issue in the case.

225. The general understanding is that mass tort cases are unsuitable for class certification. See, e.g., *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 (D.N.H. 1983); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875 (D.S.D. 1982) (DES litigation). but see *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying a class).

226. See, e.g., S. 666, S. 688, 100th Cong., 1st Sess. (1987); S. 2760, 99th Cong., 2d Sess. (1986).

227. See generally *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

228. Judge Posner, I think, is unduly pessimistic about the effect of interest groups upon legislation. See Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982). His view is that all statutes influenced by such groups are irrational, because they are in furtherance only of private, rather than public, interest, and therefore all such statutes must “flunk” minimal rational-basis scrutiny. It is not news that the clash of private interests informs legislative politics. It does not follow, however, that courts ought not to perform their characteristic function of reading the law purposively, to discover public policy, and to rationalize its

electorate cannot always \*846 reach decisions which represent its actual preferences, and that legislators cannot always do so either.<sup>229</sup> But neither can our appellate courts.<sup>230</sup> Nothing in that exasperating knowledge implies that there is anything to be gained for the American polity by denying to courts their power to consider national policy in cases raising issues of national policy. On the contrary, we must take our institutions as the Constitution has given them to us. We can look, as we traditionally have looked, to the ongoing processes of the common law, over the long haul, to provide some sounder footings for treading what, admittedly, will always be rough paths.

### (11) LEGISLATIVE INTENT

Legislation can express the will only of a majority that once existed—a majority that from the day it acted began to recede from us. In this sense, the living common law is likely to be more closely in touch with the current political will than is the dead hand of an old code.<sup>231</sup> That is one of the reasons the question of interpretation arises.

So, even apart from the contributions of the public choice theorists, it would be counterproductive, as well as unidirectional and reductionist, to treat the common law in every case as a function to some actual, original legislative intent. From what has been said thus far, it ought to be seen that the current push toward rigid originalism is

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implementation. Indeed, his description of the legislative process supports the view that adjudication is an indispensable rationalizing component of the legal system.

229. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2-3 (2d ed. 1963). Professor Arrow showed that when complex choices must be made, majorities cannot always achieve their actual preferences. Assuming three legislators (A, B, and C) and three possible choices (I, II, and III), and that the voters vote their preferences between pairs of choices in a series of votes, the outcome will be “majority cycling.” The “transitivity” of individual preference (legislator A preferring, for example, I to II and II to III) cannot be maintained. Other writers have shown that other factors, including the ordering of the votes, and legislative dealing and logrolling, will also affect the already arbitrary outcomes. The consequence is to render original intention substantially meaningless for statutory interpretation. Standard purposive reasoning, while deriving what support it can from originalist inquiry, is more clearly understood as essentially objective and teleological.

230. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (Supreme Court voting, assuming complex choices and “peaked” preferences, will produce the endless cycling and lack of transitivity noted by K. Arrow, *supra* note 229). See Eskridge, *Politics without Romance: Implications of Public choice Theory for Statutory Interpretation*, Symposium, *supra* note 227, at 275, 277-78 (“[P]ublic choice theory has explored the...dysfunctions of legislatures.... To contribute meaningfully to legal theories of statutory interpretation, public choice would have to provide us with insights about the comparative competence of courts to make law....”).

231. See generally G. CALABRESI, *supra* note 165.

misguided.<sup>232</sup> \*847 American judicial reasoning is characteristically purposive, teleological, and objective.<sup>233</sup> It has not, typically, involved a naive search for the actual intention of some long-vanished majority. Nor has it been plagued by the formalism, the text-bound, rule-bound literalism, of much English adjudication. Formalistic methods can yield, whatever their other consequences, little benefit to representational democracy.

As Professor Calabresi has recently argued,<sup>234</sup> what is needed is a way unburdening ourselves of increasingly obsolete legislation, not a way of using it to cripple the living common law. The purposive reasoning of the “legal process” school<sup>235</sup> remains the standard model, despite the indeterminacy of original intent, precisely because it washes out those problems of originalism. It relies on reason. Purposive reasoning remains the best approach we have to reconciling the legacy of the past with the life of the law. There is really nothing new in the insight that “positive” law has not application beyond its current policy support. As it diverges from that support, law becomes increasingly arbitrary and irrational. It will be construed narrowly, it will be construed away, or finally either disregarded or found unconstitutional.

Originalism and formalism, lacking the reconciling and creative features of purposive reasoning, are fundamentally at odds with adjudication. When arguments for strict originalism are most powerfully made, but made with candor, we find its more sophisticated proponents fully aware that it means the death of judicial lawmaking power.

Thus, in *Thompson v. Thompson*,<sup>236</sup> decided in the 1988-89 term, Justice Scalia wrote separately to argue that actual legislative intent should newly be introduced to determine the right to sue for injury caused by violation of a federal statute.<sup>237</sup> Justice Scalia went on, with candor, to suggest that his proposed “actual intent” test would not do the whole job he wanted done, and to advocate instead the abandonment of even a reserve

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232. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring); see also Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (text as evidence of actual intention); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.05 (4th ed. 1984) (objective evaluation of original intention had the issue then arisen). But see generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

233. Helpful current discussion may be found in Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). For the classic realist view of purposive reasoning, see Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457 (1924); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

234. See generally G. CALABRESI, *supra* note 165.

235. H. HART & A. SACKS, *THE LEGAL PROCESS* (tend. ed. 1958).

236. 484 U.S. 174 (1988).

237. *Id.* at 188-91 (Scalia, J., concurring in the judgment).



of power to fashion at common law a remedy for violation of an act of Congress.<sup>238</sup> Although Justice O'Connor said that she agreed with Justice Scalia's proposal on "actual intent" (she was the only \*848 member of the Court who did),<sup>239</sup> she did not, in fact, join an any part of his opinion. One can speculate that she wanted to distance herself from this further proposal. Justice Scalia wrote for himself alone. No other member of the Court was willing to own to a respect for Congress so perverse as to incapacitate the Court from enforcing an act of Congress unless unequivocally so instructed.

## (12) THE NEW POLITICS

The debate over federal common law has always been, and remains, a highly politicized one.<sup>240</sup> It cannot have escaped the reader's notice that the politics of federal common law recently have switched again. We may have developed our views reacting to Warren Court judicial lawmaking. But, in the latest term of the Supreme Court, we can enjoy the irony of reading an opinion by the liberal Justice Brennan impugning the legitimacy of federal common law,<sup>241</sup> and an opinion by the conservative Justice Scalia creating a broad federal common-law defense.<sup>242</sup>

The line of scrimmage today, perhaps, is not on the question of the legitimacy of federal common law generally, but rather on its legitimacy when used to fashion *claims* rather than *defenses*. This almost painfully political argument can be heard working itself out in faculty lounges all over the country. The newly cognizable remedy is thought to be one of those big leaps of the common law—the "molar" rather than "molecular" motion—which is under a cloud. This is as opposed to the new defense, which is perceived as "mere."

But it seems to me plausible, however counterintuitive, that a new claim, although never innocuous, is *less* intrusive than a new defense. Federal claims are typically supplementary; a federal claim is characteristically pleaded in the alternative, joined in a complaint with analogous state law counts. But a new federal defense necessarily supersedes state law. What is nullified, moreover, is not a "mere" state defense, but underlying state rights.

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238 *Id.* at 191 (Scalia, J., concurring in the judgment).

239 *Id.* at 188 (O'Connor, J., concurring in part and concurring in the judgment).

240 *See supra* Part 5, "The History, Continued: What Went Wrong?," note 129 and accompanying text; *see generally* Jay I and Jay II, *supra* note 2.

241 *Boyle v. United Technologies Corp.*, 108 S.Ct. 2510, 2519 (1988) (Brennan, J., dissenting).

242 *Id.*, at 2510 (Scalia, J.).

Thus, in *Boyle v. United Technologies Corp.*,<sup>243</sup> decided in the last days of this past term of the Court, Justice Scalia devoted much of his opinion for the Court to justifying the fact that the Court's newly minted defense for federal contractors in products liability cases would "preempt" state tort law. Pre-emption, in this somewhat inaccurate use of the word, would occur to the extent state law imposed a duty on manufacturers to produce military material that would not hurt our own military personnel. Federal law, under the rule in *Boyle*, imposes only a duty \*849 to comply with reasonably clear government specifications, and to warn of risks unknown to the government. Many states have imposed strict liability for defectively designed products like the failed escape-hatch device that caused the plaintiff's decedent in *Boyle* to drown in his helicopter cockpit. But the new federal defense trumps all strict products liability, when the product in question was made to the specifications of the federal government. Liability for government contractors, under *Boyle*, can occur only upon a showing of fault.

Justice Scalia offered a very limited analysis in *Boyle*. He spent much of his space explaining why this was a federal question, and why the federal answer would displace state law to the contrary. But he wrote as though that holding—that it was a federal question whether there should be a defense for government contractors—automatically was a holding that there should be such a defense. He gave very little attention to the conflicting national policy concerns raised by the substantive legal issues. He also seemed determined to speak of new federal common law in terms of displacement of state law—an analytically separate issue.

Indeed, Justice Scalia suggested, as a limiting principle, that federal common law is legitimate *only* if it displaces. This, after all, is the teaching—erroneous, as we have seen—of the *Wallis* case.<sup>244</sup> But the new preemptive defense in *Boyle* obviously intrudes upon state-created rights in a way that supplementary new federal claim could not. Even a pre-emptive new federal claim would operate as a defense to a state claim only while substituting another remedy for it. Thus, the die-hard liberal, previously committed to the propriety of federal common law, might, with Justice Brennan, begin to think that perhaps this was the occasion for deference to Congress after all. Indeed, although several circuit courts had adopted a federal contractors' defense, Congress had notably failed to act on recent proposals for a statutory federal contractors' defense.<sup>245</sup>

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243 *Id.*

244 *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (conflict with state law is precondition for fashioning federal common law); *see supra* notes 139-42 and accompanying text.

245 *See Boyle*, 108 S. Ct. at 2517, for cases recognizing some form of the defense. Bills rejecting some form of the defense include H.R. 4765, 99th Cong., 2d Sess. (1986);

A somewhat different problem is presented by the federal common law of federal judicial impotence, with which this essay began. The Supreme Court has been fashioning a vast body of jurisprudence on this. Here I refer not only to the judicial federal lawmaking impotence with which we have been primarily concerned here, but also the various judge-made doctrines of federal abstention, as well as less formal constraints, all increasingly apparent in our time.<sup>246</sup> These doctrines are impugned \*850 as—among other critiques<sup>247</sup>—illegitimate judge-made law, which nullify acts of Congress to the extent they apply.<sup>248</sup>

Here, the harm done may seem lesser or greater depending upon one's view of the ability of state courts to take up the tasks the Supreme Court would devolve upon them.<sup>249</sup> I want to make a fresh point. If one is going to criticize these sorts of rulings, it ought to be on some such ground as that they complicate the administration of national policy, or so limit litigation options as to narrow substantive rights.<sup>250</sup> But to deny the legitimacy of these doctrines *because they are fashioned at common law*, it seems to me, is to substitute a nonissue for all that is really at stake.

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S. 2441, 99th Cong., 2d Sess. (1986); *see also* H.R. 2378, 100th Cong., 1st Sess (1987); H.R. 1504, 97th Cong., 1st Sess. (1981); H.R. 5351, 96th Cong., 1st Sess. (1979)

246 The door-closing cases of the Burger Court era are too well-known and, in any event, too numerous for citation here. Among the less noted or more recent constraints upon federal adjudication, note should be taken of amended Rule 11 of the Federal Rule 11 of the Federal Rules, FED. R. CIV. P. 11; of late Supreme Court jurisprudence approving a broader role for summary judgment in federal litigation, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); cases taking a restrictive view of the availability and amount of statutory attorneys' fees, *e.g.*, *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) (plurality opinion; no upward adjustment in fee for contingency), *but see Riverside v. Rivera*, 477 U.S. 561 (1986) (fee disproportionate to damages is permissible); Supreme Court approval in *Piper Aircraft Co. v. Reyno*, 452 U.S. 235 (1981) of forum non conveniens dismissals in international cases against American companies; and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), making class actions less administrable in both sets of courts. *See infra* note 250.

247 *See generally* Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

248 *See generally* Redish, *supra* note 9.

249 On the ability of state courts to take on federal judicial business, *see* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *see also* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Gibbons, *Federal Law and the State Courts 1790-1860*, 36 RUTGERS L. REV. 404 (1984); and the interchange in 36 UCLA L. REV. 233 (1988) (articles by Professors Chemerinsky and Redish).

250 *See* Weinberg, *Federal Courts: Forum for Public Interest Litigation*, in FEDERAL COURTS: PRESENT ROLE AND FUTURE PERSPECTIVE (forthcoming); Weinberg, *A New Judicial Federalism?*, 107 DAEDALUS 129 (1978); Weinberg, *supra* note 247.

Conservatives previously opposed to judicial federal lawmaking may become quite comfortable with judicial federal defense-making like that in *Boyle*, just as they are with the huge and growing body of federal common law limiting access to federal courts. These days federal common law is not something particularly wanted by plaintiffs. Today's federal common law tends to be a common law of begrudged remedies and generous defenses. Events that have overtaken the judicial vindication of national civil rights policy, or national antitrust policy, are today mirrored even in admiralty.<sup>251</sup> A new, youthful, defendant-oriented judiciary is having its impact.

The instrumentalism of the liberals of the Sixties is giving way to the instrumentalism of these new arrivals. Who knows? We may wind up having a crisis of cognitive dissonance over federal common law. There will be those whose dislike of federal common law will outweigh their conservative instrumentalism. There will be those whose liberalism will prompt them to argue that federal common law is, indeed, illegitimate. \*851 Or we can—at least—at last—begin to see rationalized and legitimized judicial federal lawmaking power.

I would contend there is room in the middle for some progress. The pragmatic, if liberal, rationalist can agree with the committed, if formalistic, conservative that Justice Harlan's way in his famous *Moragne* opinion<sup>252</sup> is the better path of the law: the way of integrity in forthright decision, but also the way of narrow holdings, crafted to cover the question for decision, relinquishing for another day, and the gathering of experience, the question not immediately presented. In this craftsmanly way, Holmes' "molar" and "molecular" do not attach to "claims" and "defenses," but to "broadness" and "narrowness" of ruling.

This moral can be carried to Congress. If Congress seeks to ease the path to federalization of an issue, let Congress assure the courts that there is jurisdiction and that the rules of decision are to be uniform federal ones, where uniformity is needed for either substantive or administrative reasons. But only political impasse or policy error is to be achieved by loading such enabling and rationalizing legislation with whatever is on the shopping lists of either the tort reformers or the trial bar.

#### **CONCLUSION: TWO CHEERS FOR THE FEDERAL COMMON LAW**

Having come this far, we can see the extent to which the supposed illegitimacy of federal common law has been a nonissue, or has masked real issues. The moral for American courts is plain.

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251 For an intriguing debate on the new conservatism in admiralty, see the several opinions in *The Testbank*, 752 F.2d 1019 (5th Cir. 1985).

252. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (creating action at common law for wrongful death). See *supra* notes 215-16 and accompanying text.

If a federal common-law remedy is withheld, let it be because carefully considered national substantive policy is, on balance, thought to be better served; not because federal courts are courts of limited jurisdiction, and it is for Congress to strike policy balances. If a federal common-law claim is fashioned, let it be because carefully considered national substantive policy is, on balance, thought to be better served; not because there are “enclaves” of federal common law, in areas of unique federal policy concern. If a federal common-law defense is created, displacing state rights,<sup>253</sup> let it be because carefully considered national substantive policy is, on balance, thought to be better served; not because the new rule is “merely” defensive, or because displacement of state rights is permissible in a few narrow areas of unique federal policy concern.

Whatever the political climate of the day, American courts, state \*852 and federal, have, over time, proven themselves uniquely thoughtful expositors of evolving policy. With reason, policy analysis, and a careful focus upon the question for decision, the hope, if not faith, is that our courts can get on with their jobs, using fully, when the national interest is invoked, the persuasive and resolving power of the common law.

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["Of Sovereignty and Union: The Legends of Alden \[Annual Federal Courts Issue\],"](#) 76 NOTRE DAME LAW REVIEW 1113 (2001).

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253. Standardized rules for answering the question: “Who shall govern?” have functioned, in the past, rather notoriously, for concealing the true grounds of decision of cases. See Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 487 (1924) (“as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of...policy....”). The policy questions remain unargued and unconsidered; bench and bar lose the ability to identify current policy; and the legislature loses its powers of revision and control.

["The Article III Box: The Power of 'Congress' to Attack the 'Jurisdiction' of 'Federal Courts'"](#) [Symposium: Restructuring Federal Courts]," 78 TEXAS LAW REVIEW 1405 (2000).

["Choosing Law and Giving Justice"](#) [Symposium: Tribute to Symeon C. Symeonides]," 60 LOUISIANA LAW REVIEW 1361 (2000).

["Fear and Federalism"](#) [annual constitutional law symposium]," 23 OHIO NORTHERN UNIVERSITY LAW REVIEW 1295 (1997).

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