

UNLIKELY BEGINNINGS OF MODERN CONSTITUTIONAL THOUGHT*

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ABSTRACT

This paper notes an intellectual transformation occurring in relatively obscure cases in the New Deal Court. Among other things, these cases prefigure the advent of Carolene Products and the tiered scrutiny characteristic of modern rights-based constitutional litigation. At a deeper level, these cases mark a revolution in constitutional analysis with resonance for our present structural understandings of national power, state power, and the workings of American federalism.

I. INTRODUCTION

Carolene Products, with its Footnote Four,¹ is surely one of the great revolutionary achievements of the New Deal Court.² The case formalized that part of the New Deal settlement which was the particular concern of the Roosevelt administration, and to which the Supreme

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** Holder of the Bates Chair and Professor of Law, the University of Texas School of Law. I am building here on Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631 (2005); Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295 (1997); Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 B.Y.U. L. REV. 731 (1995); Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743 (1992); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the propriety of heightened scrutiny of laws violating rights specifically enumerated or discriminating against discrete and insular minorities disadvantaged in the political process). Today, rather than referring to specifically enumerated rights, we might refer more generally to “fundamental rights”; and instead of focusing on discrete groups we might refer instead to “inherently suspect classifications.”

² See, e.g., Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J. L. & SOC. POL’Y 87, 87 (2010) (“[T]he Hughes Court] announced a significant—some say revolutionary—new understanding of judicial review This new view . . . virtually unleashed Congress and the President to regulate, and the Court all but guaranteed it would sanction economic policies and programs . . .”).

Court had only just begun to accede³—a new judicial acquiescence in the will of Congress. By extension, *Carolene Products*' presumption of constitutionality would be afforded state as well as federal laws.

This in itself was a political and prudential revolution. Beyond this, with Footnote Four *Carolene Products* gave us, in essence, the method of constitutional analysis peculiarly associated with the rights-based constitutional litigation of our time—tiered scrutiny. And Footnote Four presciently recognized that the protections of the Bill of Rights would work as against the states as well as the nation.⁴ More fundamentally, *Carolene Products* was an example and an affirmation of a transformation in our understandings of *governance*—of the power of Congress, the power of the states, and of the workings of American federalism.

I made mention just now of “constitutional analysis.” By this I mean something different from “constitutional interpretation.” Constitutional *interpretation* focuses on the Constitution itself and its meaning for particular cases. It seeks to determine whether a litigant has a substantive prima facie right to challenge as unconstitutional some government act or law. The great academic debate in the aftermath of *Roe v. Wade*⁵ between “interpretivists” and “non-interpretivists”⁶ was about the legitimacy of rights not enumerated in the Constitution. The larger debate has long been about the seriousness with which to take constitutional text, given any established text's linguistic, temporal, and imaginative limits.

Constitutional *analysis*, on the other hand, as used here, focuses not on the Constitution and its meanings, but rather on the govern-

3 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (sustaining a state minimum wage law for women and minors against a *Lochner*-like due process challenge: “In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. . . . But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process . . .”).

4 *Carolene Products*, 304 U.S. at 152 & n.4. Today except for the Third Amendment protection against having to quarter soldiers, the Fifth Amendment right to indictment by grand jury, and the Seventh Amendment right to trial by jury in civil cases worth more than twenty dollars, the Bill of Rights is substantially “incorporated” into the Due Process Clause of the Fourteenth Amendment.

5 410 U.S. 113 (1973).

6 For some indication of the range of views, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Raoul Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1 (1986); Martin H. Redish, *Interpretivism and the Judicial Role in a Constitutional Democracy: Seeking an Alternative to Originalism*, 19 HARV. J. L. & PUB. POL'Y 525 (1996); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

ment act or law under constitutional challenge. It seeks to determine whether the challenged act or law is justifiable. This sort of analysis is the subject not so much of academic debate as it is of litigation, and the litigated question, to begin with, has to do with the appropriate level of judicial scrutiny to be afforded the thing challenged.

This paper deals with a transformation in constitutional analysis that preceded and led up to *Carolene Products*, a transformation arguably wrought by the Supreme Court in the 1930s in certain unlikely cases. *Carolene Products*, with its Footnote Four, was surely the beginning of the end of pre-modern constitutional thought. But it was also the end of the beginnings. These beginnings are what concern us here.

II. EARLIER INTIMATIONS

Particularly germane to our story was the early elevation of *rationality*, that bright guerdon of the common law, to constitutional status under the Due Process Clause of the Fifth Amendment. In the Supreme Court, the most prominent early example of the “substantive” use of due process to control unreasonable law—law that is arbitrary and irrational no matter what procedures might be employed in bringing it to bear—is probably *Dred Scott*.⁷ *Dred Scott* held, in pertinent part, that Congress could not, consistent with due process, strip a slaveowner of slave “property” brought with him to sojourn in a territory of the United States, merely by designating that territory as free territory. And Congress could not strip a slaveowner of *liberty* to travel into that territory with his “property.”⁸ Chief Justice Taney wrote:

And an act of Congress, which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.⁹

Although there was no majority for this rationale, this was the key argument in *Dred Scott* insofar as the case operated to strike down the Missouri Compromise of 1820, as it had stood at the time relevant to Scott’s sojourn in a free territory.¹⁰

⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁸ *Id.* at 450.

⁹ *Id.*

¹⁰ The Missouri Compromise, ch. 22, 3 Stat. 545 (1820), had been effectively repealed subsequent to Scott’s sojourn in territory north of the Missouri Compromise line, at least for Kansas and Nebraska Territories, with the Kansas-Nebraska Act, ch. 59, 10 Stat. 277, § 32 (1854), providing for voter choice between slave-state or free-state status in territories

In the bare-bones understanding of substantive due process seen in *Dred Scott's* unadorned references to liberty and property, it does not seem to matter whether the deprivation is accompanied by, or is described as, a violation of some further more specific fundamental right.¹¹ In contrast, today, when substantive due process protects “liberty,” the expectation seems to be that a particular liberty will be identified. Even in Chief Justice Taney’s reference to liberty, *Dred Scott* can be read to imply an unenumerated right to travel interstate without penalty or forfeiture.¹² There is also an implicit dimension of equal protection in this. The slaveowner is seen as deserving rights equal to the rights of those who travel into free territory without having to suffer a forfeiture of property. Justice Catron concurred in the *Dred Scott* judgment in part on this ground.¹³

Today, claims of deprivation of liberty under the bare Due Process Clause—that is, without the further pleading of a violation of some more specific fundamental right—are likely to be perceived, at most, as a challenge to the minimum rationality of a law or an official act.¹⁴ Often such claims are perceived instead as “procedural.” It is axiomatic that the most obvious and effectual check on arbitrary governance lies in regular proceedings in a court of law, upon notice and hearing—Magna Carta’s “law of the land.”¹⁵ But a characterization of

north of the old Missouri Compromise line. The predictable sequel was the little civil war in “Bleeding Kansas.” See Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 878 (2011); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 113 (2007); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 44 (2000).

- 11 Compare *Dred Scott*, 60 U.S. at 450 (finding, inter alia, a deprivation of slave property by mere action of federal territorial law), with *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (finding a deprivation of liberty in a statute interfering, inter alia, with the right of parents to control the rearing of their young).
- 12 Today, the right to travel is properly located in the Privileges and Immunities Clause of the Fourteenth Amendment. See *Saenz v. Roe*, 526 U.S. 489, 500–03 (1999).
- 13 *Dred Scott*, 60 U.S. at 527 (Catron, J., concurring).
- 14 See *Kelo v. City of New London*, 545 U.S. 465, 503 (2005) (O’Connor J., dissenting) (“[T]he Due Process Clause . . . already prohibits irrational government action.” (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005))); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan J., concurring) (“While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.”); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (referring to the substantive protections of the Due Process Clause against “all arbitrary impositions and purposeless restraints”).
- 15 See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (1833) (“The [Due Process Clause of the Fifth Amendment] is but an enlargement of the language of magna carta, *nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terrae*, neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that these lat-

law as “procedural” invites inquiry into the adequacy of pre-deprivation notice and hearing,¹⁶ or of some post-deprivation remedy, the existence of which can bar a constitutional claim.¹⁷

Claims of deprivation of *property* are also commonly perceived as “procedural,” and it may be argued in bar that adequate notice and hearing were furnished before the deprivation, or that some adequate remedy was available afterward, if not now.¹⁸

These are basic understandings that inform our interpretation of the protections afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments.

Constitutional *analysis*, on the other hand, involves a direct appeal to reason rather than to preexisting understandings. The reasoning involved can be quite powerful. When reason is brought to bear upon a question of the constitutionality of some law, it becomes evident that law can govern only those people, things, or events within the scope of its purposes. For this reason, purposive reasoning and rationality in law go hand in hand. In *McCulloch v. Maryland*,¹⁹ Chief Justice Marshall spelled this out as a connection between means and ends, in line with the thinking of Alexander Hamilton.²⁰ Marshall explained that Congress has intrinsic authority, within extrinsic con-

ter words, *per legem terrae* (by the law of the land) mean by due process of law . . .” (referring to 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1642)). There Coke refers to an act of Parliament, 37 E. 3. cap. 8, as equating “the law of the land” with “due process of law.”

16 See, e.g., *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (sustaining a bare due process claim of deprivation of liberty where the plaintiff was committed to an institution without an adequate pre-deprivation hearing).

17 See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983) (holding that a comprehensive administrative remedial scheme bars a First Amendment claim by a federal employee); *Paul v. Davis*, 424 U.S. 693 (1976) (holding that the availability of a remedy under state libel law bars a civil rights claim against local officials for posting “mug shot” notices describing the plaintiff as an “active shoplifter”).

18 See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O’Connor, J., concurring) (“[I]n challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate. . . . When adequate remedies are provided and followed, no . . . deprivation of property without due process can result.”).

19 17 U.S. (4 Wheat.) 316, 421 (1819).

20 Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 100–01 (Harold Coffin Syrett ed., 1965) (“[I]t is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage.”); THE FEDERALIST Nos. 19, 33 (Alexander Hamilton).

stitutional limits, to employ all means needful to achieve the legitimate ends of government.²¹

We see this matching up of means with ends today in the judicial distrust of laws or programs seen to be “overbroad” or too “sweeping.”²² Overbroad law, sweeping too much into its orbit, can penalize or restrain innocent conduct. On the other hand, a law or program might be held “underinclusive.”²³ A law that does not cover all the cases within the scope of its apparent purposes suggests that it is pretextual, possibly discriminatory, targeted against a specific class of persons for no legitimate reason. In other words, law must be “narrowly tailored”;²⁴ it must be “proportional” and “congruent” to a violation of clearly established law, fashioned to fit the pattern of known violations.²⁵ For similar reasons, a challenged law is sometimes held to be overly restrictive in the face of less restrictive alternatives that can accomplish the law’s purposes.

Although narrow tailoring is associated with strict scrutiny,²⁶ it would seem that lawyers will necessarily raise actual mismatches of means to ends in attacking the asserted rational bases of law. The response to such an attack has sometimes been to point out that, since the law in question does have “some rational basis,” inquiry should be at an end.²⁷ But this disregardful quality of extreme minimal scrutiny renders it unpersuasive. The broad tendency has been for rational-basis scrutiny to have considerable “bite.”²⁸

21 *McCulloch*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

22 For a prominent example, see *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act on grounds of overbreadth).

23 See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (striking down an ordinance prohibiting cross burning in part on the ground that the ordinance did not protect all victims of hate speech, but only those on a list).

24 *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (noting that “[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden”).

25 *Boerne*, 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”); *id.* at 531 (failing to find “some widespread pattern of religious discrimination in this country”).

26 *Id.* at 546–47 (O’Connor, J., dissenting).

27 See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

28 See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (coining this usage).

Purposive reasoning also necessarily implies an uncomplicated, bare due process right to non-arbitrary law. A law or official act that is purposeless is arbitrary and irrational, and cannot be due process.²⁹

Challenges to arbitrary *enforcements* of law are challenges to official action, and thus can sound in equal protection. But these can also be dealt with as a matter of due process; law that is discriminatory is not due process.³⁰

Arbitrary *choices* or *applications* of law can seem to be abstracted from the substantive content of the law to be chosen or applied,³¹ and thus off the merits. Moreover, choices and applications of law are part of the judicial function. For these reasons, the *choosing* of law, although outcome determinative, can be characterized as “procedural” as well as substantive, much as statutes of limitation, for example, are characterized either way.³²

The choosing of law joins other off-merits “procedural” concerns in another strand of relevant prehistory. One of the earliest if not the highest uses of the Due Process Clause of the Fourteenth Amendment of 1868 was *Pennoyer v. Neff*,³³ in which the Supreme Court limited a state court’s power to assert personal jurisdiction extraterritorially. The idea that it cannot be due process for a state without physical contact with a defendant to adjudicate that defendant’s case is not without resonance for the substantive freedom of travel with which *Dred Scott’s* Fifth Amendment due process was enmeshed.³⁴ The problem of extraterritorial jurisdiction also has resonance for the “dormant” Commerce Clause, the concept which, since *Gibbons v.*

²⁹ See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (referring to the substantive protection provided by the Due Process Clause against all “arbitrary impositions and purposeless restraints”).

³⁰ Cf. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (striking down de jure segregation in Washington, D.C. under an anti-discrimination principle implicit in the Due Process Clause of the Fifth Amendment). *Bolling* can be read as a reverse-incorporation of the Equal Protection Clause of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment.

³¹ But see generally, e.g., Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924) (advancing the legal-realist argument that choices of law, if rational, are not simply procedural, but depend upon the substantive merits of the respective laws as applied in the particular case, and therefore that choices of law cannot be neutral, uniform, or predictable).

³² See *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (permitting the forum to apply its own limitations period because the limitation of actions is traditionally considered “procedural” and therefore within the province of the forum).

³³ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

³⁴ See *supra* notes 7–9 and accompanying text.

Ogden,³⁵ has limited state power to affect the commerce of sister states.

In this paper, we will be looking at a different aspect of the problem of territorial overreach that troubled the Court in *Pennoyer v. Neff*. Territorial overreach obviously can occur not only when a state asserts jurisdiction to adjudicate, but also when it asserts jurisdiction to govern by its laws—its legislative jurisdiction.³⁶ As one writer has quipped, the salient question for a person in fear of being hanged is not so much *where*, as *whether*.³⁷ The immediate pre-history of modern constitutional analysis has to do with this latter question of territorially overreaching *governance*.

A related strand of constitutional prehistory emerges in the antebellum period, and increasingly preoccupies the Court, reaching its apogee in the Gilded Age struggle over the regulation of enterprise. A main effort of the Court throughout was to define the nature of regulatory power. As part of this effort, the Court also sought to distinguish state from federal power. These powers, until the 1930s, were thought to have been set down on *lists*. State regulatory authority could be found on a list developed in case law, a list of powers encompassed within the “police power” of a state. In the Supreme Court, the “police power” appears as early as Chief Justice Marshall’s opinion in *Cohens v. Virginia*,³⁸ referring to the “internal police” of a city. It appears importantly in *New York v. Miln*,³⁹ as the Court sought to mark the imagined line between the commerce power of the nation and the police power of the state.⁴⁰ The police power figures importantly also in Justice Miller’s disastrous opinion in *The Slaughterhouse Cases*.⁴¹ By the turn of the twentieth century the police power

³⁵ 22 U.S. (9 Wheat.) 1 (1824).

³⁶ For a current holding rejecting extraterritorial United States governance in transnational federal litigation, see *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (holding, in a case against American as well as foreign defendants, that the Securities and Exchange Act, and the federal common-law action under Rule 10b-5 for fraud in the purchase and sale of securities, do not apply to extraterritorial transactions on foreign exchanges).

³⁷ Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) (“To believe that a defendant’s contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.”).

³⁸ 19 U.S. (6 Wheat.) 264, 444 (1821).

³⁹ 36 U.S. (11 Pet.) 102, 131 (1837).

⁴⁰ See, e.g., *In re Rahrer*, 140 U.S. 545 (1891).

⁴¹ 83 U.S. (16 Wall.) 36, 62 (1873) (stripping, in effect, the Fourteenth Amendment’s Privileges and Immunities Clause of content by holding that that clause protects only the rights of national citizenship, rights already protected against state abridgment in large part by the Supremacy Clause, and that these rights did not include the Bill of Rights, except for a limited right to assemble). Yet the Privileges and Immunities Clause was the

was a familiar list of approved *areas of state authority*, including the safety, health, morals, and general welfare of persons within a state's borders.⁴² These were matters courts still speak of as "traditionally" for the states.⁴³ But it was also held that the states were powerless to act upon matters not included in the customary list.⁴⁴

The notion that the authority of a state to govern could be found on a list of "police powers" may have received some impetus from the analogous constitutional doctrine of enumerated powers,⁴⁵ the conviction that the power of the United States is strictly confined to the powers of the respective branches of government as specifically enumerated in the Constitution. In the decades surrounding the turn of the last century, Congress was not infrequently held to have exceeded its delegated powers. But because the states could be held as powerless to legislate *within* the Constitution's explicit delegations to Congress as Congress was to legislate *beyond* them,⁴⁶ whole swathes of the

natural repository of the fundamental rights of individuals against local government. In consequence, the Supreme Court over time has had to lodge substantive fundamental but unenumerated rights in the Due Process Clauses, notwithstanding the literally "procedural" character of due process. The Court treats such rights as components of the "liberty" the Due Process Clauses acknowledge.

42 See, e.g., *Adair v. United States*, 208 U.S. 161, 173 (1908) ("There are, however, certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed 'police powers,' the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.").

43 See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2623 (2012) (Ginsburg, J., dissenting) ("Congress [is] unable to regulate non-economic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law." (citing *United States v. Morrison*, 529 U.S. 598, 617–19 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995))).

44 See *Lochner v. New York*, 198 U.S. 45, 56–57, 64 (1905) (striking down a maximum ten-hour day for bakers on the ground that the law was not a health law, which would have been within the state's police power, but a labor law, which was not). The earlier view was that until Congress chooses to act, the state retains power. Cf. *The License Cases*, 46 U.S. (5 How.) 504, 586 (1847) (stating that, in the silence of Congress, a state retains power to enact its own laws within its own territory "according to the policy which the State may suppose to be its interest or duty to pursue").

45 Accord Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010). For the view that the Due Process Clause of the Fifth Amendment provides clearer thinking about federal jurisdiction than the enumerations in Article III, see generally Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"*, 78 TEX. L. REV. 1405 (2000).

46 Even in the absence of any significant conflict with federal law, even when the power of Congress is implied rather than express, state voices may be silenced completely via the doctrine of "complete preemption," also termed "field preemption." See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (holding that a federal common law of admiralty, although there was no such law for the case, preempts state law); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (Harlan, J.) (holding, inter alia, that the foreign re-

national economy could fall between the cracks, leaving large areas of interstate commerce in constitutional limbo, unregulable altogether.⁴⁷ Worse, the enumerated lists did not work very well when it came to supplying answers to questions about governance. The commerce power, still the focus of so much litigation, *is* enumerated. Its constitutional existence simply poses the problem. Categorical reasoning, so seemingly sound, by a perverse alchemy was transmuting power into powerlessness, and governance into lawlessness. To be sure, the antithesis of this anomaly, unbounded government power, would have been at least as condign.⁴⁸

Perhaps to guard against the anomaly of matters beyond the regulatory reach of either state or nation, there has long existed a related but conveniently flexible doctrine of *inherent power*.⁴⁹ The attraction of inherent power is its pragmatic capitulation to the reality that sometimes governance is necessary. Since the power of governing must sometimes be exercised beyond existing enumerations, it is useful to hold it implied—when possible, from analogous sources.⁵⁰ Even had American federalism not presented as difficult a task of line-drawing as it had, it would have been impractical to confine gov-

lations law of the United States even preempts the application of non-conflicting state law; and observing that “our conclusions might well be the same whether we dealt with this problem as one of state law or federal law. However, we are constrained to make it clear that an issue concerned with . . . ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”)

47 In 1905, in *Lochner*, 198 U.S. at 53–57, the Court struck down a state law regulating the conditions of labor for local bakers on the ground that the regulation of labor was not within the police power of a state, since such regulation would interfere with the liberty of contract; yet in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court also held that Congress lacked power to regulate the interstate shipment of products of child and female labor.

48 Fearing unbounded government power, the Court struck down much of the early New Deal, unfortunately throwing out the baby with the bathwater. *Cf.* *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down provisions of the National Industrial Recovery Act (“NIRA”). This legislation and the regulatory codes thereunder undoubtedly were overreaching and intrusive, but also included salutary wage and hours provisions.

49 *Cf.*, *e.g.*, *Sabbatino*, 376 U.S. at 423–27 (holding the foreign relations of the United States to be “inherently, “uniquely,” and “traditionally” federal); *Kansas v. Colorado*, 206 U.S. 46, 89 (1907) (discussing the inherent power of a state).

50 *See, e.g., Sabbatino*, 376 U.S. at 423–27 (implying federal judicial lawmaking power from the “constitutional underpinnings” of the national power over foreign relations; and fashioning a federal-common law “act of state” defense); *Jensen*, 244 U.S. at 212, 214–15, 216–17 (implying lawmaking power in Congress from the Article III grant of judicial power over all cases of admiralty and maritime jurisdiction; implying federal judicial common-law power from the same jurisdictional grant and from the implied power of Congress; and preempting the entire field for national governance).

ernance, federal or state, to predetermined lists. Inherent power, then, is a useful escape from the tyranny of enumeration.

There were others. If the enterprise to be regulated was “affected with a public interest,” the regulation might be sustained.⁵¹ This category of “affectation with a public interest” collapsed in the *Nebbia* case in 1934⁵² with the belated recognition that all lawmaking is about matters affected with a public interest. Nevertheless, “the public interest,” at that time simply an abandoned escape route, was in actuality, as we shall see, a lighted path to the future.

In the 1930s there was another very similar escape route in the air, of much earlier vintage, but even more influential than “affectation with a public interest.” I refer to the notion that a state’s own “public policy” should prevail over another state’s otherwise applicable law.⁵³ This concept of a public policy exception to otherwise applicable law had first emerged conspicuously in the antebellum period. Antebellum northern judges increasingly refused to recognize southern “property” rights in slaves, and instead applied their own state’s public policy, often on the theory that sojourning on free land made a man free.⁵⁴ Southern judges, on the same theory, might also give “sojourners” the benefit of a rule of liberty—the doctrine of “Once free and always free.”⁵⁵ But in the late antebellum period, southern judges seeking to protect the South’s peculiar institution of slavery, began to refuse, on grounds of public policy, to free a slave under the other-

51 *Munn v. Illinois*, 94 U.S. 113, 126 (1877). On the demise of the “affected with a public interest” doctrine, see generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 66–83 (1998), and HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 54–55, 150–51, 175–76 (1993).

52 *Nebbia v. New York*, 291 U.S. 502 (1934) (holding that a state may regulate the price of milk without interference from the courts).

53 See generally RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS (1934) (providing explicit public policy exceptions to its otherwise rigid choice rules throughout).

54 See, e.g., *Case of Williams*, 29 F. Cas. 1334, 1341 (E.D. Pa. 1839) (No. 17709) (attempting to weigh the claims of humanity as against the rights of property; ultimately ruling against rendition of an alleged fugitive slave); *Lemmon v. People*, 20 N.Y. 562, 564, 615, 632 (1860) (extending, on public policy grounds, the rule freeing “sojourners” in a free state to slaves merely in transit there).

55 See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560 (1856) (McLean, J., dissenting) (“In . . . *Spencer v. Negro Dennis* . . . the court say: ‘Once free, and always free, is the maxim of Maryland law upon the subject . . .’” (internal citations omitted)); *Griffith v. Fanny*, 21 Va. (Gilmer) 143 (1820) (holding that removal of a slave to a free state with the consent of the master frees the slave); *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 479 (1820) (same). See generally PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981); ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975); Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1337–42 (1997).

wise applicable law of a free state. The most famous judicial rejection of applicable free-state law on the grounds of public policy was the Missouri high court's *volte face* in the first *Dred Scott* litigation. There, the court below, applying the liberating laws of the free state of Illinois and of the free United States territory in which Scott had "sojourned," held Scott to be a free man.⁵⁶ But Missouri's high court, unexpectedly overturning its own precedents, reversed, darkly warning that "a fell spirit" was overtaking the northern states, and concluding that, in the circumstances, it would be best for Missouri to go its own way.⁵⁷

In the 1930s, these several strands of intellectual prehistory would meet, clash, and resolve in a handful of workaday cases in the Supreme Court of the United States. These unnoticed cases quietly introduced a kind of thinking that the Court would eventually embrace on a grand scale—the mode of constitutional analysis that can be seen crystallizing in *Carolene Products* and Footnote Four. In a related development in the same period, constraints on the power of Congress, thought to be implicit in the limits of Article I, would be substantially modified by a return to an understanding of government authority more in line with Chief Justice Marshall's opinion in *McCulloch v. Maryland*, with its Hamiltonian framework of necessary and proper "means" to legitimate "ends."⁵⁸ The chief actors in this drama were Justice Brandeis and Justice [not yet Chief Justice] Stone. We cannot say that these men were conscious of the intellectual framework they were building. But once the structural components are made plain, the modernist edifice built upon them takes on a character of strength.

To the extent that we can say anything that is fairly general, roughly true, and somewhat useful about the emergence of *Carolene Products* and of modernized constitutional analysis, it has its unlikely beginnings mostly in the 1930s, in the Hughes Court, in a few quotidian judicial opinions in a very different field. These key cases, all but

56 *Scott v. Emerson*, 15 Mo. 576, 586 (1852) (reversing the trial court, which had followed the rule of liberty, "Once free, always free").

57 *Id.* ("Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.").

58 *See supra* notes 20–21 and accompanying text.

unknown to constitutional generalists today,⁵⁹ were in the field of *the conflict of laws*.

In an early article, having glimpsed the connection, I thought to explain the Court's modern choice-of-law cases by attempting to assimilate them to what I presumed was preexisting constitutional theory.⁶⁰ I would have been closer to the mark had I attempted to assimilate the Court's modern constitutional cases to preexisting choice-of-law theory.

III. A FIRE IN MEXICO

In the 1930 case of *Home Insurance Co. v. Dick*,⁶¹ the Supreme Court held that Texas could not constitutionally expand the liability of out-of-state reinsurers on an out-of-state insurance policy. The result was unsurprising, quite in line with the Court's existing jurisprudence. Similar quotidian cases had already gone the same way, on seemingly similar thinking.⁶² The opinion of the Court in *Dick* was unanimous—

⁵⁹ Sanford Levinson commented on the initial draft of this paper that I might be “on to something extremely interesting and important,” remarking that constitutional “mavens” do not read the conflicts cases. Email from Sanford Levinson to author (Sept. 27, 2011, 9:59 PM) (by permission). The “unlikely” role of the conflicts cases in the intellectual history of constitutional law, much less conflicts law, is underscored by the fact that I have not been able to find among the prominent current biographies of Justice Brandeis, the author of the foundational case, *see infra* Part III, one that mentions that case, although the case is, at a minimum, the wellspring of modern constitutional control of state choices of law. *See, e.g.*, MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (2009) (making no mention of the case); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000) (same); PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (1993) (same). All are excellent works.

⁶⁰ Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

⁶¹ 281 U.S. 397 (1930).

⁶² *Cf.* *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 550–51 (1925) (reversing judgment for the insured; holding that “full faith and credit” requires the forum to subordinate its law and policy, regardless of its contacts with a case, to the law of the place chartering the insurer); *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922) (holding that “the Constitution and the first principles of legal thinking” allow the law of the place of contracting to govern the validity and consequences of contracts, but that the place of contracting was really the forum state); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376–77 (1918) (holding, on the authority of the *Head* case, *infra*, that the forum could not constitutionally impair the rights of an out-of-state creditor on an out-of-state contract, notwithstanding that, as a result, a policy of insurance would be forfeited, contrary to forum state law); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161–62 (1914) (holding the same, under the Due Process Clause and its protection for the liberty of contract); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 593 (1897) (holding under the Due Process Clause that a state may not interfere with the liberty of a sister-state contract). *See generally* E. Merrick Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926).

apparently a foregone conclusion. But the case could also be read as following a line of unattractive authority under the Due Process Clause. In *Dick*, just as in *Dred Scott*, progressive law was held to have arbitrarily deprived persons of property. At least two earlier cases, long before *Lochner*,⁶³ had even viewed progressive economic regulations as deprivations of *liberty*—the Lochnerian “liberty of contract.”⁶⁴ Yet, notwithstanding the awfulness of a provenance that combined *Dred Scott* with *Lochner*, experts in the field of conflict of laws commonly consider the *Dick* case the foundation of modern choice-of-law method.⁶⁵

Dick arose when a boat burned in Mexico. By the way, this may be the only hard fact in the case. By the time *Dick* reached the Supreme Court, the facts as stated in Justice Brandeis’s opinion were substantially, well, notional.⁶⁶ But the important thing is what Justice Brandeis *thought* he was deciding.

The facts as the Supreme Court saw them were these: The owner of the boat, a tug, was a Mexican company. The Mexican company had insured against the risk of fire, purchasing the policy in Mexico from a Mexican insurer. After the tug burned, the company failed to notify the insurer of its claim on the policy within the time allowed. Under both the Mexican insurance policy and Mexican law, the time allowed was one year. The Mexican insurer therefore refused to pay. The Mexican company thereupon assigned its claim to its employee, C. J. Dick, who hailed from Texas. Dick could file suit, naturally enough, at home in Texas. And under Texas law, Dick’s suit was

⁶³ *Lochner v. New York*, 198 U.S. 45, 56–57, 64 (1905) (striking down a maximum ten-hour day sixty-hour week for bakers as an interference with the “liberty of contract” of both employer and employee protected by the Due Process Clause).

⁶⁴ See, e.g., *Head*, 234 U.S. at 161 (describing this liberty as “freedom of contract”); *Allgeyer*, 165 U.S. at 589 (“[T]he term [liberty] is deemed to embrace the right of the citizen . . . to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.”).

⁶⁵ For current examples, see Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1554 & n.174 (2011); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1076 (2009); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1632 (2005). For the early influential broad reading of the case, see Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 188, 211–14 (1963).

⁶⁶ See Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37 (1998). I suspect that entropy of this sort, a familiar phenomenon in information theory, dogs a good many cases as they deteriorate their way up the appellate ladder.

timely. Texas law gave insureds a two-year window in which to make a notice of claim on a policy, anything in the policy to the contrary notwithstanding.

In Texas, service of process could not be had against the Mexican insurer, but Dick proceeded against two New York reinsurers instead, creatively garnishing a “debt” the reinsurers would owe the insurance company should Dick prevail in his suit. Readers might reasonably conclude from these “facts”⁶⁷ that the Mexican company was funding Dick’s litigation, and that it had made a sham assignment of its claim to Dick, its employee, precisely because it had been unable to make the insurer pay up in Mexico, and was hoping it could prevail, through Dick, under Texas law, in a Texas court.

None of this is true, but even as the Justices saw the case, it must have seemed a lawsuit on stilts. Neither party before the court was the real party in interest, and neither party had any relevant connection with Texas. The defendant garnishees had no connection with the state in which they were sued. And even the Texan, Dick, was seen by the Court as residing at all relevant times in Mexico. Furthermore, neither the tug nor the fire, nor, for that matter, the policy, had any connection with Texas.

The Texas courts had seen the case in a very different light. They had all come to the aid of their domiciliary, C. J. Dick.⁶⁸ As required by Texas law, the Texas courts had applied Texas law to trump the time limit in the foreign insurance policy. After all, a Texas resident filing a notice of claim on a policy of insurance within two years was within the class the Texas legislation was intended to protect from more restrictive provisions in insurance policies, anything in those policies to the contrary notwithstanding.

The United States Supreme Court, by Justice Brandeis, reversed this judgment, ruling in favor of the reinsurers. Summoning up the

⁶⁷ See Rensberger, *Who Was Dick?*, *supra* note 66, at 68–72. Rensberger points out that at all relevant times Dick was a bona fide resident of Texas. See also Transcript of Record at 26–27, *Home Ins. Co. v. Dick*, 281 U.S. 397 (No. 232). Furthermore, according to Professor Rensberger, the boat was a launch, not a tug, and Dick was its legal owner, not an assignee. Dick’s title was subject to the interests of a pair of intervenors—and also of the seller of the vessel, who was demanding the balance of the purchase price. There was another unpaid creditor who had installed an engine. I note a whiff of possible arson in the case. One senses in the record a growing financial desperation on Dick’s part. See Transcript of Record, *supra*, at 12–14.

⁶⁸ The Texas trial court put some meat on the bones of the case, appointing a lawyer for the absent insurer, and permitting the absentee to implead the reinsurers. Rensberger, *Who Was Dick?*, *supra* note 66. Judgment against the garnishees was affirmed by a Texas intermediate appellate court, 8 S.W.2d 354 (Tex. Civ. App. 1928), and by the state’s supreme court, 15 S.W.2d 1028 (Tex. Comm’n App. 1929).

Due Process Clause of the Fourteenth Amendment, the Court declared unconstitutional Texas's enforcement of its own law in its own courts.⁶⁹ Had the Texas court violated the Due Process Clause, as expounded in *Lochner*? That is, had the Texas court interfered with the liberty of contract? This was the central federal question raised in the brief for the garnishees in the United States Supreme Court.⁷⁰ The garnishees did not cite *Lochner* itself, however. And although *Dick* was a due process case, it does not rely on *Lochner*. These facts seemingly support Barry Cushman's view that *Lochner* was a fading memory by the early 1930s.⁷¹ But *Lochnerism* was not.

Nor was the result a matter of full faith and credit to the laws of the place of contracting, a theory that had seduced the Court on a previous occasion.⁷² The Full Faith and Credit Clause and its implementing statute, properly understood, apply only to judgments, not laws.⁷³ And they apply only to *state* judgments. They have no application to foreign law.

The Supreme Court did not strike down the Texas law, nor did it validate the restrictive time limit in the insurance policy, nor did it require deference to Mexican law. Rather, the Court struck down the Texas trial court's garnishment of the contingent debt owed to the insurer by the New York reinsurers.⁷⁴ Yet this was not, strictly speaking, a ruling about jurisdiction. Justice Brandeis reasoned, rather, that the supposed "debt" of the reinsurers had been garnished on the basis of an expansion of liability (an expansion of a year beyond the year contracted for), thus depriving the garnishees of property without due process of law.⁷⁵

Stated baldly in this way, the holding may strike you as nonsense. Of course Texas has authority, as an original matter, to expand the liability of out-of-state reinsurers. That is the sort of thing laws protective of home folks do. And of course Texas had authority to try the case against the reinsurers on the assumption that there was a

⁶⁹ *Dick*, 281 U.S. at 407–08.

⁷⁰ Brief for Appellant and Petition for Certiorari, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (No. 232); Rensberger, *Who Was Dick?*, *supra* note 66, at 64.

⁷¹ See Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 983 & n.562 (2005) (arguing that by the close of the 1930s, *Lochner* was not being cited even in *Lochner*-sorts of cases).

⁷² *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376–77 (1918).

⁷³ Cf. *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935); U.S. CONST. art. IV, § 1; Act of 1790, today codified at 28 U.S.C. § 1738. See *infra* notes 119–20 and accompanying text.

⁷⁴ *Dick*, 281 U.S. at 410.

⁷⁵ *Id.* at 407.

debt in Texas to be garnished. But in the Supreme Court's view, Texas, though the home state of the beneficiary's assignee, with presumed *quasi-in-rem* jurisdiction over the defendants, nevertheless *had nothing to do with the case*. In the Court's view, it was the choice of Texas law that had been arbitrary and unreasonable. This was not because Texas law expanded the liability of the reinsurers beyond what they had undertaken in a sacrosanct contract.⁷⁶ Rather, Texas law had expanded their liability *for no reason*.

That a state court could not constitutionally apply its own law in a case like *Dick* is hardly self-evident today. All state judges are sworn to uphold and enforce "their own" constitutions and laws, subject of course to the laws and Constitution of the United States. Under classic conflicts rules, notice-of-claim statutes, like statutes of limitation, are "procedural" in the sense that they are unconnected to the merits of a case, and the forum may always apply its own procedural law, including its own time limits.⁷⁷ To the extent that a purpose of limitation of actions is to bar stale claims, the forum may always apply its own period of limitations at least to bar a claim.⁷⁸ Even in applying a longer period of limitations to *open* the door to an otherwise expired claim, Texas had conformed to practices not uncommon even in our time, when it applied law duly enacted by its own legislature to effectuate *quasi-in-rem* jurisdiction over a defendant debtor, at the instance of its own citizen, on the basis of alleged property in the state. Recognition of the protective power of the state vis-à-vis its residents, even those whose residence is acquired after the transaction or occurrence under litigation, is quite in line (contrary to the Court's po-

⁷⁶ *Id.* at 411. For *Lochner*-like such cases before and after *Lochner*, see *infra* note 92.

⁷⁷ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–28 (1988) (holding that the forum may always apply its own period of limitations because the choice of forum law on that issue is traditional); *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990) (holding that a transferred federal case retains the limitations period of the shopped-for transferor forum, even when the transfer is on the plaintiff's motion).

⁷⁸ A similar concern about stale claims is seen in notice-of-claim statutes such as the statute in question in *Dick*. These function in part to ensure that witnesses' recollections are fresh. This purpose is not well served by opening the forum with a longer period of limitations to a claim barred at the plaintiff's residence or at the place of transaction or occurrence. Nevertheless the Supreme Court has supported a plaintiff's shopping for a long statute of limitations at a forum without connection with a case beyond its jurisdiction over the defendant. See *Ferens*, 494 U.S. at 531–32; cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1988). A successful floor amendment to § 142 offered by the author made an "exceptional circumstances" loophole in this Section available to the forum seeking to apply its own longer statute as well as the forum seeking to apply a sister state's longer statute. See Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 705–06 & n.135 (1991).

sition in *Dick*), with the 1981 case of *Allstate Insurance Co. v. Hague*.⁷⁹ *Hague* is good authority, although it will always annoy some writers. The *Hague* Court sustained a choice of the law of the after-acquired residence of the plaintiff, and imposed liability upon an out-of-state insurer who was relying on the law of the state where all relevant events had occurred, and which had been, at the time of the events in suit, the joint residence of the parties.

Worse, justice did not necessarily triumph in *Dick*.⁸⁰ Had anything in this action been able to bind the insurers, the Court might have been said to have bestowed a windfall on the reinsurers. The Court's holding, in effect, validated—in a contract of adhesion, as between parties of unequal bargaining power—a boilerplate clause that was illegal at the forum, where the forum was the assignee's home state. The law in question was reasonable public policy,⁸¹ and the resident assignee was within the scope of the law's protections.

Indeed, we might find Justice Brandeis's authorship of *Dick* surprising in any event, from a political point of view.⁸² Brandeis was "the people's lawyer," the author of the banking exposé, *Other People's Money*,⁸³ a noted progressive in both the Taft and Hughes Courts,⁸⁴ and the originator of Massachusetts' affordable savings bank life insurance. Brandeis had criticized oppressive provisions in insurance policies,⁸⁵ and had described the insurance industry as "the greatest economic menace of today."⁸⁶

It is also surprising that, in putting his shoulder to this unappealing wheel, Brandeis should have relied on the Due Process Clause.

79 449 U.S. 302, 312–13 (1981).

80 It should be noted that, notwithstanding *Dick*'s defeat in the Supreme Court, there was a settlement thereafter. Rensberger, *supra* note 66, at 68 n.220.

81 Cf. Weinberg, *Theory Wars*, *supra* note 65, at 1651 nn. 49–51 and accompanying text.

82 Note also the surprising authorship of *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376–77 (1918) (McReynolds, J.) (reversing judgment for the insurance company in a case on facts similar to those in *Dick*). Perhaps McReynolds' authorship here was like Brandeis's in *Dick*, a vote for or against *Lochner*. McReynolds' even more puzzling authorship of *Meyer v. Nebraska* is explored in Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 137 (2011) (published 2012).

83 LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1933).

84 I do not see as illiberal Brandeis's participation in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548–51 (1935) (striking down regulations under the National Industrial Recovery Act as intrusive and unenforceable). Unfortunately the *Schechter* Court also struck down a right to organize and a minimum wage. *Id.* Nevertheless it is possible to see the Act as corporate statism, influenced by fascism's supposed domestic achievements in Germany.

85 See, e.g., Louis D. Brandeis, *Wage Earners' Life Insurance*, COLLIER'S: THE NAT'L WEEKLY, Sept. 15, 1906, at 16.

86 For discussion of Brandeis's ideas, see generally *supra* note 59.

Brandeis was no fan of what we call “Lochnerism.” He disliked substantive due process when deployed as a protection of economic rights. Brandeis’s celebrated dissent in *New State Ice Co. v. Liebmann*⁸⁷ can be read as a dissent from Lochnerism. There, he was urging that the states be allowed to serve as laboratories for experiment, on the very thinking that their regulatory efforts offend no substantive due process liberty.

To be sure, *Lochner* had received a bit of a boost in the much-admired early civil rights case, *Meyer v. Nebraska*,⁸⁸ and Justice Brandeis had joined in Justice McReynolds’ opinion for the *Meyer* Court—although Justice Holmes, significantly, had not.⁸⁹ *Meyer*’s substantive due process holding, like *Lochner*’s, was about liberty.⁹⁰ Brandeis would not have liked relying on *Lochner*’s “liberty of contract,” whether or not *Lochner* were mentioned by name. *Lochner* had struck down a progressive labor law limiting the working hours of bakers. The right to transact doubtless exists, but it does not compel the striking down of laws regulating the conditions of labor. Brandeis himself had argued the landmark “Laundresses Case”⁹¹ in the Supreme Court, a working-hours case important to anti-*Lochner* developments of that time. However, it does seem probable that, in *Dick*, the Justices were assuming they would use the Due Process Clause to frustrate the state’s attempt to interfere with the obligation of contract, as the Court had done and would do again.⁹²

How, then, in view of all these contra-indications, can we explain Justice Brandeis’s authorship of *Dick*? Is it just possible that Brandeis was using the occasion to change the conversation?⁹³ In *Dick*, Brandeis breathed new life into the Due Process Clause in one of due process’s oldest functions—in protection of *reason*. Law in courts must, above all, be reasonable, in its choice and application as well as its substance. Just as law must not be arbitrary or irrational, so also it must not be applied in an arbitrary or irrational manner, and so also

87 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

88 262 U.S. 290 (1923).

89 Holmes’ dissent in *Meyer*, in which Justice Sutherland joined, is noted in *Meyer*, 285 U.S. at 403, but appears in the companion case of *Bartels v. Iowa*, 262 U.S. 404, 412–13 (1923).

90 For a darker view of *Meyer* suggested by McReynolds’ authorship of it, see Weinberg, *The McReynolds Mystery*, *supra* note 82.

91 *Muller v. Oregon*, 208 U.S. 412, 415–16 (1908).

92 *See, e.g.*, *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149 (1914) (after *Lochner*); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 593 (1897) (before *Lochner*).

93 *Dick*, 281 U.S. at 411 (“The garnishees contend that the . . . Texas law . . . violates the contract clause. Since we hold that the Texas statute, as construed and applied, violates the due process clause, we have no occasion to consider this contention.”).

it must not be *chosen* arbitrarily or irrationally. State law, when applied, must be that of a *relevant* state.⁹⁴

True, even on the Court's understanding of the facts, the named plaintiff in *Dick* was a Texan. Justice Brandeis nevertheless hammered home his own view of the case, insisting that despite Dick's allegation of residence in Texas, Texas was *irrelevant*:

[I]n the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made.⁹⁵

But what of public policy? It was classic choice-of-law jurisprudence at the time, as we have seen, that a state could avoid an otherwise applicable sister-state law if such a law was against the forum's own public policy. Public policy offered an escape from the yoke of rigid choice-of-law formulae. In *Dick*, Brandeis acknowledged this jurisprudence.⁹⁶ But application of the public policy, however admirable, of *an irrelevant state* could not be due process.

Brandeis put an accommodating gloss on the novelty of what he had done, seeming to embrace previous like cases, although previous like cases had been decided on theories that were unappealing to him. He cloaked the doctrinal past with the general proposition that the Court had always been "agreed that a state is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."⁹⁷ But, in effect, Brandeis was using due process to transfer the requirement of reasonableness

94 I should mention the problem of the "unprovided" case, noted by Brainerd Currie, in which neither concerned state would have an interest in the application of its law. See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), in CURRIE, *SELECTED ESSAYS*, *supra* note 65, at 128, 152-53. The classic "unprovided" case would be one in which the defendant's home state would protect the plaintiff who did not reside there, and the plaintiff's home state would shield the defendant who did not reside there. In this situation Currie thought the law of the forum the only clearly constitutional choice. Presumably he meant that the parties, at least, were before the court seeking judgment, the defendant was within its jurisdiction, and the forum has a residual justice-administering interest.

95 *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930).

96 *Id.* at 410.

97 *Id.* at 408 & n.5.

from the constitutional cases on extraterritorial *adjudicatory* jurisdiction⁹⁸ to the more fundamental problem of extraterritorial *legislative* jurisdiction.

Prior to *Dick*, the inquiry had been wholly formulaic. Under state law, the question had been, “Where is the place of contracting? Where is the place of performance?” Under Supreme Court jurisprudence, depending on how a case was argued, the inquiry had been, “Is the state law asserted extraterritorially? Does it interfere with interstate commerce? Does it impair the obligation of contract? Does it impair the traditional power of the place of contracting?” To these inquiries, after *Dick*, courts would begin to add the question whether the law applied was that of a *relevant* state.⁹⁹ As the Court was to put this fifty years later in the *Hague* case on due process in choice of law: “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”¹⁰⁰

We are looking at the dawn of *interest analysis* in the intellectual history of the law of conflict of laws. *Dick* is most usefully read today as Brainerd Currie, a founder of interest analysis, read it.¹⁰¹ This is also the way Justice Brennan would read it in his due process opinion for the plurality in *Hague*.¹⁰² Today we read *Dick* for the proposition that a state *without a legitimate governmental interest* in governing cannot

⁹⁸ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁹⁹ *Dick* was more or less followed in a case on substantially similar facts. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934), *reh’g denied*, 292 U.S. 607 (1934). But *Delta & Pine* superimposes upon *Dick* an obviously wrong and unworkable plaintiff-disfavoring message that was rejected by the Supreme Court in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 n.11 (1981) (Brennan, J., plurality opinion) (characterizing *Delta & Pine*’s over-reading of *Dick* as denying a state power to favor its own resident plaintiffs, but explaining that *Delta & Pine* “has scant relevance for today”). But see the astonishing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 426 (2003) (disingenuously citing *Hague* for its opposite in this regard, while holding, in aid of a floundering international claims tribunal, that the thousands of Holocaust survivors living in California did not give the state sufficient interest to require disclosure of insurance benefits owing to them).

¹⁰⁰ *Hague*, 449 U.S. at 312–13; see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting and adopting the same language from *Hague*).

¹⁰¹ Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in CURRIE, *SELECTED ESSAYS*, *supra* note 65, at 188, 211–14 (1963). Currie’s assimilation of *Dick* to his own thinking no doubt has been a major factor in the case’s celebrity and its heightened significance in modern conflicts thinking.

¹⁰² *Hague*, 449 U.S. at 313.

constitutionally govern.¹⁰³ *Dick* holds, in effect, that, under the Due Process Clause, a state must have some meaningful connection with an issue before its courts can govern that issue.¹⁰⁴ Some party, event, transaction, or thing must relate the case in a significant way to the state that is to govern. Only significant connections can bring the matter to be governed within a state's sphere of legitimate interest, and only further analysis can determine whether, even so, the state has a specific interest in having its law apply to the particular issue in the particular case on its particular facts.

This was a stunning intellectual advance at that time. If we are looking for Justice Brandeis's reasons for the otherwise inexplicable *Dick*, they are here. With the inconspicuous introduction of this thinking, so unobtrusive as to win the entire concurrence of the *Lochner*-era Supreme Court, it may not, perhaps, be too much of an overstatement to say that Justice Brandeis opened a path toward an understanding of the very powers of governance in a federal union. We have some support for this view in the fact that he seems to have brought the same understanding to bear in his opinion in *Erie Railroad Co. v. Tompkins*.¹⁰⁵

The proposition that *Dick* embodies is a crucial one, not only in itself, but even more importantly, for its corollary. For if a state without a legitimate governmental interest may not govern, it would appear that a state *with* a legitimate governmental interest *may*.

IV. RUNNING WITH THE SALMON

The 1935 *Alaska Packers* case¹⁰⁶ was a commonplace dispute over workers' compensation. In that case, the Supreme Court held that a worker could collect California workers' compensation for a workplace injury suffered, not in California, but in Alaska.¹⁰⁷ Yet as every lawyer at the time would aver, the law of the place of injury was supposed to govern the tort.¹⁰⁸ (We try not to think this way now, but the rule was universal then.) California, however, was the place where

103 See, e.g., *Shutts*, 472 U.S. at 820 (holding in part that a state with insubstantial contacts with a case could not apply its own law to the rights of out-of-state class-members on leases of out-of-state gas fields (citing *Dick*)).

104 The modern issue-by-issue approach to a choice of law, in preference to a single choice to govern a whole case, is sometimes referred to as *dépeçage*.

105 304 U.S. 64 (1938). See also *infra* Part V.

106 *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532 (1935).

107 *Id.* at 550.

108 Cf. RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 378 (1934) ("The Law of the place of wrong determines whether a person has sustained a legal injury.").

the worker had been hired. As every lawyer at the time would also aver, the law of the place of contracting was supposed to govern the contract.¹⁰⁹ This latter characterization of the case as having to do with “contract” rather than “tort” was the characterization for which the worker argued, since he wanted California law, and this was the characterization the Supreme Court chose to adopt.¹¹⁰

The problem of characterization was only one of multiple difficulties the case presented. In those days, in cases characterized as sounding in contract, there was an important alternative to the law of the place of contracting. Courts sometimes saw fit to apply the law of the place of *performance* of a contract rather than the place of contracting.¹¹¹ And in this case, of course, Alaska, not California, was the place of performance.

To add insult to workplace injury, the Alaska workers’ compensation statute purported to be the sole and exclusive remedy for workplace injuries occurring in Alaska.¹¹² The California employment contract itself stipulated governance by the law of Alaska.¹¹³ As every lawyer even today would aver, choice-of-law clauses in contracts are likely to be enforceable.¹¹⁴ On the other hand, California’s workers’ compensation code provided that “No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act.”¹¹⁵

The employer raised four distinct arguments.¹¹⁶ First, the employer argued, without much conviction, that California should simply defer. Alaska was then a territory of the United States, and its compensation law was, after all, an act of Congress.¹¹⁷ But the employer properly refrained from relying on the Supremacy Clause. Alaska’s workers’ compensation law was domestic to Alaska Territory and was

109 RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 332 (1934).

110 *Alaska Packers*, 294 U.S. at 540–41 (“[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation and its sanctions are subject, in some measure to the legislative control of the state . . . the liability under workmen’s compensation acts is not for a tort.”).

111 *See, e.g.*, *Swift v. Clay*, 272 P. 170, 171 (Kan. 1928). The rule is codified in the RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 358 (1934).

112 *Alaska Packers*, 294 U.S. at 539.

113 *Id.* at 538.

114 *Cf.* U.C.C. § 2-101. For a discussion, *see, e.g.*, *Haynsworth v. Lloyds of London*, 121 F.3d 956, 962 (5th Cir. 1997).

115 *Alaska Packers*, 294 U.S. at 538.

116 *Cf.* Brief for Appellant at 5–8, *Alaska Packers*, 294 U.S. 532 (1935) (No. 465), 1935 WL 32531, at *5–*8.

117 *Id.* at *14.

not supreme “federal” law in any state. In his opinion for the Court, Justice Stone ignored the argument altogether.

Second, the employer pointed to the specter of double liability. Each of the two governments made its law exclusive. In such circumstances, the employer argued, California should have given full faith and credit to the law of Alaska, the place of injury and the place of performance of the contract—if only to avoid double liability.¹¹⁸ This assertion was doubtful on its face. The Full Faith and Credit Clause specifically refers to the acts, records, and proceedings of a *state*,¹¹⁹ and, again, Alaska was not a state. But Stone had bigger fish to fry vis-à-vis full faith and credit. For this purpose he was content to treat Alaska as if it *were* a state. It is not too much to say that in *Alaska Packers*, Justice Stone wrote the Full Faith and Credit Clause out of the Constitution, and its implementing statute out of the U.S. Code,¹²⁰ insofar as the conflict of laws was concerned. Although some lawyers have not understood this, full faith and credit is not given to laws, but is reserved exclusively for final judgments. It was *Alaska Packers* that made this plain. As Justice Stone explained,

A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.¹²¹

Third, the employer argued that due process required adherence to the stipulation for Alaska law in the agreement of the parties. The employer did not cite *Lochner*,¹²² and Justice Stone did not mention the *Lochner* link between due process “liberty” and the obligation of contract. As had Justice Brandeis in the *Dick* case, Stone saw the due process challenge as a claim of unreasonable deprivation of property.

The greater importance of *Alaska Packers* lies in Stone’s thought processes. In an early article on the conflict of laws,¹²³ Paul Freund, who had clerked for Stone, and whose student I was, offered an intriguing observation about Stone’s *Alaska Packers* opinion. Although Freund acknowledged that *Alaska Packers* was a constitutional case, it

118 *Id.* at *6.

119 U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

120 28 U.S.C. § 1738 ¶ 3 (“Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).

121 *Alaska Packers*, 294 U.S. at 547.

122 See Brief for Appellant, *supra* note 116.

123 Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

was “suggestive of an approach in conflicts cases generally.”¹²⁴ True, Stone had troubled, for the occasion, to characterize workers’ compensation cases as sounding in contract, and to reject a characterization of tort. Nevertheless, Freund pointed out that Stone had ultimately dealt with the case “not in terms of a classification in workmen’s compensation cases as tort or contract . . . but in terms of the interests of the respective states.”¹²⁵

Freund went on, “From the point of view of due process, the facts disclosed clearly enough the interest of California in providing a legislative remedy.”¹²⁶ With this remark, Freund was implicitly basing the constitutionality of a governmental action upon the existence of a governmental interest in taking that action. However, to us, California’s interests in the worker’s recovery may not seem as obvious as they had to Freund and Stone. We are not told whether Alaska’s compensation law, had it been available to Palma, the employee, would have been less generous to him than California’s. And Stone had to acknowledge that Palma was not a Californian. Rather, he was a migrant foreign worker,¹²⁷ hired for the salmon season.¹²⁸

Although California had no continuing interest in transitory workers like Palma, Stone pointed out that Palma might wind up *requiring public assistance* in California.¹²⁹ Thus California had an interest in protecting its fisc and protecting California taxpayers from liabilities which it was the California employer’s legal obligation to assume. Furthermore, the employer was required to assume liability for compensation under the laws of *both places*—as to this, there was

124 *Id.* at 1220.

125 *Id.* at 1221.

126 *Id.*

127 The surname is used in Spanish, Catalan, Portuguese, and Southern Italian families. *Cf. Family Facts for: Palma*, ANCESTRY.COM, <http://www.ancestry.com/facts/Palma-family-history.ashx> (last visited July 22, 2012).

128 The terms of Palma’s employment, Justice Stone pointed out, required him to return to California to claim his wages. Palma probably could not have found a way of claiming compensation from Alaska, as a practical matter, after his return to California. *Alaska Packers*, 294 U.S. at 542 (“The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation.”); Freund, *Chief Justice Stone*, *supra* note 123, at 1221. Stone, or perhaps Freund, who may have written the draft opinion, apparently believed that, had some way been found for these fishermen to return to Alaska, the testimony of co-workers would have been required when they applied for compensation there. *See Alaska Packers*, 294 U.S. at 542 (“It was necessary for them to return to California in order to receive their full wages . . . accompanied by their fellow workers, who would normally be the witnesses required to establish the fact of injury and its nature.”). I doubt this. Neither Stone nor Freund could have had practical familiarity with the workings of a workers’ compensation scheme.

129 *Alaska Packers*, 294 U.S. at 542.

no conflict. Stone thus explicitly found, foreshadowing his *Carolene Products* opinion, that it was sufficient for California governance that California had a “rational basis”¹³⁰ for awarding compensation to Palma under California law. The award therefore did not entail “any arbitrary or unreasonable exercise of state power.”¹³¹ There was no offense to the Due Process Clause.

Stone might have added that California had a legitimate interest in shielding “its” employer, through its workers’ compensation scheme, from exposure to full damages in a jury trial in an action in tort. Workers’ compensation is everywhere conditioned on waiver of, or statutory exclusion of, a remedy at common law. It is this employer-protective function of the workers’ compensation remedy that explains the “exclusive remedy” clauses typical of workers’ compensation statutes—the quid pro quo for the employer’s undertaking to pay the statutory benefits. But one suspects that Stone would have felt uncomfortable with a selfish forum uniting its interest with that of its own citizen. It is only reluctantly that scholars in the conflict of laws have come to accept the obvious: that the primary intended beneficiaries of state law must be the state’s residents. Indeed, a state has very limited power to regulate or protect anybody else.

It is worth noting that the California court below, *per curiam*, had also used interest-analytic language, and had helpfully identified the chief interest on which Stone’s opinion would turn:

[S]uch contracts as the present one, which hire itinerant labor in large groups to be transported out of the state for seasonal work and returned to this state at the end of the season, constitute a special class of employment contracts in which the state of hiring has an interest at least as substantial as that of the state in which the temporary and seasonal work is to be performed. The laborer injured in the course of such employment is, by the terms of his contract of hire, to be returned to that state to become a charge upon it if he cannot obtain compensation or take care of himself.¹³²

130 *Id.* at 543; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

131 *Alaska Packers*, 294 U.S. at 543.

132 *Alaska Packers’ Ass’n v. Indus. Accident Comm’n of Cal.*, 34 P.2d 716, 722 (1934) (*per curiam*). In addition, the California court had looked at the issue from the fisherman’s point of view, bringing to the foreground the practical difficulties of the worker’s situation. *Id.* (“To leave the applicant to his remedy in Alaska in such a case would create a great hardship. In this class of employment the employer exercises great control over the presence of the applicant in either jurisdiction. Should he stay to prosecute his claim in the jurisdiction of the injury it is quite likely that he would lose his return transportation.”). Apparently, even before the Chief Justiceship of Roger Traynor (1954–1970), the California Supreme Court had been a source of this sort of conflicts thinking. For Traynor’s contributions, see, for example, *Bernkrant v. Fowler*, 360 P.2d 906, 910 (Cal. 1961) (Traynor, J.) (resolving what appeared to be a true conflict in the case at bar by narrowly

Winding up his opinion in *Alaska Packers*, Justice Stone considered, and rejected, the employer's fourth and final argument, that Alaska's governmental interests *outweighed* California's. With this, he proceeded to drive the employer's position into the ground. This was not a case of conflict at all, Stone rather surprisingly concluded. Instead, it was what Currie would call a "false" conflict—a case in which, though the laws of the two states differ, there nevertheless is only one "interested" state. California, Stone insisted, was the *only* state that had any interest at all in governing the compensation issue. Alaska had *no* present interest in the case. Alaska's relation with Palma had been "severed."¹³³ This finding, that only one of the two concerned states had an interest in applying its law, probably explains the fortunate absence from *Alaska Packers* of any balancing of interests, which Paul Freund otherwise characteristically would have preferred, imagining that interstate "accommodation"¹³⁴ would justify a departure from forum law.

Interest analysts today would argue that governmental interests, strictly speaking, should *not* be weighed. The identification of a governmental interest is sufficient to ground an application of the interested government's law. Although Paul Freund's argument was to the contrary,¹³⁵ the position today is that it is enough that the forum has an interest in—some rational basis for—choosing its own law. In this case, Alaska was perfectly free to vindicate its governmental interests—in its own courts. But Alaska's interests could not strip California, also an interested state, of the power to apply *its* own law in *its* own courts: As Stone put this, "[I]t is clear that [Alaska's interests, if any,] do not lessen the interest of California in enforcing its compensation act within the state, or give any added weight to the interest of Alaska in having its statute enforced in California."¹³⁶

After *Alaska Packers*, nothing in the Constitution would require that the interested state's power of governance be diminished in any

interpreting the scope of the interest protected by forum law) and *People v. One 1953 Ford Victoria*, 311 P.2d 480, 482–83 (Cal. 1957) (implicitly comparing the governmental interests underlying conflicting laws to resolve a true conflict in favor of the state whose interest would be more greatly impaired by application of the other state's law). Cf. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757–58 (1963) (praising "the moderate and restrained interpretation" pioneered by Justice Traynor in *Bernkrant*); Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1961).

133 *Alaska Packers*, 294 U.S. at 549.

134 Freund, *Chief Justice Stone*, *supra* note 123, at 1217.

135 *Id.*

136 *Alaska Packers*, 294 U.S. at 550.

way by competing or even greater interests elsewhere.¹³⁷ Governmental interests would not be “balanced” or “weighed.” Ironically, California’s courts would go on to develop the influential interest-weighting technique of “comparative impairment.”¹³⁸ But nothing in the Constitution requires the weighing of interests. Brainerd Currie also counseled against the weighing of interests, arguing that forum law, in cases in which both concerned states were interested states, was the only clearly constitutional choice.¹³⁹ Currie may have seen that departures from the law of the interested forum would be discriminatory.¹⁴⁰

Stone would nail down the Court’s new interest-analytic thinking in 1939, in the *Pacific Employers* case.¹⁴¹ This was another worker’s compensation case involving a peripatetic worker, here a chemical engineer. Hired at home in Massachusetts, the engineer was injured on the job in California. Although both worker and employer were from Massachusetts, Stone again sustained California workers’ compensation, explaining that any number of states might have a constitutionally cognizable interest in applying its law—any number of states might have a rational basis for governing the compensation issue. As for Massachusetts, that state, as the joint domicile of the parties and the place of contracting to boot, surely was free to apply its own law—in its own courts. For the same reasons, *California* was free to apply Massachusetts law, if it so chose. But California, as the place of injury, had legitimate interests of its own. California had an interest in affording compensation to the worker injured there. True, California could have vindicated that interest under either state’s law. The California high court, perceiving this, had instead identified a more local interest—California’s interest in compensation for its

137 For a concise statement of the modern view and of the role of the jurisprudence discussed here in its genesis, see the concluding remarks of Justice O’Connor in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494–99 (2003).

138 California early developed a way of resolving true conflicts, that is, cases in which both states are legitimately “interested” but the laws of which are in conflict. In this situation of a true conflict, Currie saw no solution, and recommended forum law. But under California’s “comparative impairment” approach, the law applied is that of the state the interests of which would be comparatively more impaired by failure to apply its law. In this sense, California “weighs” the respective interests of the states in a case of true conflict. See, e.g., *Bernhard v. Harrah’s Club*, 546 P.2d 719, 723 (1976); *One Ford Victoria*, 311 P. 2d at 480.

139 CURRIE, SELECTED ESSAYS, *supra* note 65, at 119.

140 For the proposition that it is discriminatory for the interested forum to withhold its law, see Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991) and Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

141 *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939).

medical creditors.¹⁴² In the Supreme Court, Justice Stone again took his cue from California. Were California to deny compensation to transitory persons injured there, physicians and hospitals might be forced “to go to another state,” Stone wrote, “to collect charges for medical care and treatment given to such persons.”

When Stone was through with these cases, conflicts law, at least, would never be the same.¹⁴³ Brandeis’s *Home Insurance v. Dick* and Stone’s *Alaska Packers* and *Pacific Employers* are the signal antecedents of modern conflicts analysis. We now understand that a state may govern, not necessarily because a matter is within its general sphere of interest, but rather when it has a legitimate governmental interest in having its law apply to the particular issue on the particular facts—a rational basis. This is what due process requires. It does not matter whether lawyers argue the case as a matter of full faith and credit or due process. The interest analysis remains the same.

Far more important even than this is the probability that these workaday cases, strangely enough, are the antecedents of modern constitutional thought.

V. *ERIE* AND AMERICAN FEDERALISM

The momentousness of Justice Stone’s adoption of interest analysis cannot be appreciated until grasped in its bearing on vertical (federal-state) conflicts as well as in its bearing on horizontal (inter-state) conflicts.¹⁴⁴ The news that presumptive government authority flows from governmental interest has had revolutionary force.

¹⁴² *Id.* at 504 (“The Supreme Court of California has declared in its opinion in this case that it is the policy of the state, as expressed in its Constitution and Compensation Act, to apply its own provisions for compensation, and that ‘It would be obnoxious to that policy to deny persons who have been injured in this state the right to apply for compensation when to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons.’”) (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 75 P.2d 1058, 1063 (1938)).

¹⁴³ *Cf.* Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), in CURRIE, *SELECTED ESSAYS*, *supra* note 65, at 124 (setting out the interest analytic point of view, and crediting the Supreme Court with having developed it); *see also* Weinberg, *Theory Wars*, *supra* note 65, at 1635–36, 164 (2005) (discussing Justice Stone’s contributions to the twentieth century revolution in the conflict of laws).

¹⁴⁴ *Cf.* Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237 (2011); Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743 (1992). For an analogous position vis-à-vis the substance-or-procedure cases decided in the wake of *Erie R. R. Co. v. Tompkins* and the simultaneous promulgation of the Federal Rules of Civil Procedure (1938), *see*, for example, Joseph P. Bauer, *The Erie Doctrine Revisited: How A Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1266–70 (1999).

Think of the then-misunderstandings of the commerce power. We are confident enough now that it cannot matter in the regulation of a national labor market whether goods have not yet entered the stream of commerce or have come to rest, or whether or not work is necessarily local—peace to the Court that decided *Hammer v. Dagenhart*.¹⁴⁵ Think of the then-misunderstandings of federalism, the once *de rigueur* categories of a state’s “police power”—peace to Justice Peckham in *Lochner*, fussing as he did over the question whether a ten-hour day was about “health,” in which case it would be constitutional, or about “labor,” in which case it would not.¹⁴⁶ Think about the faith, blooming even after the Thirties, in exclusive state governance of “primary activity”—peace to the second Justice Harlan¹⁴⁷—and in the “interstitial” nature of federal law—peace to Henry Hart.¹⁴⁸ Today we have the right questions to ask when struggling to identify “that which is truly local and that which is truly national”—peace to Chief Justice Rehnquist.¹⁴⁹ And peace to Chief Justice Roberts in the “Obamacare” case,¹⁵⁰ insisting upon the Constitution’s “parchment barriers”¹⁵¹ to congressional action, and raising new barriers to the exercise of Congress’s commerce and spending powers.¹⁵²

Before *Carolene Products*, the closest the Supreme Court had come to a workable understanding of government power was its gingerly recognition that a state legislature might have power to regulate those activities “affected with a public interest.”¹⁵³ All activities may not be affected with a public interest, but all law is or should be. We have come, or at least are coming, to see that even the search for

145 247 U.S. 251 (1918).

146 *Lochner v. New York*, 198 U.S. 45, 53 (1905).

147 *Hanna v. Plumer*, 380 U.S. 460, 474–75, 477 (1965) (Harlan, J., concurring).

148 HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953) (“Federal law is generally interstitial in nature.”).

149 *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

150 *See generally* *Nat’l Federation of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012) (considering the limits of the several commerce, taxing, and spending powers of Congress and notably weakening the commerce and conditional spending powers).

151 *Cf.* THE FEDERALIST No. 48 (Madison) (arguing the ineffectiveness of constitutional barriers to the encroachment of one branch of government upon the others).

152 *Sebelius*, 132 S. Ct. at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”); *id.* at 2608 (“As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions.”).

153 *Munn v. Illinois*, 94 U.S. 113, 130–32 (1876).

“some limiting principle”¹⁵⁴ is the wrong search. There are no abstract doctrinal boundaries to government authority. Rather, government has presumptive power to govern. And I believe the Supreme Court in the long run must return to this position, however contrary to Rehnquist Court jurisprudence¹⁵⁵ and Roberts Court jurisprudence.¹⁵⁶ There is—because there must be—presumptive authority in the nation, and, subject to the Supremacy Clause, in the states as well, over any matter in which either respectively or both may have legitimate regulatory concerns. There will always be hard cases, of course; but the presumption of power in the interested sovereign, when its governmental interests are understood, in best theory can be overcome only by the extrinsic limits imposed by the fundamental rights of individuals—and even these invaluable limits can be breached if the government’s interest is sufficiently compelling on the facts of the particular issue in the particular case. The inquiry can be complex,¹⁵⁷ but there is no substitute for it.

To show some of the multiplex interworkings of federal and state powers with a simple homely example, take the question of the division of assets upon divorce, a question generally assumed to be a matter of state law. A state has legitimate interests in the peaceful and equitable settlement of disputes over assets in an action for divorce, whether the state allegedly is the marital domicile, or the residence of either party, or the place of prenuptial contracting for division of the assets, or the place where the assets are.¹⁵⁸ But suppose that a veter-

154 See Transcript of Oral Argument at 16, *U.S. Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (No. 11-398) (Tuesday Mar. 27, 2012), 2012 WL 1017220 (“JUSTICE KENNEDY: . . . Can you identify for us some limits on the Commerce Clause?”); see also *Lopez*, 514 U.S. at 556–57 (“But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”).

155 Cf. *Lopez*, 514 U.S. at 561–63 (holding in 1995 that Congress lacks commerce power to prohibit the possession of guns near schools); but see, e.g., *United States v. Alderman*, 565 F.3d 641, 645 (9th Cir. 2009), cert. denied, 131 S. Ct. 700 (2011) (relying on a pre-*Lopez* case that acknowledged, notwithstanding *Lopez*, Congress’s presumptive power to regulate possession of a firearm in interstate commerce). Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari in *Alderman*, urging a grant of certiorari to reaffirm *Lopez*.

156 See generally *Nat’l Federation of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012).

157 See Weinberg, *The Federal-State Conflict of Laws*, supra note 144 (analyzing cases).

158 See Justice Brennan’s reminder in *Hague* that state interests grow out of contacts the state has with the issue to be governed, contacts with significance for the state in the particular instance. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-23 (1981) (“The lesson from *Dick* . . . , which found insufficient forum contacts to apply forum law, and from *Alaska Packers*, . . . which found adequate contacts to sustain the choice of forum law, is that for a State’s substantive law to be selected in a constitutionally permissible manner, that State

an's benefits are among the assets sought to be divided. Entitlement to veterans' benefits would seem to be within the legitimate concerns of the nation, in the rough "jurisdiction-selecting"¹⁵⁹ sense that we can perceive a general sphere of national interest.

Presumably the United States provides veterans' benefits to advance the recruitment and retention of military personnel. National power to effectuate this governmental interest need not be implied; the provision and protection of veterans' benefits is within the expressly enumerated power of Congress to raise and support armies.¹⁶⁰ But the question remains, under what law, federal or state, should veterans' benefits be divided on divorce? The state's interest in protection of the resident dependent spouse is obvious. But the national interest in providing for veterans is equally obvious.

This was the question confronting the Court in *McCarty v. McCarty*.¹⁶¹ The Court, in an opinion by Justice Blackmun, decided that Congress must have intended that veterans' retirement pay be personal to the veteran, and therefore not subject to California's community property laws.¹⁶² Justice Blackmun reasoned that veterans' retirement pay is important to the recruitment and retention of military personnel, and also provides current compensation for the risk of recall to service. In addition, veterans' retirement benefits further the national interest in encouraging orderly promotion and retirement in order to open senior military positions to youth.

All this was true enough, as far as it went. But under countervailing pressure Congress stepped in to override *McCarty*, apparently intending to deploy the same national power the *McCarty* Court had deployed. The Uniformed Services Former Spouses Protection Act¹⁶³ quite properly avoids creating any spousal rights. Instead, the Act refers courts to state law to determine the division of a veteran's benefits upon divorce. Congress might be said to have acted within its sphere of identified interest to raise and support armies. Yet it would seem that the nation has no power to *discourage* the recruitment and retention of military personnel or to *discourage* retirement of older

must have a significant contact . . . , creating state interests, such that choice of its law is [not] arbitrary. . . .").

159 David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 173 (1933) (criticizing "jurisdiction-selecting" rules of choice of law on the ground that a sphere of interest is too general to ground a choice of law to govern a specific issue on specific facts).

160 U.S. CONST. art. I, § 8, cl. 12.

161 453 U.S. 210 (1981).

162 *Id.* at 223-24 (1981).

163 Uniformed Services Former Spouses Protection Act of 1982, codified at 10 U.S.C. § 1408.

military personnel. Perhaps the security of the spouse, even unto divorce, is part of the military's recruitment and retention effort. Perhaps the national interest that more convincingly justifies the act of Congress is the general structural interest in preserving a measure of autonomy to the states in matters of domestic relations.¹⁶⁴ Congress might be seen as exercising an implied power to preserve state-created rights from the operation of federal supremacy when it is possible to accommodate such rights.

In this example we can glimpse the complex interplay between national and state powers, and the sort of governmental interests (rational bases) from which these powers derive. What is happily missing from the Supreme Court's decision of the federal question in the *McCarty's* case is a judge's independent view of the best answer to a state-law question—the sort of independent judgment federal judges were once permitted to provide in state-law cases, in the absence of any national interest to justify the displacement of state law.¹⁶⁵ We can readily see that to apply a federal judge's ideas, however good, to a question that, properly considered, remains purely a state-law question, is to displace the relevant judicial decisions of a relevant state *for no reason*. That cannot be due process; and in this sense *Erie R.R. Co. v. Tompkins* might well have been decided under the Due Process Clause¹⁶⁶—although of course it was not.

This insistence on an authoritative lawgiver, of course, is the positivistic proposition that undergirds *Erie*. As Justice Brandeis explained in *Erie*, quoting Justice Holmes,

But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.¹⁶⁷

Nor can *any* government, however clearly specified, supply law on a given issue, if it lacks a legitimate governmental interest in doing so.

¹⁶⁴ For the argument that the national interest encompasses a vital interest in locally-administered delivery of certain services, such as police protection and education, in view of the justified fear of a national alternative, see Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295 (1997).

¹⁶⁵ *Swift v. Tyson*, 41 U.S. 1 (1842).

¹⁶⁶ For the extended argument, see Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. (forthcoming 2013), draft available at <http://ssrn.com/abstract=2125474>.

¹⁶⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 n.23 (1938) (citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370–72 (1910); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–36 (1928)).

If, in the McCartys' case, the McCartys did not reside in California, if no agreement of theirs on the disposition of assets in the event of divorce was made or to be performed in California, if the assets in dispute were not located in California—in short if the McCartys' case had no significant contact¹⁶⁸ with California, California would lack any relevance to the problem of the division of Mr. McCarty's retirement pay on the occasion of his divorce. In such circumstances California—whether in its own courts or in the courts of any other state, would have no power to govern the division of the McCartys' assets. The identified governing sovereign must be a *relevant* one. That is the deeper message of Justice Brandeis's opinion in *Erie*, as it is of his earlier less famous opinion in *Dick*.¹⁶⁹

Erie and *Dick* both hold that law without a relevant—"interested"—lawgiver is unconstitutional. It also becomes clear, after *Erie*, that American courts must *choose*. *Erie* holds, in effect, that a choice of law—the identification of the sovereign source of governance—is constitutionally required. No general rule will do. The law chosen need not be that of the *most* relevant place, and need not be the law of the place of the *most* significant contact, or the place having the *greatest* interest. It need only be the law of an interested sovereign.¹⁷⁰

It is no doubt accidental that *Carolene Products* and *Erie* were decided on the same day. But it is nevertheless the fact that a "rational basis"—the legitimate governmental interest of a relevant sovereign—is what authorizes judge-made law under *Erie*, and what authorizes statutory law under *Carolene Products*. Once you grasp the interest-analytic metaphysics of *Dick*, *Alaska Packers*, and *Erie*, you can see *Carolene Products* as part of this story. You can also see it as an outcome and capstone of these unlikely beginnings.

168 The phrase is taken from RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS (1971), as it is used throughout.

169 I am eliding the question of the power of Congress to incorporate the law of a potentially irrelevant state. See, e.g., the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (incorporating "the law of the place where the act or omission occurred"). The Supreme Court attempted to deal with this problem in *Richards v. United States*, 369 U.S. 1 (1962) (holding that Congress intended to incorporate the whole law of the place of act or omission, including its choice rules). This approach is analogous to that of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (prescribing that when adjudicating issues of state law, federal courts must apply the law of the forum state, but must apply that state's whole law, including its choice rules). In either context the rule requires judges to make a good-faith effort to divine what law the designated state's courts "would" apply, according to the designated state's own choice rules.

170 See, e.g., the fact situation in *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972). There, the plaintiff's Canadian domicile would have barred relief and the defendant's New York domicile would have permitted recovery.

VI. GOVERNMENTAL INTERESTS AND MODERN CONSTITUTIONAL ANALYSIS

Today the authority of governments to govern, the very idea of governance, seems to be under political assault by libertarians, the Tea Party, and cynical or naïve champions of deregulation. But as a matter of constitutional theory, governmental power can be understood in light of the forerunner cases we have been discussing. The dawn of modern constitutional analysis cleared a path to new understandings, still not fully comprehended, of the sources, interworkings, and scope of the respective powers of nation and state. We can see that government power arises in the presence of a legitimate governmental interest within the rational sphere of interest of a relevant sovereign—whether that interest is an exigent need or simply some rational basis. Any more formulaic doctrinal test at best will only approximate the needed analysis of governmental interest.

At the time of the Gilded Age, the Article I powers of Congress on the one hand, and the “police powers” of the states on the other, had come in most cases to define the sources of American law. Until the age of modernism, these powers were thought to be not only stringently limited to enumerated lists as an original matter, but also—and further circumscribing them—to be mutually exclusive. Such thinking obscured the nature and sources of lawmaking power. Power is not convincingly ascribable to some enumeration on a list. (To be sure, the enumerations in the Constitution are the best evidence of the legitimacy of an asserted national interest; but where power is necessary but unenumerated it will be implied—and it was implied, and is implied, then as now.¹⁷¹)

Following *Carolene Products*, governments, federal and state, would gain presumptive authority to act within their respective spheres of legitimate interest. Today, government must show at a minimum a rational basis for the exercise of legislative or executive power, just as courts must show a rational basis for the choice of a sovereign lawgiver to govern each issue in a case.

With *Carolene Products*, we get deference to ordinary regulation—a long-awaited surrender to the views of the political branches. And we

¹⁷¹ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (implying national power over the foreign relations law of the United States from scattered “constitutional underpinnings”); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214–15 (1917) (in the absence of Article I enumeration, implying national power in Congress over admiralty cases from the grant of admiralty jurisdiction in Article III).

get a normalized administrative law.¹⁷² To be sure, today we have acute political problems that include influence peddling, chronic under-funding, agency capture, and the revolving door. But on the level of theory, the achievement of *Carolene Products* in the post-New Deal settlement remains a useful baseline for thinking about governance.

With *Carolene Products*, the Roosevelt administration would no longer need to fear judicial review. The regulatory efforts of state and federal legislatures and agencies were to be presumed constitutional. A submission to political will that had been deemed fatalistic and even reactionary in Justice Holmes¹⁷³ was now seen as a triumph of progressivism. Think about it. It would be surprising if Justice Stone, the author of *Carolene Products*, had *not* experienced the *arrière-pensées* discernible in his Footnote Four. The New Dealers were eliding some big questions. What about the rule of law in courts? What about *Marbury v. Madison*, and the preeminent province and duty of the judicial department to say what the law is?¹⁷⁴ What about the Bill of Rights? Footnote Four was obviously an afterthought, but in the longer perspective turned out to be essential. It was an acknowledgment that a democracy, for all its insistence on majority rule, is best mediated by sound institutions under the rule of law. A democracy is only as good as its protection of minorities and its respect for fundamental rights. Footnote Four was a recognition that without serious judicial review these requisites of good government might—would—languish.

172 But see the appallingly deferential opinion in *Astrue v. Capato*, 132 S. Ct. 2021 (2012) (deferring to the Social Security Administration's arbitrary use of state law, where state law disqualified posthumous children otherwise eligible for support, in a case in which the identity of the father was not an issue). Discrimination against a class of children has been held a violation of the Equal Protection Clause in both *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) and *Plyler v. Doe*, 457 U.S. 202 (1982). See the analogous case of *De Sylva v. Ballentine*, 350 U.S. 570 (1956) (referring to state law to determine whether an illegitimate child was a "child" eligible for copyright renewal rights). In revising the copyright act, Congress created a definition of "child" which includes illegitimates, 17 U.S.C. §§ 101, 304, overriding *De Sylva* on its facts, better conforming to the Equal Protection Clause, and better vindicating the national interest in promoting "the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8.

173 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 248–49 (Mark DeWolfe Howe ed., 1953) ("I have little doubt that the country likes [the Sherman Act] and I always say that if my fellow citizens want to go to Hell I will help them."); see also FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT: OLIVER WENDELL HOLMES DEVISE LECTURES 1960, at 9 (1961).

174 For discussion of this general class of problems see, for example, CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 193–231 (1959).

So with *Carolene Products* and Footnote Four we reach one of the most significant outcomes of interest-analytic thinking—our currently prevailing regime of constitutional analysis, *tiered scrutiny*. Impressed by the reservations Justice Stone spelled out in Footnote Four, our courts have afforded heightened scrutiny to inherently suspect classifications and injuries to which the political process can be unresponsive, and heightened protections for fundamental rights. Courts require that government show more than a legitimate interest in circumscribing these rights. In Footnote Four cases, the asserted governmental interests must be more than legitimate and rational; they must be *compelling*.¹⁷⁵

One perhaps troubling consequence of *Carolene Products* and the post-New Deal settlement is the discrimination they entail against economic rights. At least when the economic rights in question are the *personal* rights of *individuals* and the small businesses they own, the Supreme Court's treatment of economic rights is generating considerable public concern. Think of *Astrue v. Capato*,¹⁷⁶ or *Kelo v. City of New London*,¹⁷⁷ or *Wilkie v. Robbins*,¹⁷⁸ or *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.¹⁷⁹ The common law also traditionally has been reluctant to remedy certain kinds of

¹⁷⁵ Cf. *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2731 (2011) (under the First Amendment, holding insufficiently compelling the state's interest in protecting minors to justify the state's regulation of minors' access to sadistic video games).

¹⁷⁶ 132 S. Ct. 2021 (2012) (reading the Social Security Act to require that the survivors' benefits of dependent in vitro children born posthumously of a known wage-earning father be determined by the vagaries of state intestacy law, notwithstanding that the children in the case met the qualifications set out in the statute authorizing survivors' benefits). See also discussion of *De Sylva v. Ballentine*, *supra* note 172.

¹⁷⁷ 545 U.S. 469 (2005) (holding that a city could authorize demolition of an old residential neighborhood not shown to be blighted, to the advantage of a private developer and large pharmaceutical company, on the speculation that development of a hotel and office complex there might increase revenue). In *Kelo*, funding fell through, and the land has been turned into a dump.

¹⁷⁸ 551 U.S. 537 (2007) (holding that years of harassing misconduct by federal government officials, with resulting damage to the plaintiff's business, was not remediable in a civil rights action under *Bivens v. Six Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

¹⁷⁹ 130 S. Ct. 2592, 2599 (2010) (holding that homeowners had no right to prevent interposition of a public beach between their ocean-front houses and the ocean, notwithstanding the resulting diminution in the value of their homes as private "waterfront" properties); *id.* at 2599 (explaining that the homeowners took title subject to the statute authorizing government renourishment of beaches eroded by hurricanes, and to the common-law rule that the government, having created the new land, took title to it in trust for the public, so that the addition automatically became a public beach). But the Court could have held that the Fifth Amendment Takings Clause requires "just compensation" when the government lays open the private property of a homeowner to "public use," in effect, in this way.

economic loss.¹⁸⁰ It may be time to rethink judicial approaches to these kinds of cases.

ENVOI: THRUST AND COUNTER-THRUST

From unlikely beginnings in Supreme Court cases on choice of law, we can see emerging the sort of thinking that today informs the litigation of constitutional rights. This sort of thinking also turns out to be useful in dealing with the complexities of federalism and the intrinsic limits of power.

Late in the New Deal period, *Erie* held that the law applied in courts *must* be chosen—that the law applied in courts must be the law of some relevant sovereign. Choosing the law of a relevant lawgiver inevitably leads to and informs an understanding of the wellsprings of lawmaking power. But the choice-of-law question, unlike the power-of-the-lawgiver question, is ideally presented “as applied,” while the question of authority is sometimes answered in a more abstract jurisdiction-selecting way,¹⁸¹ looking to a “sphere” of interest that purports to cover a whole class of cases.

Such abstractions can cover too much ground. A question whether a court should choose to apply a law the purpose of which is to protect enterprises from liability should not be answered without reference to the question whether the particular defendant enterprise in the case is conducting its enterprise in a way that is significant to the liability question within the state the law of which is sought to be applied. The lawgiver cannot be chosen on abstract principles, but rather is identifiable as lawgiver only if its law is capable of rational application on the particular issue in the particular case on the particular facts. Once this is understood, the several judicial functions of choosing law, determining the authority of the lawgiver, construing law, and applying law, can become disentangled and capable of the impress of thought. But it is fair to say that a governmental interest is

180 See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1928) (holding that the lessee of a vessel could not recover either in contract or tort against a dry dock company for economic loss resulting from delay in the lessee's access to the vessel occasioned by the company's negligent disrepair of the vessel's propeller at the order of the shipowner). *Robins*, a case in admiralty, was governed by federal common law. In the context of oil spills, Congress has removed federal common-law bars to recovery for economic loss in two statutes. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–61, § 2702(b); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–57, § 2702(b)(2)(E).

181 See generally Cavers, *A Critique*, *supra* note 159.

most convincingly identified *within* an acknowledged “sphere” of governmental power.

It is widely remarked that in our courts the tendency, gradually intensifying over the past four decades, has been to erect barriers to enforcement of substantive law.¹⁸² From the point of view of the national interest, right-wing suspicion of regulatory governance might well be reconsidered. A market seen to be well-regulated inspires confidence in that market’s safety, integrity, and fairness. Of course, overreaching, intrusive, or abusive regulation will trench upon rights which it is a core national interest to protect. But civil society also rests in large part on the vindication in independent courts of legitimate substantive governmental interests when sufficiently protective of those rights.

The reader will recognize the thrust and counter-thrust acknowledged here. When are rights virtually absolute? When is governmental interest sufficiently compelling to justify abridgment of individual rights? The interest-analytic question is clearly a powerful question, often capable of yielding a conclusive answer. When a forum’s governmental interest can be identified it will yield forum power. But the question will remain whether that power should be exercised. In the end it must be admitted that governmental interest analysis, like earlier efforts to assist, direct, or cabin judicial discretion, can simply open to discretion a different question. The hope is that the question can escape unhelpful doctrine—that it is, in fact, a better question, and that the existence of cases it does not purport to resolve will not impair its value.

The difficulties encountered in attempting to raise and sort out questions of government power, concerns of federalism, and questions of right, through governmental interest analysis as through any other methodology, may be too *great* to yield better answers for us, despite the superiority of the method. The answers in the end will seem too often to lie in the eye of the beholder. In the Supreme Court, some federal questions are too politicized for us to expect to find persuasive answers to them through any methodology. There will always be difficulty in disentangling reason from prior doctrine, and in the impossibility of providing balm to outrage on either side.

¹⁸² See generally, e.g., WE DISSENT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS: TALKING BACK TO THE REHNQUIST COURT (Michael Avery ed., 2009); H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217 (2011); Geoffrey R. Stone, Essay, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008).

This paper has tried to show simply that governmental interest analysis is a key legacy of the Hughes Court's work in the field of conflict of laws, and that, surprisingly, this mode of analysis today grounds much of modern rights-based constitutional litigation. Beyond this, this paper has tried to show that interest analysis can, and does—at the very least—shed light on the complex interworkings of American federalism, and can clarify the respective powers of state and nation (our mired politics aside) to govern for the common good.