

Repressing *Erie*'s Myth

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Some cases are not just cases; they are icons. Built of more than ordinary facts and holdings, at least three decisions stand as cultural pillars of our legal architecture: *Marbury v. Madison*, *Brown v. Board of Education*, and *Erie Railroad v. Tompkins*.¹ Though it is unclear just what separates “iconic cases” from others, every lawyer knows these three by name and has some idea what they mean. Moreover, each is thought to express something basic about the United States legal system.² These iconic cases are modern orthodoxies, which

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

2. To support *Erie*’s ranking as the last and least of this threesome, see, for example, John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974) (“*Erie* is by no means simply a case. Nor would it do it justice to call it a rule or even a principle, for it implicates, indeed perhaps it is, the very essence of our federalism.”); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 378 (6th ed. 2002) (“It is impossible to overstate the importance of the *Erie* decision.”); BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 272 n.4 (1977) (“*Erie* will remain a star of the first magnitude in the legal universe.”); Justice Hugo Black, Address at the Sixty-Second Annual Meeting of the Missouri Bar Association (Sept. 24-26, 1942), in 13 MO. B. J. 173, 174 (1942) (describing *Erie* as “one of the most important cases at law in American legal history”); Irving Younger, *What Happened in Erie*, 56 TEXAS L. REV. 1011, 1011 (1978) (“[*Erie*] is the keystone of the procedure course taught at every American law school.”); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980) (“[*Erie*] has been the central concern of an entire generation of academic lawyers.”); Donald L. Doernberg, *Juridical Chameleons in the “New Erie” Canal*, 1990 UTAH L. REV. 759, 761 (“To call [*Erie*] a landmark case certainly is to belittle its effect.”); Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 166-67 (1988) (“So powerful is *Erie*’s grip on the American legal imagination that [it has been applied] even to issues of international choice of

inspire debate but rarely dissent, and their privileged status makes disputes over their meaning perennially important.

This Article seeks to undermine *Erie*'s iconic prominence. *Erie*'s bare holding—that federal diversity cases apply state substantive law—is established beyond boredom, and this Article will not dispute it.³ My quarrel is with *Erie*'s “myth,” its position as a foundation of United States law. Although *Erie*'s myth has been retold for generations—by such jurists as Brandeis, Friendly, and John Hart Ely—it stands on flawed premises. By exposing these flaws, I hope to separate what *Erie* is from what it is not.

The problem has two parts: *Erie*'s “old myth” and “new myth.”⁴ The old myth is the Court's original claim that its decision had a valid constitutional basis. *Erie* was not by terms a decision about choice of law, prudence, or comity; it rested on constitutional grounds. Part I of this Article explains that *Erie*'s original foundations are cracked. Although the *Erie* majority specified several constitutional reasons for its result, these cannot bear scrutiny.⁵ The only aspect of *Erie*'s old myth that might conceivably survive criticism is a narrow ruling about the choice between state and federal law when federal courts hear cases implicating both, as occurs in classic *Erie* cases that arise under diversity or supplemental jurisdiction.⁶ I doubt even this narrow holding's constitutional basis, yet if *Erie*'s myth were confined to this original context, the need for further discussion would be less urgent.

Modern jurists have pressed *Erie*'s constitutional pretensions farther, and these efforts yield unnoticed peril. Part II analyzes *Erie*'s new myth, the idea

law . . . ”). This Article suggests that such iconographies are overstated.

3. *Erie*, 304 U.S. at 80.

4. Many commentators believe that *Erie* has some constitutional foundation, though it is variously characterized and persistently vague. See, e.g., 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4505 (3d ed. 2007) (endorsing *Erie*'s “remarkably abbreviated” and “puzzling” constitutional holding); cf. Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 237 n.69 (2003) (noting “the murky bases of the decision in *Erie*,” which “lacks specificity on what exactly was unconstitutional”); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 756 (1986) (“Long after *Erie*, there was widely shared uncertainty as to . . . its constitutional holding.”).

5. Even though other scholars have challenged *Erie*'s constitutional basis, e.g., 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 865-66, 912-15 (1953); Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L.Q. 494 (1949); John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087 (1992), this Article offers a distinctively comprehensive critique. Also, the critics cited *supra* conclude, unlike this Article, that *Erie* is ineffective as a matter of policy and should be overturned.

6. Canonical *Erie* cases include *Hanna v. Plumer*, 380 U.S. 460 (1965), *Guar. Trust Co. v. York*, 326 U.S. 99 (1945), and *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). See also *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996). All of these were diversity cases involving state-law causes of action. In noting that diversity jurisdiction and supplemental jurisdiction are conventional sources of “*Erie* problems,” I do not address arguments that the two should be analyzed differently. See, e.g., Westen & Lehman, *supra* note 2, at 385-88.

that the case imposes constitutional limits on federal common-law authority regardless of state law. In simplest terms, the new myth trades *Erie*'s original federalism for modern separation-of-powers norms, and uses the latter to resist broad categories of federal common law.

The new myth figures heavily in the work of Curtis Bradley, Jack Goldsmith, and David Moore.⁷ It also tracks the widespread illusion that, after *Erie*, "there is no federal common law."⁸ Although specialists know that *Erie* said nothing of the sort,⁹ one strand of scholarship claims that any federal common law that survived *Erie* is categorically suspect and should exist only in specified "enclaves," such as admiralty or interstate disputes.¹⁰

According to the new separation-of-powers myth, *Erie* was chiefly concerned with stripping the unguided policymaking authority that federal courts had exercised under *Swift v. Tyson*.¹¹ Part II will show that the new myth (a) lacks support in *Erie*'s text, (b) is conceptually unstable, (c) has misled scholars and the Court to invoke *Erie* against customary international law, and (d) would cause absurd results if applied in other contexts.

7. Bradley and Goldsmith have written at least ten articles addressing *Erie* and customary international law. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

8. See, e.g., *Idema v. Wager*, 120 F. Supp. 2d 361, 364 (S.D.N.Y. 2000) ("[A]s Justice Cardozo [sic] declared long ago in the immortal case of *Erie v. Tompkins*, . . . 'There is no federal common law. [sic]'""); see also Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 612 (2007) ("Students tend to recall that Justice Brandeis said that there is no federal common law, but he did not."); George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 622 (1984) (noting that "*Erie* simply did not deal with the question of when federal courts can fashion common law") (emphasis omitted).

9. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.") (emphasis added); see also RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003) ("There is no longer serious dispute that the body of federal law legitimately includes judge-made law."); see also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (deciding, on the same day as *Erie*, that an interstate dispute over apportioning water in a stream involved "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive"). But cf. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1271-75 (1996) [hereinafter Clark, *Federal Common Law*] (claiming that most traditional "enclaves" of federal common law are not "judge-made" law at all).

10. See, e.g., Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 412-18 (1964) [hereinafter Friendly, *Praise*] (describing labor contracts, unfair competition affecting interstate commerce, activities of interstate carriers, and defamation by multi-state media as spheres of expanding federal common law). But cf. Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 274, 279 (1999) (proposing to abandon "federal common law rules in admiralty cases that arise within state territorial waters").

11. 41 U.S. (16 Pet.) 1 (1842); see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46-47 (1985).

The new myth's broad resistance to federal common law affects much more than choice of law. Efforts to inflate *Erie* beyond its original context might, if successful, cloak a wide range of antijudicial ideas in *Erie*'s conventional garb. Although American legal culture has long worried over undue judicial power,¹² this Article seeks to displace *Erie* as a counterproductive distraction. My thesis is that doubts about federal judges generally should not be cast as attacks on federal common law; much less should they be seen as deriving from *Erie*.

One example of *Erie*'s overgrowth concerns the judicial application of customary international law under the Alien Tort Statute (ATS).¹³ In *Sosa v. Alvarez-Machain*, *Erie* was a touchstone of the Court's ATS analysis, and not one Justice questioned *Erie*'s relevance.¹⁴ What *Sosa* inadequately explained, however, is why *Erie*, a 1938 decision about choice of law in diversity suits, should affect the interpretation of a 1789 statute concerning torts based on international law. *Erie*'s application to a context so far from its origins shows the decision's stunning iconic force; so does scholars' widespread acceptance that *Erie* affects customary international law.¹⁵ By contrast, I argue that the new myth's application to *Sosa* and customary international law is a mistake, with wide-ranging theoretical consequences.

At the broadest level, undercutting *Erie*'s new myth may clarify general issues of judicial power. This is particularly important because there are many areas outside *Sosa* and international law where rigorous application of the new myth might have disturbing results.¹⁶ I will discuss two surprising examples: the rescission of habeas jurisdiction over Guantanamo detainees, and military tribunals for noncitizens accused of war crimes. *Hamdan v. Rumsfeld* implicitly rejected the new myth in both contexts, thus proving that the Court has not accepted that theory's largest and potentially absurd consequences.¹⁷

Having rejected *Erie* as a framework for evaluating federal common law, Part III asks what might come next. Federal common law could be analogized to Justice Jackson's discussion of presidential authority in *Youngstown Sheet &*

12. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); OWEN FISS, *THE LAW AS IT COULD BE* (2003).

13. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

14. 542 U.S. 692 (2004).

15. See, e.g., Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 163-65 (discussing *Erie*-based confusion over the Alien Tort Statute).

16. As one new-myth advocate eagerly inquired, "Where Might The New *Erie* Doctrine Strike Next?" Brown, *supra* note 8, at 637.

17. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Tube Co. v. Sawyer.¹⁸ Jackson's opinion explains the basic interaction between Congress and a branch with largely derivative constitutional authority. I suggest that those dynamics work similarly whether one considers Congress and the President (*Youngstown*), or Congress and the Judiciary (federal common law).

Following Jackson's opinion, I would analyze the validity of federal common law in three categories: (i) maximally appropriate when authorized by Congress, (ii) in a zone of twilight when Congress has not spoken either way, and (iii) minimally appropriate when forbidden by Congress.¹⁹ This framework affirms congressional primacy over federal common-lawmaking. But it rejects new-myth preoccupation with abstract definitions of "common law" and "enclaves," focusing instead on contextual issues that are often decisive in real-world instances of judicial action.

Legal icons are important, but so are their limits. Among the triad of American icons, *Marbury* and *Brown* have drawn tireless defenders and skeptics, while *Erie* has not.²⁰ And although this Article may not fully reverse *Erie*'s cultural overgrowth, the stakes are high enough to warrant substantial effort.

I

ERIE'S OLD MYTH

I admit that learned judges have fallen into the habit of repeating this doctrine But, notwithstanding the great names which may be cited in favor[,] . . . there stands, as a perpetual protest against its repetition, the Constitution of the United States²¹

Erie's status as a great American case owes much to its purported constitutional basis, which I call *Erie*'s "old myth." This Part explains why (a) *Erie*'s constitutional rationale was once important, (b) that rationale is unsound, and (c) the old myth, even if true, cannot unseat judicial power outside the context of concurrent state and federal law. My goal is not a return to *Swift*. Instead, I analyze *Erie*'s holding to deflate its prestige and expose modern

18. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

19. See *id.* at 635-38.

20. For outpourings about *Marbury* and *Brown*, see *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003), Symposium, *Judging Judicial Review: Marbury in the Modern Era*, 101 MICH. L. REV. 2557 (2003), Symposium, *Brown at Fifty*, 117 HARV. L. REV. 1302 (2004), and Symposium, *Revisiting Brown v. Board of Education: 50 Years of Legal and Social Debate*, 90 CORNELL L. REV. 279 (2005). Milder celebrations of *Erie* include Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988), and Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988).

21. *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting). Although this quotation originally condemned *Swift*-era common law, I would apply it to *Erie*'s old myth.

efforts to push the case beyond its original meaning.

A. Erie's Original Basis

Erie's drama starts with its villain: *Swift v. Tyson*.²² *Swift* was a federal diversity case about an interstate land deal. If the lawsuit had been filed in state court, the underlying transaction would have been invalid because it involved prior debt, which was inadequate consideration under state case law. Because *Swift* filed in federal court, however, the Supreme Court ignored state jurisprudence and upheld the transaction.

Congress's Rules of Decision Act might have required an opposite result; it said that "the laws of the several states . . . shall be regarded as rules of decision . . . in the courts of the United States, in cases where they apply."²³ But *Swift* held that "laws of the several states" did not include judicial decisions, and that state precedents bind federal courts only on local issues, like property disputes, not on "general principles . . . of commercial jurisprudence" like consideration standards.²⁴

Swift did not identify the origin of federal courts' authority to apply federal general common law in such contract cases. But the Court likely implied such power from the statutory grant of diversity jurisdiction and the Rules of Decision Act's reference to state "laws," rather than court decisions.²⁵

Swift drew many critics²⁶ and was reversed after ninety-six years in *Erie*

22. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 14, 16-18, 22 (1842); see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 61 (1977) (describing *Swift's* demonization as a "headless monster, marked down for destruction by all right-thinking men"). Strong historical accounts of *Erie* include 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), TONY FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* (1981), and Younger, *supra* note 2.

23. In 1938, the Rules of Decision Act read: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Federal Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789). The current codification applies to all "civil actions," not just to "trials at common law." 28 U.S.C. § 1652 (2000). For conflicting views of the Act's original intent, compare Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923), with WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 79, 148 (Wythe Holt & L.H. LaRue eds., 1990). For arguments over the Act's relevance to *Erie*, compare Ely, *supra* note 2, at 698-99, 718-38, with Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 14 n.58 (2006).

24. *Swift*, 41 U.S. at 18-19. The relationship was never clear between *Swift's* statements about statutory versus common law on the one hand, and general versus local law on the other.

25. See *id.* at 18; Percy Werner, *National Common Law*, 8 S. L. REV. NEW SERIES 414, 420 (1882); Felix Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499, 524 (1928) (noting that *Swift's* federal general common law purportedly "derived from diverse-citizenship jurisdiction").

26. See FREYER, *supra* note 22, at 35-37, 55-56, 73-77, 84-86, 92-96, 99-100 (explaining how *Swift* became a "center of controversy"); PURCELL, *supra* note 22, at 65-69; EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL*

Railroad Co. v. Tompkins.²⁷ A train struck Tompkins as he walked beside railroad tracks; the Supreme Court's issue was whether federal courts must follow a state's common-law requirement that such plaintiffs show willful misconduct. By holding that federal diversity cases in such contexts are governed by state judicial precedents, *Erie* conclusively abolished all *Swift*-based federal general common law.

Justice Brandeis's majority opinion first condemned *Swift* as unworkable.²⁸ Contrary to its defenders' hopes, *Swift* had failed to produce a nationally uniform common law. In addition, clear lines never emerged to separate issues of local law, where federal courts followed state precedent, from general law, where federal courts' own judgment controlled.

These prudential objections were not the Court's basis for decision, however. On the contrary, a *constitutional* argument was deemed necessary to overrule *Swift*:

The injustice and confusion incident to . . . *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. . . . *If only a question of statutory construction were involved*, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.²⁹

The "question of statutory construction" at stake was *Swift*'s holding that a combination of the Rules of Decision Act and the statutory grant of diversity jurisdiction allowed federal courts to disregard state common law.³⁰ *Erie*'s holding did not resolve the statutory merits of that "course pursued," but rather found it unconstitutional.³¹

Erie's constitutional analysis was arguably unnecessary to its result. For

AMERICA, 1870-1958, 62, 226-27 (1992).

27. 304 U.S. 64, 69-71, 78 (1938).

28. "Criticism of the doctrine became widespread" as increasingly flagrant forum shoppers escaped unfavorable state common law by invoking federal diversity jurisdiction. *Id.* at 71-76.

29. *Id.* at 77-78 (citations omitted) (emphasis added). Brandeis was the first of *Swift*'s critics to argue that the case could be judicially overruled only on constitutional grounds. See Frankfurter, *supra* note 25, at 524; FREYER, *supra* note 22, at 85-95. Brandeis had also encouraged a legislative solution. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1109 (1982).

30. See *Swift*, 41 U.S. at 18.

31. Some commentators have blurred the line between *Erie*'s statutory and constitutional arguments, claiming in effect, that *Swift*'s federal general common law was not authorized by statute and was *therefore* unconstitutional. Such arguments are unsupported by the Court's opinion, which analyzed the statutory and constitutional arguments in different sections using different arguments. *Erie*, 304 U.S. at 72-73, 77-80; see *infra* note 32 (noting a sharp division between Reed and Brandeis on this point). Any effort to fuse *Erie*'s statutory and constitutional arguments would also depart from conventional discussions of judicial power by "convert[ing] every judicial mistake of legislative interpretation into a constitutional violation." Westen & Lehman, *supra* note 2, at 340-41, 340 n.95 (collecting sources).

example, Justice Reed argued in a concurring opinion that state law should apply in federal court purely on statutory grounds.³² If *Erie* had been decided solely on Reed's proposed basis, the decision would still be enormously important as a practical matter, yet it would command significantly less theoretical interest, much less a spot in any jurisprudential pantheon.³³ It is *Erie*'s constitutional holding that has sustained the case's iconic status through the years. As an initial step in dismantling *Erie*'s myth, the next Section argues that Brandeis's constitutional reasoning is outmoded and likely incorrect. This analysis of the Court's original arguments sets a benchmark for measuring *Erie*'s modern inflation.

B. *Erie*'s Constitutional Flaws

If *Erie*'s constitutional analysis were correct, then even an explicit legislative effort to authorize federal general common law would be invalid.³⁴ Yet Brandeis's arguments on this point were remarkably spare, consisting of quotes from prior dissents and just three sentences of original reasoning.³⁵ The Court stated several grounds for its decision: equal protection, legal positivism, and federalism. My first task is to show that none of these provides adequate constitutional support for *Erie*'s result.

32. *Erie*, 304 U.S. at 91 (Reed, J., concurring in part); cf. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 427 (1996) (describing *Erie*'s holding as a construction of the Rules of Decision Act). For modern debates about the Rules of Decision Act, see Burbank, *supra* note 4, at 789-90 (describing the Act as a limit on federal common law); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 875 (1989) (suggesting the opposite); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1559 n.51 (1992); RITZ, *supra* note 23, at 134. One problem with resting *Erie* solely on statutory grounds might have been that the Rules of Decision Act at that time applied only to common law cases, and *Erie*'s defenders certainly wished its principles to apply in equity cases as well. Cf. *Guar. Trust Co. v. York*, 326 U.S. 99, 103-04 (1945).

33. Some scholars might assert that grand labels should attach even to a statutory version of *Erie*. For example, although Kevin Clermont believes that *Erie*'s constitutional arguments are unsteady, he calls *Erie* a "megadoctrine" concerning subconstitutional federalism and comity. Clermont, *supra* note 23, at 50. One might question whether such principles are best named "*Erie*." See Philip B. Kurland, *The Federal Courts and the Federal System*, 67 HARV. L. REV. 906, 907 (1954) (Book Review) (proposing to rename "*Erie*" jurisprudence to emphasize *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)); Doernberg, *supra* note 8, at 662-63 (suggesting that much "*Erie*" doctrine owes to *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525 (1958)); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946) (criticizing lawyers' reflex of citing a "single great case," *Erie*, whenever federal-state issues arise).

34. To avoid this result, *Erie* expressly disclaimed holding any federal statute unconstitutional. See *Erie*, 304 U.S. at 79-80.

35. See *id.* at 78-80 ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general' And no clause in the Constitution purports to confer such a power upon the federal courts [In applying *Swift*,] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.").

1. *Equal Protection*

Erie's equal protection argument is insignificant.³⁶ Admittedly, *Swift* caused disparities between litigants in federal court and litigants in state court; the former were governed by federal general common law, the latter by state law. And as modern interstate entities proliferated, progressives like Brandeis especially disliked that corporate magnates could manipulate diversity jurisdiction to receive (under *Swift*) favorable substantive law in federal court.

When Brandeis wrote that disparate treatment based on litigants' state citizenship denied "equal protection," however, he spoke at most in a colloquial sense. *Erie* did not—and could not—reverse *Swift* as violating the constitutional equal protection. Until the 1954 desegregation case *Bolling v. Sharpe*, it was unclear whether even racial discrimination by the federal government violated equal protection.³⁷ *Bolling* was in no sense foreshadowed by *Erie's* throwaway sentence about discrimination against diverse litigants.

Even under today's broadened view of equal protection, the Constitution does not bar using different substantive rules in federal and state courts. Conventional choice of law analysis often applies different states' substantive law based on the parties' citizenship; such decisions do not implicate the racial, sexual, or fundamental-rights discrimination that today merits heightened scrutiny.³⁸ Nor did *Swift*-era federal practice lack a rational basis; rather, *Swift*-era federal courts sought to apply better substantive law, which would clearly satisfy permissive modern scrutiny.³⁹

36. *Id.* at 74-75 (footnote omitted) ("*Swift* . . . made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court Thus, the doctrine rendered impossible equal protection of the law."). *Id.* at 74-75 (footnote omitted).

37. 347 U.S. 497, 498-500 (1954). See Louis H. Pollak, *Thinking about Liberty*, 79 TEMP. L. REV. 737, 746-49 (2006) (describing how substantially the legal climate changed in the decade before *Bolling*). Compare *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that federal racial discrimination ordinarily should receive "the most rigid scrutiny"), and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (noting that the Fifth Amendment "contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process"), with RICHARD KLUGER, *SIMPLE JUSTICE* 226, 255 (2004) (noting explicit racial segregation in the United States military until 1948), and PETER IRONS, *JUSTICE AT WAR* 364 (1983) ("[In 1942, Secretary of War Henry J. Stimson] defended the Army's segregation of black soldiers [He] denounced [contemporaries] who failed to understand 'the basic impossibility of social equality' in a society that forced the races apart by law."). Cf. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1478 (1997) [hereinafter Clark, *Ascertaining*].

38. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188(2)(e), 145(2)(c) (1971); Clark v. Jeter, 486 U.S. 456, 461 (1988).

39. Paul Carrington has argued in passing that "there likely is an equal protection consideration" in *Erie*, and that "arbitrarily discriminatory results occur because of the citizenship of the disputants." Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 998-99 (1996). Such "discrimination," however, is the indirect result of federal courts' general inability under Article III to decide state-law cases absent diversity of citizenship.

None of this analysis defends *Swift's* unfairness as good policy. See Westen & Lehman, *supra* note 2, at 378. Nevertheless, the disparities caused by *Swift* were not so extreme as to

The very existence of diversity jurisdiction contemplates “discrimination” based on litigants’ citizenship.⁴⁰ For example, unlike citizens of the same state, diverse litigants can access federal judges, juries, courthouses, dockets, and remedies. All of these differences from state courts are citizenship-based disparities that flow directly from diversity jurisdiction itself. It seems improbable, given such background asymmetries, that equal protection would bar federal diversity cases from employing substantive law that differs from state jurisprudence.

Swift’s practical disparities might seem unfair in some subconstitutional sense, but they would not have violated equal protection if Congress had explicitly enacted such a regime. Equal protection objections to *Swift*’s judicially inferred scheme of common law are likewise implausible. Brandeis’s use of the term “equal protection” was not constitutionally serious at the time, and modern equal protection jurisprudence has likewise ignored it.⁴¹

2. *Legal Positivism*

Erie’s second argument concerned legal positivism, the philosophical idea that law derives from “posited” legal authority of some sovereign government, rather than natural law or other sources.⁴² Brandeis quoted a Holmes dissent condemning *Swift*’s “fallacy” that federal general common law was a “transcendental body . . . outside of any particular State but obligatory within it.”⁴³ Holmes apparently believed that federal courts could apply *Swift* only by conjuring applicable legal norms out of a jurisprudential ether, without any sovereign government’s command.

Even if Holmes’s argument were true, *Swift*’s alleged “fallacy” did not violate the Constitution. Positivism was popular in the early twentieth century and remains so today. Yet the Constitution requires no more adherence to trendy legal theory than to Spencer’s sociology.⁴⁴ As a constitutional argument, the Holmesian position turns a colorful phrase, but is short on substance.⁴⁵

Erie’s positivism argument also has substantive flaws. Although many *Swift*-era jurists thought that federal general common law embodied primordial ideals to be “discovered” without any sovereign’s approval, *Swift*’s federal

violate constitutional equal protection or due process.

40. See U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (2005).

41. See, e.g., Ely, *supra* note 2, at 713.

42. See H.L.A. HART, *THE CONCEPT OF LAW* (1961); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 112 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

43. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); see also *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky . . .”).

44. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

45. E.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in the judgment) (calling Holmes’s rhetoric “hyperbolic”).

general common law did not require such antipositivist beliefs.⁴⁶ Common-law rulings in all eras have implied that their judge-made outcomes were “found” or “derived” from nature, logic, precedent, or timeless practice. Yet judicial lawmaking does not violate legal positivism. On the contrary, many positivists have acknowledged that, when judges decide cases, *that is positive law*.⁴⁷ Federal judges “make law” in admiralty cases, state border disputes, statutory and constitutional interpretation, and countless other fields;⁴⁸ state judges make law even more broadly. Regardless of whether any of this judicial lawmaking is good or bad, none of it violates legal positivism; neither did *Swift*.

To reinforce this point, consider H.L.A. Hart's explanation of his theory of positivism as “descriptive,” because it analyzed only how one should think about law, not whether particular legal practices (like *Swift* or *Erie*) are desirable.⁴⁹ Although many *Swift*-era judges and scholars believed that federal general common law stemmed from some unduly mystical source, positivism would criticize *only that belief*, not the practice of *Swift*'s federal general common law. Indeed, *Swift*'s result was often defended—consistently with legal positivism—using constitutional, statutory, and precedential arguments, alongside prudential arguments about national uniformity and economic growth.⁵⁰

46. For a superb essay on this point, see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676 (1998) (“Legal positivism is conceptually and normatively irrelevant to *Erie*'s holding.”); see also *id.* at 682-83 (“It is doubtful that *Swift* represented a commitment to or belief in the ‘brooding omnipresence’ theory . . . [The Court] and commentators justified [*Swift*] primarily on constitutional grounds . . . Whatever one thinks of the merits of this constitutional argument, it does not rest on a denial of the truth of legal positivism.”) (footnotes omitted); *id.* at 685 (“Even the *Swift* supporters . . . thought that [federal general common law] was judge-made, national common law authorized by the Constitution and analogous to . . . state common law. They too were legal positivists.”) (footnote omitted); *id.* at 694 (“Legal positivism was embraced by both critics and supporters of *Swift* . . . few if any ever defended *Swift* on anti-positivist terms.”); see also Ely, *supra* note 2, at 703 n.59 (“[I]t is not necessary to believe in a ‘transcendental body of law’ . . . to approve *Swift*; one might just prefer to have federal judges making law.”) (citation omitted); FREYER, *supra* note 22, at 122 (observing that critiques and defenses of *Swift* were equally consistent with positivism); *id.* at 116 n.28, 117 n.29, 119 nn.32-34 (citing as examples: JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 248-49, 253 (1909); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499 (1928); Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 25-27, 35 (1929)). William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

47. See, e.g., HART, *supra* note 42, at 132 (comparing stare decisis to rule-production by administrative agents); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-09 (1958) (“[O]nly an entire misconception of what analytical jurisprudence . . . has led to the view that [John Austin] believed that . . . judges deduced their decisions from premises. On the contrary, he . . . berated the common-law judges for legislating feebly and timidly . . . instead of adapting their decisions to the growing needs of society as revealed by the moral standard of utility.”).

48. See *infra* Section II.B.2.

49. See HART, *supra* note 42, at vii.

50. See *supra* notes 25, 46 (collecting sources).

Simply put, positivism does not require *Erie's* rule that common-law substantive authority be transferred from federal judges to state judges. *Swift*-era federal courts crafted common law in diversity cases using the same techniques as state courts. The lone difference was that federal courts were bound to follow only their own precedents, not those of any state, whereas state courts were bound to follow only *their* precedents, not those of federal courts. The pre-*Erie* system might seem odd, impractical, and unfair—resulting in different substantive law for federal and state courts “a block away” from each other.⁵¹ Yet such anomalies did not breach any premise of right-thinking legal positivism, and compliance with positivism is not constitutionally required.⁵²

3. *Two Forms of Federalism*

Erie's most important original rationale was federalism. In just a few sentences of text, Brandeis invoked two types of federalism: enumerated federal powers and reserved states' rights.

[a.] Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or “general”. . . . And no clause in the Constitution purports to confer such a power upon the federal courts. . . . [b.] We merely declare that in applying [*Swift*,] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.⁵³

The two most important scholarly analyses of *Erie* invoke these theories. Judge Henry Friendly's *In Praise of Erie—and the New Federal Common Law* favors states' rights, while John Hart Ely's *The Irrepressible Myth of Erie* endorses an enumerated-powers approach.⁵⁴ With full respect, I dispute both positions.

51. *See Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

52. Some readers may feel that, even if positivism itself does not support *Erie's* result, positivism at least clarifies *Swift's* other constitutional flaws. This of course depends on whether my arguments concerning federalism and separation of powers fail. *See infra* Subsection I.B.3; Section II. One indirect effect of changes in American legal theory was perhaps to make *Swift's* subconstitutional problems (unfairness, forum shopping, and pro-corporate favoritism) more difficult to justify as twentieth-century theorists cast doubt on *Swift's* “brooding omnipresence in the sky.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Yet it was no transformative legal theory that determined whether *Swift's* common law was properly implied from the Rules of Decision Act and the grant of diversity jurisdiction. Thus, for commentators who believe (as I do) that *Erie* is justified on prudential grounds, positivism must stay firmly on the sidelines. And for jurists who dispute my analysis of federalism or separation of powers, I cannot see how positivism's emergence enlightens any core point of disagreement.

For a particularly dedicated effort to link *Erie's* federalism and positivism arguments, see Clark, *Ascertaining*, *supra* note 37, at 1479-80. Yet even Clark concludes that *Erie's* “embrace of legal positivism . . . is not sufficient to explain” *Erie's* result. *Id.* at 1481 (emphasis added). I would add that positivism also seems unnecessary.

53. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

54. *See Ely*, *supra* note 2, at 702; Friendly, *Praise*, *supra* note 10, at 397.

a. *States' Rights*

The claim that federal general common law breached states' constitutional sovereignty predominates in Brandeis's opinion.⁵⁵ Since the Founding, states' rights have inspired controversy,⁵⁶ and debates later flared when such arguments supported unchecked markets, child labor, and racial discrimination.⁵⁷ Indeed, "*Lochner*-era" jurisprudence included a particularly strong form of states' rights that Robert Post has called "dual sovereignty,"⁵⁸ which "sought to divide the country into separate and exclusive spheres of sovereignty. Dual sovereignty held that the nation and the states were each authorized to control autonomous and distinct domains of social life."⁵⁹ In its highest form, *Lochnerian* dual sovereignty analyzed interactions between federal and state governments like those between separate countries.

Given the Court's 1937 "switch in time," it may seem strange that *Erie's* states' rights argument builds on *Lochnerian* dual sovereignty.⁶⁰ After all, Brandeis championed progressive regulation;⁶¹ is it possible that his celebrated *Erie* opinion relied on pre-New Deal federalism? The opinion's text suggests just that. Brandeis "declare[d]" *Erie's* holding by invoking the Tenth Amendment's reservation of states' rights.⁶² The Court also quoted Justice

55. See *Erie*, 304 U.S. at 71-80.

56. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1159 n.67 (1988) ("A major difficulty is that the Constitution's supporters and opponents alike attributed 'complex and often contradictory meanings' to the concept of state sovereignty."); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1524 (1987).

57. See, e.g., Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 885 (2006); cf. *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 43-44 (1922); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

58. Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1635 (2002); accord Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001). The Court has used "dual sovereignty" with an apparently different meaning. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). My use of the term follows Post's and Young's.

59. Post, *supra* note 58, at 1518.

60. See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1406 (2006). But see Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 411 n.233 (2002) [hereinafter Young, *Sorting*] (noting that *Erie's* federalism argument "rested crucially on . . . assumptions of 'dual federalism' . . . that have mostly disappeared from our jurisprudence."). See generally Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)).

61. See *PURCELL*, *supra* note 22, at 113-120.

62. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) (holding that *Swift* "invaded rights which . . . are reserved by the Constitution to the several states"); cf. U.S. CONST. amend. X. *Erie's* text thus unsettles *Purcell's* claim that the Tenth Amendment argument in *Erie* is "derivative[.]" "oblique[.]" and reluctant[.]" or "superfluous". See *PURCELL*, *supra* note 22, at 178-79. *Purcell* notes that *Erie* did not explicitly cite the Tenth Amendment, nor elaborate its reference to "rights which . . . are reserved by the Constitution to the several states." *Id.* at 180 (quoting *Erie*, 304 U.S. at 80). By contrast, I find the opinion's language quite clear; and perhaps more so in 1938, when states' rights arguments were prevalent. For comparably indirect Tenth

Field's dissent in *Baltimore & Ohio Railroad Co. v. Baugh*, which had criticized *Swift* at length.⁶³ Modernists tend to overlook Field's opinion in *Baugh*, yet it may be our best clue in understanding *Erie's* states-rights argument.

Baugh was decided in 1893, near the height of *Lochner*-era federalism, and Field's dissent is steeped in now-discredited views of state autonomy. For example, the sentence quoted by Brandeis introduced an entire page of dual-sovereignty fulminations in Field's dissent.⁶⁴ The following quote illustrates the principles underlying Field's—and by incorporation *Erie's*—attacks on *Swift*:

“[T]he general government and the states . . . are *separate and distinct sovereignties*, acting separately and independently of each other, within their respective spheres.” . . . To this autonomy and independence of the States their legislation must be as free from coercion as if they were separated entirely from connection with the Union.⁶⁵

Baugh's comparison of states to independent nations is what stamps dual-sovereignty federalism with near-universal disdain.⁶⁶ *Erie's* reliance on such

Amendment references, see *Wiggins Ferry Co. v. City of E. St. Louis*, 107 U.S. 365, 375 (1883), and Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 434 (Roy P. Basler ed., 1953).

My disagreements with Purcell may owe to our different methodologies. See PURCELL, *supra* note 22, at 1 (introducing his “work of history, not of law”). On occasion, Purcell seems to read *Erie*, not simply through its published words, but as an expression of Brandeis's judicial biography. See *id.* at 114 (“*Erie* was . . . a decision of the Supreme Court that embodied the well-considered and fundamental constitutional theory of only a single justice.”). In my judgment, such a historicized approach can be taken too far, underappreciating that Supreme Court opinions are produced by an institution, not a single Justice. Cf. Young, *supra* note 60, at 410-11 n.233 (drawing similar methodological distinctions).

Purcell's own research shows that some of *Erie's* strongest federalism rhetoric was added to satisfy other members of the Court. See PURCELL, *supra* note 22, at 179 (“Hughes, like Justice Roberts, had suggested that the Tenth Amendment created substantive restrictions on national power, and both may have considered the provision as *Erie's* constitutional basis.”); *id.* at 109-113; *id.* at 114 (noting that three members of the *Erie* majority may have doubted the Court's constitutional arguments); *id.* (noting that Purcell's non-states-rights theory of *Erie* “may well have had no [full] supporters” except Brandeis himself); *id.* at 180. As Purcell would agree, however, even the most penetrating insights into Brandeis's jurisprudence cannot displace the Court's collectively approved language—the latter is my focus.

63. *Erie*, 304 U.S. at 78 (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

64. *Baugh*, 149 U.S. at 402.

65. *Id.* at 401-402 (Field, J., dissenting) (quoting *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1870)) (emphasis added). *Day* was limited to its facts one month after *Erie* was decided, see *Helvering v. Gerhardt*, 304 U.S. 405 (1938), and was explicitly overruled in 1939, see *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). The fierceness of Field's dissent may owe to *Baugh's* facts, which applied the fellow-servant defense to railroad torts, rather than to a principled commitment to federalism, see FREYER, *supra* note 22, at 65-70 (noting that *Baugh* rejected Field's opinion in *Chicago, Milwaukee & St. Paul R.R. Co. v. Ross*, 112 U.S. 377 (1884), which had reached opposite conclusions as a matter of federal general common law).

66. See Post, *supra* note 58, at 1638. Modern federalism debates, which are typically more modest, are described in Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV.

discredited antecedents is easily overlooked, because it contradicts the case's high status and its perceived distance from pre-New Deal federalism. Any move to connect *Erie* with *Lochner* might reduce the former's prestige or inaptly enlarge the latter's.

The fact that *Erie*'s states-rights position stems from the shibboleth of dual sovereignty is important, but *ad tempus* criticism cannot fully rebut the argument. Judge Friendly himself defended *Erie*'s states-rights position in 1968, claiming that judicial "[p]ower to deal with [certain state common-law subjects is] reserved by the Tenth Amendment 'to the States respectively, or to the People.'"⁶⁷ Despite Friendly's estimable support, however, *Erie*'s states-rights argument is of questionable merit.

Under modern constitutional law, some jurists reject states-rights arguments altogether,⁶⁸ but *Erie*'s "right" for states to be free from federal general common law seems especially anomalous. After all, *Swift*'s federal general common law did not "commandeer" state officials, nor did it even preempt state law as applied in state court.⁶⁹ On the contrary, *Swift* merely prescribed substantive law in federal court for a category of cases (e.g., those under diversity jurisdiction) that the Constitution and congressional statutes explicitly assigned for federal decision.⁷⁰ Did that violate some constitutional prerogative of the states?

The Tenth Amendment reserves to the states and the people all residual powers that are not delegated to the federal government.⁷¹ But Article III seems to remove diversity cases from any sphere of protected state autonomy—much like cases arising under federal law, affecting ambassadors, or concerning admiralty and maritime jurisdiction.⁷² States might have deep practical interests in the substantive law applied in these cases, but such interests find no shelter in the Constitution's allocation of judicial responsibilities.

It is of course theoretically possible that the Constitution's grant of diversity jurisdiction includes only issues of forum, and silently reserves to the

1763, 1763 (2006), and Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621-26 (2001).

67. Friendly, *Praise*, *supra* note 10, at 395.

68. See, e.g., Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867 (2005); William H. Pryor Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1171-72 (2002). See generally Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 434 (Roy P. Basler ed., 1953) ("Much is said about the 'sovereignty' of the States; but the word, evèn, is not in the national Constitution . . .").

69. See, e.g., FREYER, *supra* note 22, at 40; cf. *Printz v. United States*, 521 U.S. 898 (1997) (prohibiting the commandeering of state officials to execute federal laws). For extended analysis of preemption's relevance to modern federalism, see Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006).

70. Cf. FREYER, *supra* note 22, at 38.

71. U.S. CONST. amend. X.

72. U.S. CONST. art. III, § 2.

states all control over substantive law.⁷³ With creativity, for example, one could imagine an affront to states' "dignity" when federal courts resolve diversity suits one way and state courts decide similar issues differently. These arguments seem difficult, however, given diversity jurisdiction's function. Since the First Judiciary Act, the federal government has resolved diversity cases without resort to state courthouses, docket control, judges, or juries. All such differences could be read as implicitly disrespectful of state adjudicative systems, yet diversity jurisdiction exists precisely so that federal courts might decide cases differently from state courts, e.g., without "bias."⁷⁴ This background makes it quite unlikely that—even as diversity cases were whisked out of supposedly flawed state courts—the Tenth Amendment or some unstated constitutional norm requires federal courts to follow state substantive law.⁷⁵

Modern case law also undercuts *Erie*'s states-rights argument. One reference point for identifying a constitutionally protected state's right concerns "functions essential to [states'] separate and independent existence."⁷⁶ *Swift*'s federal general common law, which did not affect state courts and did not preempt state law, cannot meet that extremely high standard. Modern courts are also skeptical of federal intrusion on a "traditional aspect[] of state sovereignty."⁷⁷ But such tradition-based arguments founder on 151 years of pre-*Erie* practice, during which general-common-law cases were decided independently of state precedent.⁷⁸ As a matter of constitutional structure and pre-*Erie* history, diversity cases are within the federal government's domain. And if Congress had explicitly enacted a *Swift*-based regime of federal general common law, states' rights would not have constitutionally invalidated that system.⁷⁹ Accordingly, modern states-rights federalism cannot support *Erie*'s

73. Cf. Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 80, 98 (1993).

74. Although this is the orthodox rationale for diversity jurisdiction, e.g., Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) [hereinafter Friendly, *Historic Basis*], I express no view on its merit.

75. For further discussion of whether "the constitutional structure" supports *Erie*'s result, see Craig Green, *Erie and Problems of Constitutional "Structure": A Response to Professor Clark*, 96 CALIF. L. REV. 661 (2008).

76. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (internal quotations omitted).

77. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 849 (1976). Not all fields of traditional state authority qualify as constitutionally protected states' rights, however. E.g., *Gonzales v. Raich*, 545 U.S. 1, 29 n.38 (2005).

78. See FREYER, *supra* note 22, at 2.

79. Clark claims that, under the Supremacy Clause, unless federal "law" is created through the mechanisms set forth in Article I and Article II or derives from some other constitutional requirement, it lies outside the federal government's constitutional power. See Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289 (2007). My full response appears elsewhere in this volume. See Green, *supra* note 75. On the merits, I question whether the Supremacy Clause serves the limiting function that Clark describes, which might put all federal common law under a constitutional shadow, along with many executive agreements and much administrative law. Furthermore, the Supremacy Clause would seem an odd basis for overruling *Swift v. Tyson*, since federal general common law was not thought to preempt state law.

constitutional holding, and premodern arguments about dual sovereignty can only undermine *Erie's* present status.

b. *Enumerated Powers*

Erie's strongest original argument is that the federal government lacks authority to construct common-law principles and precedents in cases that exceed Congress's enumerated powers. To bring this argument into focus, imagine a federal statute that states: "In any case *substantially affecting interstate commerce*, federal courts shall not be bound by state precedents, but shall construct such common-law principles and precedents as they deem appropriate." Such a statute would authorize *Swift's* federal general common law, but neither equal protection, positivism, nor states' rights objections would render it unconstitutional.

Ely has offered perhaps the best known explanation of *Erie's* enumerated-powers argument:

[*Erie*] has been faulted for failing to indicate precisely what constitutional provision [*Swift's*] interpretation of the Rules of Decision Act violated, but the lack of a relevant provision was precisely the point. The prior interpretation was unconstitutional . . . not because [*Swift's*] common law rules . . . were encroaching on areas of 'state substantive law' It was unconstitutional because nothing in the Constitution provided *the central government* with a general lawmaking authority of the sort the Court had been exercising under *Swift*.⁸⁰

As Brandeis explained, "*Congress has no power to declare substantive rules of common law applicable in a State whether they be local . . . or 'general,' be they commercial law or a part of the law of torts. . . . And no clause in the Constitution purports to confer such a power upon the federal courts.*"⁸¹ This suggests that the entire federal government—including Congress and the courts alike—lacks constitutional authority to create federal general common law. Although *Erie's* enumerated-powers argument has been widely accepted,⁸² it is flawed as a rationale for the Court's holding on the facts

80. Ely, *supra* note 2, at 702-03 (citation omitted) (emphasis added).

81. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

82. William Crosskey criticized *Erie* as overlooking Article III, Congress's power to "constitute tribunals," and the "necessary and proper" clause. See CROSSKEY, *supra* note 5, at 633-39, 866-71. Though Crosskey's work has been fiercely disputed, e.g., Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439, 1456 (1954), choice of law rules like *Swift* and *Erie* could plausibly be "necessary and proper" ancillaries to exercising diversity jurisdiction under Article III: Congress can make laws "necessary and proper for carrying into Execution" the powers of *any* branch of government. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 442, 443-48 (1969); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 565 (1958). By this logic, Congress could authorize federal courts to decide diversity cases using only federal precedents, as occurred in *Swift*.

The remaining question would be whether federal courts could make substantive laws in such

of *Erie* itself.

Commentators have reconstructed Brandeis's analysis of limited congressional power as follows: Some cases heard by federal courts under Article III and the diversity statute concern purely intrastate, noncommercial matters, which Congress could not regulate as interstate commerce or under other Article I powers.⁸³ Imagine a purely intrastate assault, where the plaintiff moves to another state and sues in federal court.⁸⁴ Such examples arguably fall in a "gap" between federal jurisdiction under Article III and Congress's powers under Article I.⁸⁵ *Erie*'s rejection of federal general common law thus ensured that federal courts' lawmaking followed limits on Congress itself.⁸⁶ To rephrase the point, even if Congress did authorize *Swift*-era common law through the Rules of Decision Act and the diversity statute, Congress could not expand federal legislative powers simply by shifting lawmaking duties to the courts.

The problem with *Erie*'s enumerated-powers argument is that any "gap" between Article III diversity jurisdiction and Article I legislative power is too small to explain *Erie*, much less justify the wholesale reversal of *Swift*-era common law. Diversity cases with facts like *Erie*'s involve interstate parties and almost always affect interstate commerce; thus, they do not fall into any "gap" between judicial and congressional authority. *Erie* concerned a train accident involving a New York railroad operating in Pennsylvania. Such a dispute is susceptible to federal regulation under nearly any theory of Article I authority.⁸⁷ *Swift* likewise concerned an interstate commercial paper dispute that probably fell within Congress's commerce power.⁸⁸ And facts like *Erie*'s

cases. For arguments that federal courts' power should reach most, if not all, cases with interstate litigants, see *infra* notes 87-89 and accompanying text. *But cf.* Stephen B. Burbank, *supra* note 4, at 756-57 n.102 (doubting, for reasons partly explained, whether "Congress [in 1938] had, or that it now has, the power to prescribe [a substantive liability rule] applicable only in federal courts, with the states having concurrent jurisdiction and remaining free to apply their own rules.").

83. See, e.g., Westen & Lehman, *supra* note 2, at 338 ("The federal courts had interpreted *Swift* to mean . . . that they could adopt a federal common law in diversity cases that differed from the state common law . . . and that they could fashion such a federal law in all areas of regulation . . . That interpretation of *Swift*'s holding was unconstitutional, because it accorded the federal courts more extensive authority to make law than Congress itself possessed." (emphasis omitted)).

84. See generally *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1381-82 (1993) ("[T]he party's status at the time of suit controls for the purpose of determining whether diversity jurisdiction exists.").

85. This gap is presumably what *Erie* meant in stating that Congress was "confessedly" without power. *Erie*, 304 U.S. at 72. *But cf.* PURCELL, *supra* note 22, at 180 (offering a different view). By contrast, if Crosskey's argument were true, *supra* note 82, the federal government could regulate such disputes through diversity cases, even though such regulation would otherwise exceed Congress's Article I powers. For many jurists, that would be unacceptable. See Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1320 n.78 (1985).

86. See, e.g., Westen & Lehman, *supra* note 2, at 338 ("[C]ourts acting in a common law capacity possess only as much power as the legislature possesses.").

87. See, e.g., Ely, *supra* note 2, at 703 n.62.

88. *Cf. id.*

and *Swift*'s do not seem atypical.⁸⁹

As a result, even if the Erie Railroad had challenged *Swift*'s constitutionality,⁹⁰ its argument would have been at most a "facial challenge," because its force would depend on factual circumstances different from those immediately before the Court.⁹¹ Under modern jurisprudence, "[a] facial challenge . . . [is] the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."⁹² That standard could not have been met in *Erie*.⁹³

Congress's commerce power is also greater now than in 1938.⁹⁴ Especially important is the "aggregation principle," which upheld commerce legislation if any rational basis suggests that the regulated conduct, as an aggregate class, substantially affects interstate commerce.⁹⁵ Thus, even if some modern-day tort or contract disputes might not fall within constitutional limits, that is irrelevant because large numbers of diversity cases clearly do "substantially affect interstate commerce" as an aggregate set. Thus, under conventional assumptions about modern congressional authority and the universe of diversity cases, any "gap" between Article I commerce power and federal diversity jurisdiction seems very small indeed.

My point should not be overclaimed. *Erie*'s enumerated-powers argument was that Congress and federal courts each lack "power to declare substantive rules of common law applicable in a state."⁹⁶ At least in cases like *Erie* that affect interstate commerce, Congress and the federal government *do* have "power to declare substantive rules of common law applicable in a state."⁹⁷ Although there probably was a small number of *Swift*-era lawsuits for which "nothing in the Constitution provided the central government with a general lawmaking authority,"⁹⁸ *Erie* was not such a case, nor was it a proper vehicle

89. Cf. FREYER, *supra* note 22, at 102 (claiming without elaboration that "[p]erhaps as much as 80 percent of [twentieth century cases applying *Swift*] involved corporations engaged in interstate enterprise").

90. See generally *Erie*, 34 U.S. at 82 (Butler, J., dissenting).

91. See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

92. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

93. See Young, *supra* note 60, at 411 n.233 ("[T]he notion that the entire regime of *Swift* would be unconstitutional simply because some judicial applications of the common law might fall outside the zone of federal legislative power seems inconsistent with the modern facial challenge doctrine. The Railroad would not have been able to make an 'as applied' challenge to *Swift* in *Erie* because the particular rule at issue there was surely within Congress's legislative power.") (emphasis and citation omitted).

94. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), with *Gonzales v. Raich*, 545 U.S. 1 (2005). See also Borchers, *supra* note 73, at 118-19.

95. See, e.g., *Raich*, 545 U.S. at 22-23.

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

97. *Id.*

98. Ely, *supra* note 2, at 703.

for considering such cases. Thus, *Erie's* invalidation of federal general common law across the board is particularly difficult to defend based on enumerated powers.

C. *Taming Erie's Old Myth*

The previous Section offered a rebuttal of *Erie's* original constitutional arguments. Unlike most previous critics, however, I have no wish to unsettle the case in its original and classic contexts, such as cases involving diversity jurisdiction, supplemental jurisdiction, or other interactions between federal and state law in federal court.⁹⁹ Nor do I urge a return to *Swift*.¹⁰⁰ On the contrary, I think *Erie's* result is substantially better than its predecessor.¹⁰¹

In 1938, Brandeis may have felt some need for a constitutional argument before overruling *Swift's* aged precedent, and later commentators made constitutional arguments to cement *Erie's* achievement. After seven decades, however, concerns for *Erie's* survival seem quaint. Jurisprudence applying *Erie* has been repeatedly praised.¹⁰² Experience has demonstrated *Erie's* political and social benefits, while its defects have not appeared.¹⁰³ And *Erie's* progeny have provided intraterritorial uniformity, with a generally serviceable line between state "substantive" law that binds federal courts and "procedural" law governed by federal rules. Thus, in many of the fields where *Swift* upset its critics, *Erie* has succeeded. Such practical credentials should be quite enough to repel any latecoming assaults on *Erie's* decision about choice of law in diversity cases.

My goal in criticizing only the constitutional basis of *Erie's* "old myth" is to foreclose the decision's expansion beyond its proper scope: federal courts deciding legal issues commonly heard in state court. This category is exemplified (but not exhausted) by diversity cases involving state-law actions and defenses.¹⁰⁴ But if I am right, this may be as far as *Erie* goes. Every year,

99. See sources cited *supra* note 6; see also Clermont, *supra* note 23 (arguing that *Erie* should also guide whether state courts follow federal procedural requirements).

100. For rare criticism reaching similar conclusions, see Lawrence Earl Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L.J. 3 (1941). See also Kurland, *supra* note 33, at 910.

101. See, e.g., Louis H. Pollak, *In Praise of Friendly*, 133 U. PA. L. REV. 39, 61, 43 (1984) ("[*Erie*] cure[d] the besetting problem . . . [that differences between] state and federal courts . . . as to the law applicable to the same case results in irritation which has somewhat impaired the usefulness of the federal courts in some localities.") (quoting Friendly, *Historic Basis*, *supra* note 74, at 438 n.2 (quoting CHARLES W. ELIOT ET AL., PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE (1914))); PURCELL, *supra* note 22, at 141-155, 165-172.

102. *Erie*, 304 U.S. at 74. See Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 966 (1998). But cf. Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 123-24 (1993).

103. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

104. On the "oft-encountered heresy" that *Erie* applies *only* to diversity cases, see Friendly,

Civil Procedure classes explain and justify *Erie* as a rule that avoids disparities and forum shopping, while barely noting the decision's constitutional basis. This Article supports that approach, and would take the added step of jettisoning such constitutional arguments altogether

Some readers will resist this last step. Yet even if *Erie*'s constitutional arguments are somehow true, perhaps everyone can agree that they are limited in scope. *Erie*'s old myth is a story of federalism, navigating frictions between state and federal courts where they decide comparable legal issues. The text of *Erie*'s holding had nothing to do with separation of powers or specific limits on federal courts. On the contrary, *Erie*'s most plausible argument concerned enumerated powers, and here the Court drew explicit parallels between congressional and judicial power to determine law in diversity cases.¹⁰⁵ At no point did Brandeis suggest that federal courts should be uniquely restrained, compared to other federal agents, in their authority to create federal law governing state torts and contracts. Under old-myth federalism, federal courts had no more power than Congress itself, and *Erie* held that the authority of both branches was lacking when it came to *Swift* and federal general common law.¹⁰⁶

Of course, some modern scholars view *Erie* not just as a federalist limit on the United States government as a whole, but as a particular constraint on federal courts, independent of federalism. This transformation of *Erie*-as-federalism to *Erie*-as-judicial-restriction is the hallmark of a far more powerful mythology, which may now be analyzed on its own terms.

II

ERIE'S NEW MYTH: SEPARATION OF POWERS

Alongside *Erie*'s old myth as a "cornerstone[] of our federalism"¹⁰⁷ is a second story with less doctrinal basis and greater potential force. *Erie*'s new myth swaps the old myth's federalism for a focus on separation of powers, and derives from the latter a resistance to certain categories of judicial activity grouped under the label "federal common law." The new myth thus claims that *Erie*'s principal concern was to eliminate undue judicial policymaking, and although a mainly intellectual innovation for decades,¹⁰⁸ its recent doctrinal

Praise, *supra* note 10, at 408-09 n.122.

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

106. Some scholars have suggested that *Erie*'s language concerning congressional power is "dictum," e.g., Borchers, *supra* note 73, at 118, just as earlier scholars claimed that the totality of *Erie*'s constitutional argument was "dictum," e.g., Clark, *supra* note 33, at 278. As written, however, the Court's conclusion about judicial power seems squarely to rest on its conclusion about congressional power. Thus, both seem to represent the Court's "stated and, on its view, necessary basis for deciding" the case. Friendly, *Praise*, *supra* note 10, at 385.

107. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

108. For the first full statement of *Erie*'s new myth, see Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974). See also Hill, *supra* note 82, at

applications warrant focused attention. The following discussion will show that the new myth (a) lacks support in *Erie*'s text, (b) is conceptually unstable, (c) has misled scholars and the Court to apply *Erie* to customary international law, and (d) could produce indefensible results if applied rigorously to other contexts.

A. *The New Myth's "Newness"*

Commentators have not distinguished *Erie*'s old and new myths.¹⁰⁹ Thus, my first task is to show that "new" separation-of-powers arguments against federal common law do not appear in *Erie* itself. This is simple, because *Erie*'s separation-of-powers myth has just two links to the Court's opinion, and neither is substantial.

First is Brandeis's conclusion, "[t]here is no federal general common law."¹¹⁰ Like *Erie* itself, this phrase had nothing to do with separation of powers or new-myth aversion to federal common law. "Federal general common law" is different from "federal common law."¹¹¹ The former refers to a specific kind of judicial decision, exemplified by *Swift*, which arose mainly in diversity cases.¹¹² "Federal common law" is a vague term covering a broader swath of judicial product. Friendly's article stressed the difference: "In Praise

444-47. As a matter of intellectual history, the old myth has been in nearly continuous decline: from Brandeis's opinion, to Friendly's vigorous defense, to Ely's milder enumerated-powers argument. And Mishkin's separation-of-powers theory appeared as a response to Ely. *Erie*'s new myth thus sparked to life just as old-myth federalism turned to ash.

Other leading defenders of the new myth include Thomas W. Merrill, *supra* note 11, at 46-47, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. REV. 761 (1989), Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001), Young, *Sorting*, *supra* note 60, Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002), and Bradley & Goldsmith, *Customary International Law*, *supra* note 7.

109. Partial exceptions are Brown, *supra* note 8, and Doernberg, *supra* note 2, but they would not call "old *Erie*" or "new *Erie*" myths. By contrast, new-myth academics often criticize old-myth federalism in order to show that *Erie* is a separation-of-powers case. *See, e.g., supra* note 108.

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

111. Brandeis changed his opinion to state "[t]here is no federal general common law," when an earlier draft had imprecisely said "[t]here is no federal common law." PURCELL, *supra* note 22, at 106. *See generally* Borchers, *supra* note 102, at 111-15, and Fletcher, *supra* note 46, at 1527-28.

112. Federal general common law was "federal" because it issued from a federal judge, even though such rulings did not preempt contrary state law in state court. *See* FREYER, *supra* note 22, at 40. The term "general" indicated that these substantive rules came from broad principles of law and justice independent of any particular jurisdiction. *Cf. Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) ("[Q]uestions of general commercial law . . . [depend] upon general reasoning and legal analogies"); *id.* ("[T]he true interpretation and effect [of contracts and commercial instruments] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.").

of *Erie*—and of the New Federal Common Law.”¹¹³ Wordplay is all that underlies confusion between *Erie*'s antipathy toward federal general common law on the one hand, and new-myth aversion to federal common law generally on the other.¹¹⁴ The mistake is easily made, but is also easy to avoid.

In context, *Erie*'s knell for federal general common law meant only that *Swift* was reversed, and for the Court's listed reasons. The Court did not attack federal common-law policymaking, and the specialized term “federal general common law” had no relevance outside *Swift* and its direct progeny.

Second is *Erie*'s statement that, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.”¹¹⁵ By terms, this language does support new-myth limits on federal courts' lawmaking authority. Indeed, if the sentence were accurate, it would bar federal common law altogether—and therein lies its error.

Federal courts regularly apply law that is neither the Constitution, an act of Congress, nor state law. There is and always has been federal common law.¹¹⁶ The most obvious examples are admiralty and interstate border disputes, but there are many others. Federal common law was prevalent before and after *Erie*, similar traditions are strong today, and only one sentence of *Erie* stands against them. The Court's language is overstatement, which must be read narrowly if it is to make sense.

The Court failed to limit such rhetoric because it was so intent on reversing *Swift*. With respect to “classic” *Erie* cases involving diversity jurisdiction, the applicable law often is (as *Erie* declared) the Constitution, a federal statute, or “the law of the State.”¹¹⁷ But that raises no doubts about federal common law's existence and desirability in other areas.

It may be sufficient for some readers that *Erie*'s new myth lacks support in Brandeis's opinion. Indeed, the Court's words fail to identify any separation-of-powers issue at all. Thus, it may seem logical that federal common law's constitutionality should be discussed through authority other than *Erie*, such as constitutional text, framing-era history, or precedent.¹¹⁸

113. Friendly, *Praise*, *supra* note 10 (emphasis added); *id.* at 405.

114. The term “general” feeds this confusion. Modern readers might construe the word to mean “broad” or “widespread.” But in contract, it concerned the belief (criticized by Holmes and discussed *supra*) that *Swift*-era common law derived, not from the federal or state government, but from “general” transcendent principles. This may be why *Erie* used the term “federal general common law” (i.e., federal application of “general” common law), rather than “general federal common law” (i.e., broad application of federal common law). *Erie*'s use of “general” identified the source of *Swift*-era common law, not its breadth.

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

116. See sources cited *supra* note 9. Of course, to accept federal common law's existence does not answer what legal authority is needed to justify federal common law. See *infra* Part III.

117. For examples, see sources cited *supra* note 6.

118. Debates over judicial authority and the separation of powers might continue with citations to *Cort v. Ash*, 422 U.S. 66 (1975), or *Alexander v. Sandoval*, 532 U.S. 275 (2001). But these modern cases are products of their age, and are seen to stand for only “one side” of modern

On the other hand, some myths die hard, and many commentators have accepted the notion that *Erie* represents a blend of federalism (old myth) and separation of powers (new myth).¹¹⁹ Engaging the latter point on its merits, the next Sections describe the new myth's conceptual problems, trace its application to customary international law, and analyze its absurd implications in other contexts. My aim is to call attention to the new myth as a phenomenon of legal culture, and to raise questions about its theoretical sustainability and practical consequences.

B. Conceptual Problems

If one overlooks *Erie*'s text, the case seems easier to characterize as broadly limiting judicial power. The new myth runs as follows: Because *Erie* concerned railroad safety that Congress could have regulated under the Commerce Clause, the real question was whether federal courts could regulate railroads on their own, and *Erie* answered "no."¹²⁰ Under the new myth, *Swift*'s flaw lay not in disparities between federal and state courts, nor in applying federal general common law to state causes of action, nor in federal overreaching into states' business. Instead, *Swift* erred by allowing federal judges to make law with too much discretion and too little congressional guidance.¹²¹ The new myth reads *Erie* as an implicit, categorical attack on federal courts' lawmaking power. With certain narrow exceptions, the new myth construes *Erie*-based separation-of-powers norms as forcing such policy decisions toward the political branches, or at least state judges. Unless Congress speaks, federal courts should be quiet.

Because *Erie*'s new myth rejects most forms of federal common law as unconstitutional, however, the theory must identify that disfavored category with precision. I suggest that the new myth condemns federal common law at undue abstraction, and that it does so to influence factual contexts that are significantly different from diversity decisions like *Swift* and *Erie*.¹²² Such

controversies over judicial role. By contrast, *Erie* lets judicial critics move beyond controversies over the Warren and Burger Courts' legacies, to claim fundamental, almost transcendent doctrinal roots. This Article does not take sides in post-*Erie*, post-Warren, post-Rehnquist debates over judicial power; I simply insist on recognizing such issues for what they are.

119. See sources cited *supra* note 108.

120. See, e.g., *id.*; David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 551-52 (1987).

121. Note the difference between the old myth, which limits all federal power, and the new myth, which demands only more congressional specificity.

122. See *infra* Part II.C. Commentators differ over the new myth's scope. Compare sources cited *supra* note 7 (rejecting federal common-law enforcement of customary international law), with Clark, *Federal Common Law*, *supra* note 9, at 1292-1322 (accepting federal common law in foreign affairs), and Young, *supra* note 60 (proposing that customary international law should be enforceable in federal court, but not binding upon state courts). My theoretical objections apply to all accounts of the new myth, but my practical concerns stem from the new myth's broadest applications, which some new-myth advocates themselves resist.

theoretical ambitions raise conceptual issues surrounding the definition of “common law” and permissible “enclaves” thereof; I will call these the new myth’s identification problems.

1. Identifying “Common Law”

First, the new myth must differentiate common law from other forms of judicial activity, which is not easy. Torts, contracts, and property are traditional examples of common law subjects. But one could stare oneself blind trying to separate common law from statutory or constitutional interpretation, remedial law, and other “non-common-law” judicial decision-making.¹²³ No court or scholar has fully resolved such dilemmas, because the border between common law and other judicial activity is littered with confounding hybrids.¹²⁴ Well-known examples include antitrust, where vague statutes leave details in judicial hands; jurisdiction, where courts rule without clear statutory anchors; and constitutional law, which mirrors common-law decisions in many contexts.¹²⁵

As a functional matter, the trick is to identify when federal courts “make” legal rules, thereby qualifying as common law, even though their actions formally derive from another legal source. Consider the Constitution’s “due process of law”¹²⁶ or the Sherman Act’s “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.”¹²⁷ In one sense, courts applying such language undertake statutory or constitutional interpretation, not common law; nonetheless, judicial doctrine in these areas often looks much like common

123. See, e.g., Westin & Lehman, *supra* note 2, at 331-32 (“When a court in this country acts in a common law capacity, it performs precisely the same function as when it interprets a statute: It legislates ‘interstitially’ by ‘filling in the gaps left by the legislature,’ fully recognizing that the legislature ‘can by the ordinarily legislative process correct results if it does not approve.’ . . . The more definite and explicit the prevailing legislative policy, the more likely a court will speak of common law.”) (footnotes omitted) (quoting John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 50 (1978)); *id.* at 333 (“The courts in each case fashion law by assessing public policy as reflected in the enactments and silences of Congress, remembering, always, that ‘Congress can have the last word if it chooses.’”) (footnotes omitted) (quoting Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: the Lincoln Mills Case*, 71 HARV. L. REV. 1, 17 (1957)); Burbank, *supra* note 4, at 790.

124. See Westin & Lehman, *supra* note 2, at 333-34 (comparing “common-law” admiralty cases to “statutory” antitrust); cf. Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation*, 51 STAN. L. REV. 1, 19-20 (1998); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216-17 (2001).

125. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (antitrust); *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (constitutional torts); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1985) (jurisdiction); Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-72, (1989) (personal jurisdiction); see Philip C. Kissam, *Triangulating Constitutional Theory: Power, Time, and Everyman*, 53 BUFF. L. REV. 269, 310 & n.158 (2005); *Bush v. Vera*, 517 U.S. 952, 1077 (Scalia, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 510 n.1 (Black, J., dissenting).

126. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

127. 15 U.S.C. § 1 (2004).

law. And the new myth's claim that federal courts should be categorically averse to common-lawmaking, more than other judicial business, requires us to understand the difference.

For the new myth, the conceptual stakes could not be higher. If the new myth cannot identify what "common law" means, new-myth advocates might be tempted to pick and choose. Jurists who disfavor private litigation might decry common-law causes of action but not common-law defenses, while plaintiff-friendly advocates might prefer the opposite. New-myth proponents might also apply the "common law" label differently in different substantive contexts, based on their own policy judgments about judicial activity in various contexts.

Such inconsistencies are troubling in themselves, but they also suggest that the new myth's resistance to common-law judging might spread to other areas, branding more and more types of judicial work with a scarlet "E," undignified pariahs in a post-*Erie* world. Most of all, this problem undermines the very idea of resisting federal common law as a category. If the new myth cannot separate common law from other judicial activity as a descriptive matter, its normative project should likewise fail.¹²⁸

2. Identifying "Enclaves"

The new myth's second identification problem concerns how to separate illegitimate federal common law from acceptable enclaves thereof.¹²⁹ This must be done because almost no one views *Erie* as rejecting *all* federal common law.¹³⁰ On the same day *Erie* was decided, for example, the Court applied federal common law to an interstate border dispute, and Brandeis wrote both majority opinions.¹³¹

The enclave of federal common law governing interstate disputes is nearly universally accepted; admiralty is also highly conventional.¹³² The analytical

128. Of course, one need not be a realist or crit to think that vague line-drawings are pandemic in the law. See John Hasnas, *Back to the Future from Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86-90 (1995). The deeper questions are whether the new myth's vague categories present the wrong framework for analysis, with special risks of abuse, and whether this particular game is worth the candle.

129. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004); Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 856.

130. Perhaps the closest to rejecting all federal common law is Redish, *supra* note 108, at 786; Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853, 859 (1989). Clark also claims that most traditional areas of federal common law are not "judge-made" law after all. Clark, *Federal Common Law*, *supra* note 9, at 1271-74.

131. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

132. See Friendly, *Praise*, *supra* note 10, at 412-18; but see Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469 (2004) (arguing against admiralty's "enclave" status).

warrant for such exceptions is less clear. Nationalizing interstate disputes and admiralty was a reason for establishing federal courts in the first place.¹³³ But that does not require federal courts to create substantive law rather than demanding congressional guidance.¹³⁴ After all, why should unelected judges, rather than Congress, make law in areas of such vital national importance? And if judicial lawmaking is permissible for interstate litigation and admiralty, why not in other important categories of Article III jurisdiction, like diversity?

As a matter of intellectual history, common-law enclaves other than admiralty and interstate disputes have sparked fierce debates. For example, Friendly endorsed a wide range of judicial activities as appropriate exercises of federal common law.¹³⁵ Other critics disagree.¹³⁶ Some commentators seek to identify legitimate enclaves using history and precedent, such that federal common law is acceptable if old.¹³⁷ Others focus on contemporary function.¹³⁸ Such varied decisions to reject most-but-not-all federal common law illustrate that the new myth can tolerate exceptions. But the method of designating enclaves reveals the new myth's categorical nature, and its need to offer a satisfactory basis to determine what is in and what is out.

The problem of identifying enclaves is just as important as defining "common law," and for the same reasons. Rather than address particularized pros and cons of judicial action, the new myth labels broad categories of judicial acts as *Erie*-barred common law. But the new myth's opposition to all federal common law except enclaves presumes an ability to mark appropriate boundaries. Current, deep, and longstanding disagreement on these points casts doubt on whether a workable definition of enclaves will soon emerge.

3. *The Identification Problems' Implications*

These two identification problems pose fundamental challenges for the new myth if it wishes to be doctrinally useful.¹³⁹ Only answers to such

133. See FALLON, JR. ET AL., *supra* note 9, at 15.

134. For example, one can (barely) imagine a federal court's deciding that its jurisdiction over admiralty and interstate disputes did not create causes of action, nor authorize the creation of substantive law to be applied. Absent further (and surely forthcoming) legislative action, such a court would refuse to grant relief.

135. Friendly, *Praise*, *supra* note 10, at 412-18.

136. See, e.g., Merrill, *supra* note 11, at 47.

137. *But cf.* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 912 (1986) (criticizing purely historical analyses).

138. See, e.g., Young, *supra* note 132, at 521.

139. To make matters worse, some new-myth advocates may need *constitutionally based* answers to the identification problems. First, insofar as the new myth views *Erie* as a landmark with wide-ranging effect, constitutional pretense may be necessary. For example, if new-myth jurists wish to argue about *Erie* in contexts that do not involve state law, the Rules of Decision Act is of no help, for it governs only "cases where [the laws of the several States] apply." 28 U.S.C. § 1652 (2000). Relatedly, it would be paradoxical for the new myth's proponents to cite a common-law source for their idea of resisting federal common law. See, e.g., Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*,

questions can save the new myth from risks of ad hoc application, conceptual spread, and categorical dissolution.¹⁴⁰

Let me stress that it is the new myth, not *Erie* itself, that has made such identification problems important. Whereas *Swift* held that federal courts must follow only state statutes, *Erie* forced compliance with states' statutory and common law, thus eliminating any need to separate the two. Ironically, the new myth must revive the need to identify common law as common law, despite a near century of cases that failed to resolve such issues under *Swift*.¹⁴¹

Likewise, the need to identify enclaves of judicial activity is far more urgent under the new myth than under prudential or old-myth versions of *Erie*. The Court saw no need to reconcile *Erie*'s holding with its companion case about interstate borders because the former applied only in cases of overlapping state and federal law. Nor did Brandeis identify other enclaves of permissible common law; "classic" *Erie* cases did not plumb such depths. The new-myth effort to extract universal truths from *Swift*'s collapse is what makes identifying enclaves so vital.

Although this Section has voiced doubt about whether any transsubstantive theory of judicial activity can emerge from debates over common law and enclaves, I should repeat that this Article does not resist separation of powers generally, nor does it endorse freewheeling judges. Questions of judicial role and proper judicial business are extraordinarily important, but such discussions are not advanced by *Erie*'s new myth. On the contrary, the new myth's unstable concepts are categorical distractions from more contextual assessments of judicial power. At the very least, my analysis charts the distance that new-myth advocates must travel to resolve questions of judicial authority outside *Erie*'s "classic" context of applying state law.¹⁴² The next Section elaborates the new myth's intellectual and doctrinal impact on customary international law, and its troubling potential to affect other contexts.

115 YALE L.J. 1564, 1622 (2006) [hereinafter Resnik, *Law's Migration*]. Finally, some new-myth advocates assert that their theory can alter the meaning of statutes, like the ATS, which requires reference to the Constitution as higher law. See *infra* Part II.C.2.c.

140. *Supra* Part II.B.1-2.

141. See FREYER, *supra* note 22, at 48-62 (collecting cases). This irony may carry particular sting for scholars who would connect *Erie* to legal realism. See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 17 (2006); Goldsmith & Walt, *supra* note 46, at 674 n.7 (criticizing sources making this argument). From a legal realist perspective, *Erie* recognized that state common-law precedents "make" law; judges do not "find" such law by simply analyzing implicit natural principles. By contrast, the new myth insists that courts should not "make" federal common law; they should only "find" law within statutes or constitutions. Taking legal realism seriously should require an acknowledgment that both common law and statutory interpretation involve fundamentally similar judicial lawmaking.

142. See Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. REV. 585, 627-644 (2006).

C. *Erie* and International Law?

Readers with a domestic focus may be surprised that a great modern battle over *Erie* concerns customary international law.¹⁴³ Yet Philip Jessup, the great diplomat, scholar, and judge, foresaw such debates in 1939, when he warned that “any attempt to extend the doctrine of the [*Erie*] case to international law should be repudiated by the Supreme Court.”¹⁴⁴ The rapid growth of customary international law after World War II raised the stakes of its legitimacy,¹⁴⁵ but the legal community largely accepted Jessup’s advice until Curt Bradley and Jack Goldsmith argued that *Erie* should decisively limit federal courts’ power to consider customary international law.¹⁴⁶

Bradley and Goldsmith, joined recently by David Moore, have been called “Revisionists” due to their perceived divergence from orthodox international law scholarship.¹⁴⁷ In my view, however, these authors have earned that name because they are among this generation’s leading advocates of *Erie*’s “revised” mythology. The Revisionists have been the new myth’s most controversial advocates, and their use of *Erie* is a case study in the new myth’s problems. Moreover, the dearth of fundamental objections to their new-myth arguments illustrates how *Erie*’s iconic status can be a distraction, allowing arguments against judicial power to claim, even in unexpected contexts, an orthodox, conventional pedigree.

A decade of controversy followed the Revisionists’ conclusions about international law,¹⁴⁸ but this Article is distinctive in criticizing only their use of *Erie*. Unlike the Revisionists’ human-rights critics, I will not analyze when or how federal courts should apply customary international law. I simply suggest that the Revisionists are wrong that *Erie* answers such questions.

143. Customary international law is nontreaty law that arises from patterns in nations’ behavior, which countries follow from a sense of legal obligation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

144. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 743 (1939).

145. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 37-40 (1995).

146. See Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 853-54.

147. See Bradley et al., *supra* note 7, at 870, 871 n.3, 872-74; Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 468-69 (1997).

148. See, e.g., William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 24 (2007); William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635 (2006); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2254-61 (2004); Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 548 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 47 (2004); Goodman & Jinks, *supra* note 147, at 469; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 380 (1997).

My thesis is that *Erie*'s influence should not extend so far beyond the context of state law in federal court. If *Erie* were to become central in discussion of customary international law, increasingly polarized debates might overlook questions about when—not whether—such law should apply in federal courts. This Section will analyze the Revisionists' arguments before addressing *Sosa v. Alvarez-Machain*, where the Supreme Court partly adopted the Revisionist position without directly considering arguments against doing so.

1. *A Critique of the Revisionist Position*

The Revisionists ask whether customary international law should apply as a matter of federal common law, and they conclude that it generally should not.¹⁴⁹ Although the Revisionists' arguments have morphed over time, their core position is that courts should enforce customary international law as federal common law "only in the relatively rare situations in which the Constitution or the political branches [have] authorized courts to treat it as such."¹⁵⁰

The Revisionists often target common-law application of customary international law in human-rights litigation, where it favors criminal defendants, military detainees, and plaintiffs suing the government.¹⁵¹ Yet it is important that their argument is not simply "anti-human rights." The Revisionists do not oppose federal common-law enforcement of customary international law on ad hoc, context-specific grounds. They resist such judicial action on principle, and for a decade they have called that principle "*Erie*."¹⁵²

To clarify the Revisionists' reliance on *Erie*, one might note a few entirely separate questions about customary international law. For example, how can one possibly identify customary rules? How many nations must follow a practice, and for how long, before it becomes "law"? Should governmental

149. See Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 816 (citation omitted).

150. Bradley et al., *supra* note 7, at 871. Note that even this language complicates the notion of "common law" because if Congress or the Constitution, in "authoriz[ing]" judicial activity, prescribes the *content* of decisions applying customary international law, such decisions may no longer qualify as *judge-made* "common law." Cf. Clark, *Federal Common Law*, *supra* note 9, at 1271-75.

151. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*]; Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 *MICH. L. REV.* 2129 (1999) [hereinafter Bradley & Goldsmith, *Pinochet*]; Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 *CHI. J. INT'L L.* 327 (2000).

152. The Revisionists' focus on *Erie* is only amplified in their recent work. See, e.g., Bradley et al., *supra* note 7, at 873 ("[W]e attempt to focus the debate more directly on *Erie* and its implications for modern federal common law. Like the Court in *Sosa* . . . we believe that *Erie* is centrally relevant to the current status of [customary international law] in U.S. courts."); *id.* *passim* (mentioning "*Erie*" 169 times).

declarations count as “custom,” or is only state behavior relevant? Should customary international law trump domestic law, including constitutions, statutes, precedents, and traditions? The Revisionists discuss these points in passing, but their main contribution concerns *Erie* and federal common law. The latter is my exclusive focus.

The Revisionists use *Erie* in two ways. First, they assert that before *Erie*, customary international law was treated like *Swift*'s federal general common law.¹⁵³ This defensive argument aims to dismiss pre-*Erie* declarations that customary international law is “part of our law.”¹⁵⁴ Second, the Revisionists claim that customary international law falls outside any post-*Erie* enclave of legitimate federal common law.¹⁵⁵ This is the Revisionists' affirmative claim that federal courts cannot apply customary international law without permission from Congress or the President.¹⁵⁶

Again, the Revisionists do not just assert that federal-common-law use of customary international law sometimes goes too far. Their signature claim is that, absent political authorization, *the entire category* of customary international law is unenforceable as federal common law. *Erie* is the fulcrum used to support that conclusion.¹⁵⁷

In this Subsection, I will first show that the Revisionists' *Erie* arguments rely on the new myth, rather than prudential considerations or the old myth. Then, I will argue that the Revisionists have not solved the new myth's identification problems concerning “common law” and “enclaves.”

a. Revisionists and the New Myth

Despite *Erie*'s featured role in the Revisionists' narrative, the case receives little direct analysis in their work. Thus, it is important to establish that the Revisionists' conclusions come solely from *Erie*'s separation-of-powers myth, not from *Erie*'s prudential concerns or old-myth federalism.

Erie's prudential concerns about forum shopping and state-federal disparities cannot support Revisionist opposition to customary international law, because customary international law is fundamentally different from *Swift*'s federal general common law. Unlike “classic” *Erie* cases, customary international law neither relies on state-law actions or defenses nor does it

153. See, e.g., Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 824; Bradley et al., *supra* note 7, at 882-84.

154. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . .”); *The Paquete Habana*, 175 U.S. 677, 700 (1900).

155. See Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 856-57.

156. *Cf. id.*, at 886.

157. See *id.* at 852-853 (“Because the appropriate ‘sovereigns’ under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law. After *Erie*, then, a federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so . . .”) (citations omitted).

concern issues typically decided in state court.¹⁵⁸ Admittedly, customary international law sometimes involves conduct that is collaterally regulated by state law, but unlike traditional *Erie* issues, customary international law is not itself state law.¹⁵⁹ Thus, concerns about substantive disparities in federal and state courts, forum shopping and inequitable administration of justice may not arise. On the contrary, if customary international law were treated as federal common law that preempts conflicting state law, it would apply in state or federal courts alike, and raise no forum shopping incentives at all.

The Revisionists also cannot use old myth federalism to resist federal common-law application of customary international law. First, as a matter of states' rights, it is hard to see any categorical sovereign interest in states' ability to interpret customary international law. Again, *particular instances* of customary international law may affect state behavior, as do some instances of federal law. For example, a major field of customary international law is human rights, which regulate governmental activities and can affect states' behavior.¹⁶⁰ But the Revisionists' arguments are not limited to instances of customary international law that affect states' behavior. Instead, the Revisionists invoke the transsubstantive structure of *Erie's* new myth, opposing the common-law application of customary international law simply because it is a common-law application of customary international law.¹⁶¹ This formal and categorical aspect of Revisionist scholarship is its distinctive intellectual contribution, and this alone draws attention here.

The Revisionists' categorical opposition to customary international law cannot be found in *Erie*. The Court characterized *Swift's* common law as federal meddling in a "sphere" of *pure* state activity, like ordinary tort and contract actions, where state law is the exclusive regulator.¹⁶² That form of states' rights is tautologically absent from discussions of customary international law. Customary international law does not apply where state law

158. Customary international law covers many substantive areas, some of which do not affect state interests. *See, e.g.*, *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635, 666-670 (1862) (prize, capture, and the definition of civil war); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) (the law of the sea) (quoting *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 191 (1970)); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002), *dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005) (rape and forced labor); LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1472-73 (4th ed. 2001) (mineral resources of the high seas).

159. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*] (disclaiming any argument that customary international law is state law: "we have not in fact argued that [customary international law] is state law"); Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 151, at 349-50 (similar); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1861 (1998).

160. *See, e.g.*, Obasi Okafor-Obasi, *The International Criminal Court and Human Rights Enforcement in Africa*, 12 ILSA J. INT'L & COMP. L. 87, 96 (2005).

161. *See, e.g.*, Bradley et al., *supra* note 7, at 886.

162. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938).

is the *only* governing law. Instead, customary international law by definition applies only in contexts where (a) state law does not regulate, or (b) state and international law both regulate.

Stalwart states' rights proponents might claim that state law should trump international law wherever any conflict arises. But the Revisionists' arguments are not limited to contexts where customary international law and state law happen to diverge. Instead, the Revisionists claim that customary international law should never be federal common law regardless of whether it is consonant, dissonant, or unconnected with provisions of state law.¹⁶³ The Revisionists' argument is thus less concerned with the integrity of state law than with restricting federal courts' power. This shift from federalism to limiting federal courts is the new myth's main premise.

Unlike *Erie*, cases concerning customary international law involve something more than just state law, and that "something more" weakens states-rights objections to federal common-lawmaking. Even if, under the old myth, federal courts cannot tamper with areas of pure state regulation, customary international law governs contexts that by definition are not pure spheres of state law. State law does not determine when courts should consider customary international law, or what customary international law requires. From a federalism perspective, this tends to legitimate federal courts' independent determination of customary international law issues, as contrasted with "classic" *Erie* cases and state law typically heard in state courts.

The second aspect of old-myth federalism, enumerated congressional powers, also does not affect federal courts' consideration of customary international law: Congress has explicit constitutional authority to enforce customary international law.¹⁶⁴ As discussed earlier, the universe of diversity cases includes some intrastate disputes that lie outside Congress's commerce power, thus creating a "gap" in federal authority that cannot be filled with common law.¹⁶⁵ By contrast, Congress has explicit constitutional power to "define and punish . . . offenses against the law of nations," including customary international law.¹⁶⁶ This plenary power of Congress to enforce customary international law, leaves no constitutional "gap" to mind; federal courts' authority to enforce customary international law thus satisfies any concerns over enumerated federal powers.

Of course, congressional authority over customary international law does

163. See Bradley & Goldsmith, *Federal Courts*, *supra* note 159, at 2260 ("[O]ur view is that [customary international law] should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so.”).

164. U.S. CONST. art. I, § 8, cl. 10; see Dodge, *supra* note 148, at 24. See generally J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

165. See *supra* Part I.B.

166. U.S. CONST. art. I, § 8, cl. 10.

not grant federal courts such authority. Instead, it means that *Erie*-based opposition to common-law application of customary international law must move beyond old-myth federalism, which applied to Congress and courts equally. Accordingly, the Revisionists' *Erie* arguments must stand or fall alongside new-myth notions of separated powers and limited judicial role.¹⁶⁷

b. Revisionists and the Identification Problems

Insofar as the Revisionists rely on *Erie*'s new myth, they must explain first how common law differs from other judicial activities and second how permissible enclaves of federal common law differ from the run of impermissible federal common law. Without these two building blocks, the Revisionists' principled ambitions cannot succeed, and their *Erie* arguments must yield to more particularized debates about customary international law. The Revisionists have not resolved the new myth's identification problems, and this inability illustrates how other versions of the new myth may be vulnerable to criticism.

i. Common Law

The Revisionists fail to clearly define the boundaries of common law, as their work repeatedly blurs lines between common law and statutory interpretation. Two examples illustrate this point. The first concerns the *Charming Betsy* canon of statutory interpretation, which instructs that ambiguous statutes should be read to comply with international law, including customary international law.¹⁶⁸ The second concerns the Revisionists' attacks on litigation under the Alien Tort Statute (ATS).

The Revisionists' have long struggled to determine whether *Charming Betsy* should be treated as statutory interpretation or disfavored common law. In 1997, the Revisionists claimed that their arguments would unsettle *Charming Betsy* and narrow its scope,¹⁶⁹ but this effort to impose *Erie* upon

167. The Revisionists indirectly acknowledge their new-myth roots, claiming that sometime after 1938, "[*Erie*'s] reasoning about constitutional limitations on the federal government's power to invade state rights evolved into an argument about limitations on the federal judiciary." Bradley et al., *supra* note 7, at 877 (emphasis added). Merrill, *supra* note 11, at 15 ("[T]he federalism principle identified by *Erie* . . . has been *silently transformed* from a general constraint on . . . the federal government into an attenuated constraint that applies principally to . . . the federal judiciary." (emphasis added)). The Revisionists do not explain whether this "evolution" and "silent transformation" retains any deep link to *Erie*, or whether such "evolutionary," "transformed" results are ultimately coherent.

168. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 reporters note 1 (1987).

169. The Revisionists originally argued that *Charming Betsy* should be based solely on separation-of-powers considerations, *not on assumptions about legislative intent*. See Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 871-72 (arguing that *Charming Betsy*

modes of statutory interpretation pushed the new myth beyond defensible limits. As a formal matter, if “common law” means anything, it means “not statutory interpretation.” And whatever one thinks was wrong with *Swift* or right with *Erie*, it had nothing to do with general canons for interpreting federal statutes.

In a recent article, the Revisionists take a very different view. The Revisionists now argue that *Erie* should *not* limit the application of customary international law under *Charming Betsy*. The Revisionists now deem customary international law under *Charming Betsy* inoffensive because “[customary international law] is not applied as a rule of decision . . . , but rather as a relevant consideration in discerning Congress’s intent.”¹⁷⁰ The Revisionists thus distinguish between vanishingly little legislative involvement—as occurs when *Charming Betsy* applies customary international law to vague statutes—and no legislative involvement at all, which would be unacceptable common law. This distinction has two shortfalls.

First, regardless of whether *Charming Betsy* is “a rule of decision,” rather than “a relevant consideration in discerning Congress’s intent,” the canon remains a judge-made interpretive rule that allows federal courts to use customary international law wherever statutes are unclear.¹⁷¹ Because vagueness does not always show legislative endorsement of international law, *Charming Betsy* conflicts with the Revisionist view that federal courts must not apply customary international law without Congressional authorization.¹⁷²

Second, the Revisionists cannot explain all applications of *Charming Betsy* as implementations of legislative intent. Wherever statutes are ambiguous, *Charming Betsy* grants courts flexibility to interpret customary international law using techniques that look much like unauthorized common law. No legislative act determines when courts should consider customary international law, what it requires, or whether its application is otherwise sound. The result is unstructured judicial decision-making, and this is why the Revisionists first argued against a broad view of the *Charming Betsy* canon,

would be “questionable” if based on the idea that “Congress generally wishes to conform its legislation to the requirements of international law”). The Revisionists claimed that *Charming Betsy* should apply only where there is “clear evidence” of the international law principles at stake, and where such principles are consistent with “deference to the political branches.” Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 532-33 (1998) [hereinafter Bradley, *Charming Betsy*]; *id.* at 536 (proposing that this reconceptualization “has important implications for the proper scope and role of the canon”); *see also* Bradley & Goldsmith, *Customary International Law*, *supra* note 7, at 871-72.

170. *See* Bradley et al, *supra* note 7, at 921.

171. *See* Bradley, *Charming Betsy*, *supra* note 169, at 532-33; Bradley et al., *supra* note 7, at 921.

172. *See* Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 753 (2001); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 675 (1986).

before they argued for it.

The Revisionists' *Charming Betsy* dilemma highlights broader difficulties in defining "common law." On one hand, the Revisionists cannot say that statutory construction is "common law" without hopelessly muddling those categories. On the other hand, customary international law under *Charming Betsy* functions much like unauthorized common law. Although the Revisionists oppose the use of customary international law where Congress is silent, *Charming Betsy* applies when Congress speaks inaudibly softly. Regardless of whether *Charming Betsy*'s use of customary international law "is" or "is not" common law, in the end, one must doubt the Revisionists' view that anything important turns on that distinction.

A second issue for the Revisionists in defining "common law" concerns their opposition to litigation under the ATS,¹⁷³ which states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."¹⁷⁴ I will discuss this "fount of modern international human rights litigation" in a moment.¹⁷⁵ For now, it is enough that the ATS is a *statute* about *tort* actions. Thus, the ATS's content might be "statutory," and therefore exempt from new-myth skepticism. Or the application of tort law under the ATS might muddy its statutory or common-law status.

Either way, to invoke *Erie*'s new myth in construing the Alien Tort *Statute* again highlights the need to define "common law." The Revisionists' curious mix of statutory interpretation and common law shows how new-myth opposition to common law slides toward ever-more-general attacks on judicial power. Also, the Revisionists' apparent belief that *Erie* restricts the ATS, but not the interpretation of other statutes under *Charming Betsy*, suggests ad hoc application, which in turn undermines the new myth's categorical project.

The binary distinction between categorically suspect "common law" and "non-common-law" judging is unstable. Such lines are extremely difficult to draw, with inconsistent application and unnoticed consequences. Most importantly, the new myth's preoccupation with such categories obscures issues of judicial role that apply to *all judging*. The Revisionists' problems in defining "common law" thus illustrate the new myth's first identification problem in tangible form.

ii. Enclaves

The Revisionists list several enclaves where federal common-law application of customary international law is "consistent with . . . *Erie*,"¹⁷⁶ but

173. See Bradley et al., *supra* note 7, at 902-06.

174. 28 U.S.C. § 1350 (2000).

175. Bradley et al., *supra* note 7, at 887.

176. See *id.* at 910; *id.* at 915-24.

they fail to explain why only some enclaves are acceptable. The Revisionists do not directly confront this issue,¹⁷⁷ but their work suggests three possible responses.

First, the Revisionists validate certain enclaves of federal common law by reference to adjectival phrases, which they call “basic parameters” of post-*Erie* common law. According to the Revisionists, all common law must be “interstitial,” “derive[d] . . . from extant federal law,” and “tailored” to other federal policy choices.¹⁷⁸ But these abstract phrases do not separate proper from improper federal common law; they apply to *all* judicial activity. Judicial decisions applying statutes, the Constitution, and common law are all “interstitial,” “derivative,” and “tailored.”¹⁷⁹ Indeed, a core aim of judicial craft is to locate one’s decision within a defensible array of authorities, which support the ruling as an outgrowth of other normative commitments.¹⁸⁰

Even if judicial action should be “interstitial,” for example, that would not determine what counts as a “stice” or how much space “between” them should be filled. Indeed, even *Swift* might have met the Revisionists’ vague standards, based on its asserted basis in the Rules of Decision Act, the grant of diversity jurisdiction, and policies of interstate commerce.¹⁸¹ To characterize post-*Erie* common law as “interstitial” and consistent with federal law and policy may thus restate some basics of judging. But it makes no headway in dividing proper federal common law from improper variants.

The Revisionists’ second effort to identify enclaves suggests that common law may be legitimate if it is old.¹⁸² But *Erie* shows that age is not everything when it comes to enclaves, as *Erie* itself was a radical decision that felled a near century of *Swift*-era precedent.

The hardest challenge for any age-based standard for enclaves is knowing how old is old enough. Consider two pivotal dates: the constitutional framing in 1789 and *Erie*’s decision in 1938. One can imagine new-myth claims that federal common-law authority “froze” at one of these moments, so that modern

177. See *id.* at 878 (noting that the Supreme Court’s list of post-*Erie* enclaves lacks adequate explanation).

178. *Id.* The Revisionists claim that these principles “can be discerned from *Erie* itself and the various post-*Erie* federal common law decisions . . .” *Id.* Yet none of the three appears in “*Erie* itself.” Compare *supra* Part II.A, with Bradley et al., *supra* note 7, at 878-881 & nn.40-61. On the contrary, the Revisionists’ doctrinal support comes from cases like *Northwest Airlines, Inc. v. Transportation Workers Union*, 451 U.S. 77, 95 (1981), *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981), and *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991). See Bradley et al., *supra* note 7, at 878-881 & nn.40-61. The Revisionists’ choice to use *Erie* as a nominal placeholder for these other, significantly different cases illustrates a common feature of new-myth arguments.

179. All three also are based on “extant federal law,” are “ground[ed] in a federal law source,” and must be consistent with federal policy choices. See Bradley et al., *supra* note 7, at 878.

180. Cf. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112, 141 (1921).

181. See *supra* Part I.A.

182. See Bradley et al., *supra* note 7, at 918.

common law must be traced to judicial practice before that time. Unfortunately, neither date can serve this function.

The Revisionists cannot use 1789 as a temporal breakpoint because the Framing generation thought that federal courts held extremely robust common-law powers.¹⁸³ Indeed, even new-myth advocates who are otherwise originalists endorse *Erie* precisely because it rejects federal common-law excesses of the eighteenth and nineteenth centuries.¹⁸⁴

Likewise, 1938 was not a high-water mark for federal common-law power. On the contrary, any graph of federal common law's doctrinal influence would trace an upward trend after *Erie*, with a peak during the Warren Court, and a downturn only during the Burger and Rehnquist Courts.¹⁸⁵ The emergence of federal common law is not new at all, regardless of any historical cutoff the Revisionists might propose; on the contrary, it is the new myth itself that has a meager historical basis.¹⁸⁶

The Revisionists' third effort to identify enclaves divides "general common law" from "federal common law." The Revisionists claim that impermissible general common law applies only in federal court but not in state courts, whereas post-*Erie* federal common law is law that binds state and federal courts alike.¹⁸⁷ The Revisionists assert that pre-*Erie* customary international law was general common law because it did not bind state courts; thus, such law was abolished by *Erie*'s literal holding that "[t]here is no federal general common law." For the Revisionists, whatever enclaves survived *Erie*'s attack on federal common law, customary international law is not among them. For brevity's sake, I will bypass the Revisionists' historical argument¹⁸⁸ to focus on two flaws in their analytical premise.

First, it is implausible that *Erie* prevents federal courts from making common law unless the result binds state courts. Whether *Erie* concerns

183. See, e.g., Alton B. Parker, *The Common Law Jurisdiction of the United States Courts*, 17 *YALE L.J.* 1, 6 (1907).

184. See *infra* Part II.C.2.b.

185. See, e.g., Molot, *supra* note 141, at 20-21; Brown, *supra* note 8, at 625; Friendly, *Praise, supra*, note 10, at 405-07.

186. The Revisionists' application of age-based standards illustrates these problems. Two Revisionist enclaves—admiralty and interstate disputes—can be traced to the Founding, yet Founding-era traditions are no firm credential in this context. See *supra* note 183 and accompanying text. By contrast, the Revisionists acknowledge that their third "enclave," regarding foreign head-of-state immunity, did not emerge in modern form until after 1976. Before that time, immunities of heads of state and foreign governments were both governed by common law, with deference for executive preferences. Problems may also arise with respect to customary international law, which has long been recognized as "part of our law." Why should that age-old practice not qualify as an "enclave"? See *infra* note 187 and accompanying text. Because the Revisionists have not recognized the full theoretical importance of drawing clean lines identifying enclaves, they have not developed any adequately workable or theorized test for doing so.

187. See Bradley et al., *supra* note 7, at 875, 892-93; see also Bradley & Goldsmith, *Current Illegitimacy, supra* note 151, at 322-24.

188. See sources cited *supra* note 148.

separation of powers or federalism, neither value requires that federal common law bind state courts. From a separation-of-powers perspective, judicial policymaking is unacceptable regardless of its effect on state courts; the line between general and federal common law is irrelevant. With respect to federalism, federal common law is worse than general common law, because the former regulates state courts. Thus, the line between federal common law and general common law offers no defensible basis for identifying enclaves.

Second, the Revisionists' distinction is underinclusive. It is false that all federal common law binds state courts.¹⁸⁹ For example, federal justiciability standards (standing, ripeness, mootness) do not bind state courts; states have their own rules governing such issues.¹⁹⁰ Federal abstention doctrines are likewise nonprecedential in state courts.¹⁹¹ Federal administrative law, patent law, federal preclusion doctrine, and federal procedural rules all include particular areas where federal common-lawmaking does not apply to state courts.¹⁹² In each of these circumstances, federal law is uniquely applicable in federal court, as when state courts do not directly decide such issues.¹⁹³ Nevertheless, federal courts create such fields of common law using federal law and do not impose them on state courts.

Customary international law may or may not be a field of uniquely federal common law like those listed *supra*. In either case, debates over common-law application of customary international law should not turn on whether pre-*Erie* state courts were bound by such federal decisions. *Erie* did not force federal courts either to impose their rulings on state courts or to refrain from action

189. See Amy Coney Barrett, *A Theory of Procedural Common Law*, 94 VA. L. REV. (forthcoming June 2008) (manuscript at 3, on file with author); cf. *id.* at 56 (concluding that such law is grounded in Article III).

190. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1855-75 (2001).

191. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

192. See, e.g., *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148-49 (1988) (rejecting an injunction because federal forum non conveniens rules do not bind the state, which has different forum non conveniens rules); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505-06 (1988) (construing a military contractor's defense in a case applying the Federal Tort Claims Act, which requires litigation in federal court); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (refusing to displace state contract law due to federal patent law, where jurisdiction is also exclusively federal); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 965-69 (1998) (describing different preclusion rules in state and federal courts). See generally Resnik, *Law's Migration*, *supra* note 139, at 1622; MICHAEL ASIMOW ET AL., *STATE AND FEDERAL ADMINISTRATIVE LAW* 3 (2d ed. 1998) (demonstrating that state administrative law is independent of federal law).

193. Of course, many rules and results in the text's listed fields do bind state courts, at least in some contexts. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (holding that federal common law governs the preclusive effect of judgments in diversity); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (explaining how patent issues can be litigated in state court, despite the exclusivity of federal jurisdiction with respect to plaintiffs' filing patent claims). My point is that *not all* federal law binds state courts.

altogether.¹⁹⁴ In sum, the Revisionists have underanalyzed the problem of identifying common law, and their efforts to identify enclaves are incomplete.

c. Implications for the New Myth

For readers unfamiliar with customary international law, the significance of debates over Revisionism could be lost in details: 'After all, even if the Revisionists' argument slips in some particulars, doesn't everyone know that *Erie* restricts federal common law? Even if customary international law isn't state law like *Erie*'s tort or *Swift*'s contract, *Erie* was more than a decision about states; it was also a ruling about federal courts' power.'

These assumptions would be untenable if less widely held. There are many reasons to support or oppose judicial power, both as a general matter and in specific contexts. But none of those issues was discussed or less resolved, by *Erie*. This Section has singled out the Revisionists because they are the new myth's strongest proponents, and because the Supreme Court has partly accepted their arguments. But my broader aim is to sketch a template for criticizing the new myth wherever it might appear.

For the Revisionists, *Erie*'s conceptual limits are less important than limiting customary international law's application in federal courts. This inattention to basics is vital. Consider the many contexts arguably governed by customary international law, from criminal defense, to private lawsuits, to maritime actions, to the law of war.¹⁹⁵ All might involve some form of judicial policymaking; yet the Revisionists might brand only some as condemnable federal common law.

As the category of illegitimate federal common law becomes suppler and broader, the new myth's consequences rise, and its expansionist doctrinal power needs limits. Unless the Revisionists can justify their view of *Erie*'s myth—which widely departs from the decision's original context—*Erie* cannot do the lifting that their theory requires. And without *Erie*, the Revisionist categorical framework must collapse.

Discussions of customary international law stand far from *Erie*'s original boundaries. Such expansion has gone largely unnoticed because, as Ely wrote elsewhere, "[f]amiliarity breeds inattention."¹⁹⁶ The Revisionists are not alone in viewing *Erie* broadly; on the contrary, the new myth's errors appear in many modern legal circles. The next Section suggests that *Erie*'s new myth would yield unfortunate results if applied rigorously. But first, I must consider a Supreme Court decision that applied the new myth to customary international law.

194. See, e.g., Aleinikoff, *supra* note 148, at 91; Young, *Sorting*, *supra* note 60, at 368.

195. See sources cited *supra* note 158.

196. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980); cf. Burbank, *supra* note 29, at 1024 ("Over time, one person's neglect becomes another's ignorance.").

2. *Sosa and the Alien Tort Statute*

The Revisionists' hotly debated approach to customary international law—and their seldom debated view of *Erie*—became even more important after *Sosa v. Alvarez-Machain*.¹⁹⁷ *Sosa* involved the Alien Tort Statute, which states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.”¹⁹⁸ The ATS was enacted in 1789 and lay unused for almost two hundred years.¹⁹⁹ Then in the 1980s, plaintiffs began winning ATS judgments about violations of customary international law, typically including torture or genocide.²⁰⁰ Circuit courts over the next quarter century used different tests to evaluate “violation[s] of the law of nations,” applying various theories of when ATS litigation was appropriate.²⁰¹

Scholars divided over the propriety of ATS litigation, and the Revisionists' skepticism of customary international law persuaded them that federal courts should hear no ATS litigation at all.²⁰² For the Revisionists, the ATS is a purely jurisdictional statute that creates no cause of action through which plaintiffs can bring suit.²⁰³ Moreover, the Revisionists argued that recognizing a common-law cause of action under the ATS would require federal courts to interpret customary international law, including human rights. According to the Revisionists, such matters lie entirely in the hands of Congress and the President.²⁰⁴

Sosa was the Supreme Court's first substantial effort to analyze whether ATS litigation was legally proper. The issue was whether Humberto Alvarez-Machain could sue in federal court, alleging that he was kidnapped in Mexico and moved to the United States in violation of various international norms condemning arbitrary arrest and detention.²⁰⁵ The Court unanimously rejected Alvarez-Machain's ATS claims, but divided six to three in its analysis.²⁰⁶

197. 542 U.S. 692 (2004).

198. 28 U.S.C. § 1350 (2000).

199. *Sosa*, 542 U.S. at 712.

200. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

201. See, e.g., *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). For post-*Sosa* decisions, see, for example, *Taveras v. Taveraz*, 477 F.3d 767, 781-82 (6th Cir. 2007), and *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

202. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 151, at 357-63 (arguing that “[t]he United States has no general duty under international law to provide civil remedies in its courts for human rights violations committed abroad by foreign government officials against aliens” and that a more active reading of the ATS might have “profound collateral implications” far beyond the First Congress's intention).

203. See *id.* at 358-60.

204. See Bradley et al., *supra* note 7, at 871; see also Trimble, *supra* note 172, at 716 (arguing that “courts should never apply customary international law except pursuant to political branch direction”).

205. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

206. Alvarez-Machain also brought claims against the United States itself under the

Justice Souter wrote for the Court, and Justice Scalia (joined by Justice Thomas and Chief Justice Rehnquist) wrote an opinion concurring in the judgment that disputed much of the Court's reasoning.

Souter and Scalia both accepted that *Erie* posed a relevant limit on federal courts' authority to apply customary international law; likewise, not one Justice, litigant, or amicus curiae expressed doubt that *Erie* should affect interpretation of the ATS.²⁰⁷ If Revisionist scholarship marks an academic extension of *Erie*'s myth, *Sosa* shows what can happen when such arguments are unchallenged. This Subsection compares the Souter and Scalia opinions to the Revisionist position, and analyzes the new myth's possible implications in other contexts.

a. *Sosa's Majority*

Souter's majority opinion endorsed *Erie*'s new myth in principle, but did not accept the Revisionists' wholesale opposition to ATS litigation. An initial question was whether the ATS created a cause of action, and if not, whence such a cause of action derived. Souter surveyed eighteenth-century enforcement of customary international law and concluded that, although the ATS did not itself create a statutory cause of action, "the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature."²⁰⁸ Congress meant for the ATS to do something, and right away.²⁰⁹ Souter thus explained that the ATS, despite being a jurisdictional statute, contains a "limited, implicit sanction" for federal courts to consider certain violations of international law as "common law claims."²¹⁰ This decision to enforce customary international law through a common-law cause of action was a result that the Revisionists had resisted for years.²¹¹

At the same time, Souter rejected the anti-Revisionist position that all customary international law is automatically enforceable in federal court. Souter viewed the First Congress as allowing some, but only a few, violations of customary international law to be remedied under the ATS.²¹² Accordingly, Souter declared that "courts should require any claim based on the present-day

Federal Tort Claims Act; the Court unanimously dismissed those claims. *Id.* at 700-712.

207. See, e.g., *id.* at 726; *id.* at 740-41 (Scalia, J., concurring in part and concurring in the judgment). The closest that any litigant came was to argue, in effect, that customary international law should be considered an "enclave." See Brief for the Respondent at 31, *Sosa v. Alvarez-Machain*, No. 03-339, 542 U.S. 692 (2004) [hereinafter *Sosa* Respondent Brief].

208. *Sosa*, 542 U.S. at 719.

209. See *id.* at 724.

210. *Id.* at 712.

211. See, e.g., Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 151, at 354-55.

212. *Sosa*, 542 U.S. at 724. Souter's historical support for limiting the number of originally intended ATS torts is noticeably light. See *id.* at 720 (citing Blackstone and the First Judiciary Act, neither of which substantiates the historical need for numerical limits); cf. *id.* at 719 (citing considerably stronger historical evidence for the claim that the First Congress intended some form of litigation to proceed under the ATS).

law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”²¹³

Souter could have grounded his analysis solely upon the ATS's historical context, legislative history, and statutory function. Yet his opinion went farther, outlining five “reasons . . . for judicial caution” in determining which customary international law claims should be actionable under the ATS.²¹⁴ This is where *Erie* entered Souter's analysis, and I believe it was a mistake.

Souter's reasons for “caution” included both *Erie*'s old myth and the new myth. First, Souter quoted Holmes's claim that *Swift*-era common law was “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”²¹⁵ Brandeis had quoted these words to support the *Erie* majority's positivism argument,²¹⁶ and Souter likewise used such language to illustrate a transformation in modern common law, which now is “not so much found or discovered as it is either made or created.”²¹⁷

Second, Souter shifted from the old to the new myth, explaining that “along with . . . [the post-*Swift*] development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it.”²¹⁸ Here, Souter's analysis echoed new-myth principles, describing *Erie* as “the watershed in which we denied the existence of any federal ‘general’ common law . . . which largely withdrew to havens of specialty.”²¹⁹

Souter acknowledged that modern federal courts may create federal common law if there is “express congressional authorization,” and in “interstitial areas of particular federal interest.”²²⁰ But on balance, he confirmed that the Court “now adhere[s] to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, [*see Erie*], that federal courts have no authority to derive ‘general’ common law.”²²¹ This enclave theory, complete with its rhetoric of “interstitiality,” supports the new-myth characterization of *Erie* and its doctrinal penumbras as broad limits on federal common law, with only a few grudging exceptions.

What Souter, like the Revisionists, did not fully explain is why *Erie* should merit a pivotal role in applying customary international law under the

213. *Id.* at 725.

214. *Id.*; *see id.* at 725-28.

215. *Id.* at 725 (internal quotation omitted).

216. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

217. *Sosa*, 542 U.S. at 725. Of course, there is nothing “transcendental” about ATS litigation, and in any event, judges' estimates about whether the law they apply is transcendent should be firmly subordinate to their overall goal of implementing Congress's statutorily expressed will. *See supra* Part I.A.

218. *Id.* at 726.

219. *Id.* (citation omitted).

220. *Id.*

221. *Id.* at 729 (citation omitted).

ATS. *Erie* postdates the statute by almost one hundred fifty years, and Brandeis's opinion does not reference customary international law, much less the ATS. The only connection between diversity suits and human rights litigation is the abstract logic of *Erie*'s new myth. Although Tompkins's negligence action obviously differed from Alvarez-Machain's human rights suit, the new myth views both as somehow analogous forms of judicial lawmaking that deserve uniform, categorical suspicion.

Souter's opinion was a mixed result for the Revisionists. On one hand, it endorsed the Revisionists' claim that *Erie* limits federal common-lawmaking. On the other hand, Souter tempered the new myth's application to the ATS. He cited several precedents before and after *Erie* that characterized customary international law as "our law," and he cited congressional intent to explain that at least some lawsuits to enforce customary international law should be heard under the ATS.²²² None of this could have pleased the Revisionists very much.²²³

Sosa's middle-ground result bears brief explanation. Despite accepting the new myth's basic principles, the Court allowed jurisdiction over three torts that Congress had implicitly authorized in 1789: violation of safe conducts, infringement of ambassadors' rights, and piracy.²²⁴ Because the First Congress intended those three torts to be actionable under the ATS, *Sosa* held that similar torts should be litigable today. Thus, post-*Sosa* ATS actions can succeed only if the international norm at stake has such "definite content and acceptance among civilized nations" that it is comparable to the three torts of 1789.²²⁵

The *Sosa* majority's "definition" and "acceptance" standards reveal an internal tension. The urge to suppress ATS litigation stems from new-myth resistance to federal common law. Yet courts must use *distinctively common-law methods* to identify which tort actions the ATS allows. The Court's "definiteness" and "acceptance" standards have no support in the ATS's text or legislative history; such tests emerged from a canvass of United States history and an evaluation of ATS litigation's "practical consequences."²²⁶ Likewise, courts applying *Sosa*'s doctrinal test will have only judicial precedents as guideposts and will almost inevitably produce flexible, case-by-case judgments. From a functional viewpoint, this looks much like the unguided, common-law

222. *Id.* at 729-30 ("*Erie* did not in terms bar any judicial recognition of new substantive rules . . . For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.") (citations omitted).

223. The Revisionists have adopted a conciliatory tone in analyzing the *Sosa* majority. Yet they also gently acknowledge that *Sosa* diverged from their position in holding that the "purely jurisdictional" ATS authorizes judicial recognition of common-law causes of action. Bradley et al., *supra* note 7, at 896.

224. *Sosa*, 542 U.S. at 724.

225. *Id.* at 732; *see also id.* at 732 n.20, 733 n.21.

226. *Id.* at 732-33.

policymaking that raises separation-of-powers concerns under the new myth.

In its application, *Sosa's* common-law approach led the Court to reject Alvarez-Machain's claims. Alvarez-Machain invoked the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. But the Court replied that the Declaration created no enforceable rights under international law, and that the Covenant was ratified by the Senate only with an explicit denial of creating any self-executing rights.²²⁷ Alvarez-Machain also claimed that his detention and capture violated international law because they were unauthorized by United States law.²²⁸ The Court disagreed because this argument's "breathtaking" policy implications would allow ATS lawsuits "for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and . . . for any seizure of an alien in violation of the Fourth Amendment."²²⁹

b. *Scalia's Opinion*

The Revisionists have largely chosen to "make nice" with the majority's mixed endorsement of the new myth in *Sosa*.²³⁰ But Scalia's concurrence showed no mood for compromise; it embraced the Revisionist position with both hands.²³¹ Like the Revisionists, Scalia declared that impermissible general common law differs from permissible federal common law because the former does not precedentially bind state courts.²³² He also equated customary international law with general common law, and viewed *Erie* as "signal[ing] the end" of all such projects, universally "extirpat[ing]" this sort of judicial activity "with its famous declaration that '[t]here is no federal general common law.'"²³³ Like the Revisionists, Scalia stated that the ATS is a purely jurisdictional statute, and that post-*Erie* federal courts lack authority to recognize any common-law cause of action to enforce customary international law.²³⁴ Federal courts must await congressional action before entertaining any lawsuits under the ATS.²³⁵

Scalia pressed the Revisionists' point even farther. In detailing his vision of *Erie's* new myth, Scalia listed a few enclaves of acceptable common law.²³⁶ He recognized admiralty as a "firmly entrenched" example of legitimate common law. But he described *Bivens v. Six Unknown Named Agents*, which

227. *Id.* at 735.

228. *Id.* at 734.

229. *Id.* at 736.

230. Bradley et al., *supra* note 7, at 897.

231. See *Sosa*, 542 U.S. at 739-40, 750 (Scalia, J., concurring in part and concurring in the judgment) (citing Bradley & Goldsmith, *supra* note 7, at 824).

232. *Id.* at 739-40.

233. *Id.* at 740-41; see also *id.* at 744.

234. *Id.* at 743.

235. See *id.* at 750.

236. *Id.*

authorizes damages for federal constitutional violations, as “the other extreme.”²³⁷ Scalia declared that, although the *Bivens* precedent stands, “the ground supporting it has eroded.”²³⁸ Indeed, Scalia characterized *Bivens*’s remedy for constitutional violations as “a relic of the heady days in which this Court assumed common-law powers to create causes of action.”²³⁹

Scalia’s notion that *Erie* conflicts with *Bivens* is remarkable, and his argument demonstrates the new myth’s force outside customary international law.²⁴⁰ *Bivens* has long been controversial,²⁴¹ yet it is by terms a remedial decision designed to enforce the Bill of Rights. Thus, *Bivens* might seem no more common law in its origins than the exclusionary rule or an injunctive action to enforce the Constitution—none of which typically creates “*Erie* problems.”²⁴² Furthermore, even if *Bivens* were in some sense common law, the federal interest in vindicating constitutional rights might offer a strong argument for recognizing a permissible enclave. Yet some new-myth exponents (including Scalia) would affix the condemnable “common law” label even when federal courts vindicate enumerated constitutional rights.

Scalia also chided the Court for citing the First Congress’s view of the ATS, which “rested upon a notion of general common law that has been repudiated by *Erie*.”²⁴³

The Court recognizes that *Erie* was a “watershed” decision heralding

237. *Id.* at 742 (citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)). *Bivens* claimed that federal agents had violated the Fourth Amendment by entering his apartment and arresting him, threatening to arrest his family, and taking him to a federal courthouse for a strip search. *Bivens*, 340 U.S. at 389.

238. See *Sosa*, 542 U.S. at 742-43 (Scalia, J., concurring in part and concurring in the judgment).

239. *Id.* at 742 (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

240. Scalia is not the first to make this argument. In 1980, then-Justice Rehnquist filed a dissenting opinion arguing that *Erie* conflicts with *Bivens*. See *Carlson v. Green*, 446 U.S. 14, 31-33 (1980) (Rehnquist, J., dissenting). None of Rehnquist’s colleagues joined that opinion, and no Justice has positively cited it since that time. *Cf.* *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 82 n.10 (2001) (Stevens, J., dissenting) (citing Rehnquist’s *Carlson* dissent as an example of undue “hostility to the core of *Bivens*”).

241. Compare Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1121 (1989), with Merrill, *supra* note 11, at 52.

242. Justice Harlan’s concurrence was the only *Bivens* opinion even to cite *Erie*, and he viewed the two decisions as quite compatible with each other:

However broad a federal court’s discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)—that in a nondiversity suit a federal court’s power to grant even equitable relief depends on the presence of a substantive right derived from federal law. . . . Thus the interest which *Bivens* claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest.

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 400 (1971) (Harlan, J., concurring in the judgment). Nonetheless, Scalia’s suggestion that *Bivens* remedies are, in some sense or other, “common law” is quite popular. *Cf.* Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1124, 1135, 1141 (1989).

243. *Sosa*, 542 U.S. at 744 (Scalia, J., concurring in part and concurring in the judgment).

an avulsive change, wrought by “conceptual development in understanding common law . . . [and accompanied by an] equally significant rethinking of the role of the federal courts in making it.” The Court’s analysis, however, does not follow through . . . Post-*Erie* federal common lawmaking . . . is so far removed from . . . general-common-law adjudication which applied the “law of nations” that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter. . . . [T]oday’s federal common law is not our Framers’ general common law²⁴⁴

Scalia’s arguments neatly match those of the Revisionists, yet no Justice challenged or identified such arguments’ underpinnings. For example, Scalia was never pressed to explain how common law differs from other judicial activity, nor did he explain what separates post-*Erie* enclaves from unacceptable types of common law. This Article suggests that answering such questions could have been difficult indeed.

c. *Sosa’s Implications*

Although Souter and Scalia both endorsed *Erie’s* new myth in theory, the practical differences between their opinions are significant. Souter applied the new myth with greater nuance. He used the ATS’s history to sidestep the results commended by Scalia and the Revisionists, and his view of *Erie* flexed to accommodate context-specific practicalities, rather than presumptively resisting common law as a categorical matter. Souter explained that the ATS’s framers could not have anticipated new-myth restrictions on judicial power; therefore, some lawsuits should be allowed to enforce customary international law. Which suits? Those that apply “accepted” international norms that have been “defined” with appreciable specificity.²⁴⁵ On the other hand, Souter limited such lawsuits’ availability based on the realities of federal litigation and the policies of other federal branches.²⁴⁶ Thus, Alvarez-Machain lost partly due to the “breathhtaking” risk that countless illegal arrests around the globe might be litigated in the United States.²⁴⁷ Also, Alvarez-Machain’s reliance on the International Covenant on Civil and Political Rights was rejected because the Senate had ratified that document only on the condition that it not create judicially enforceable rights.²⁴⁸

By contrast, Scalia argued that the ATS should never allow suits for violations of customary international law, even for genocide or torture. Scalia did not analyze whether the three torts of 1789 were litigable as an original

244. *Id.* at 744-46 (citation omitted).

245. *Id.* at 732.

246. *Id.* at 727.

247. *Id.* at 736.

248. *Id.*

matter, but he implied that no claims should be actionable under the ATS today.²⁴⁹ Such resistance to common-law application of customary international law would make the ATS worthless, a jurisdictional statute with no cause of action under it. Scalia's insistence on high new-myth principles, even at the price of absurd results, helps explain why his opinion did not draw more votes.

Scalia's analysis exemplifies the new myth's broader function. Rather than focus on particular merits and costs of recognizing lawsuits under the ATS, the new myth forces debate toward higher abstraction. Scalia's categorical tone owes entirely to his preoccupation with *Erie*, and to the new myth's suggestion that *Erie* "extirpated" even tort actions that might have been litigable under the ATS at the Framing. Scalia underappreciates that Congress can authorize courts to apply customary international law, and when that happens, the resultant common law is fully legitimate unless it violates the Constitution.²⁵⁰ Where Congress speaks, *Erie* has nothing more to say, unless (as I dispute) *Erie* rests on valid constitutional law.

This point is clear if one sets *Erie* aside. Without *Erie*'s distraction, *Sosa*'s core issues are those that Souter addressed and Scalia ignored: Did Congress authorize litigation under the ATS or not? What about the three framing-era torts? Was the ATS a lifeless jurisdictional statute, which waits idle even today? These questions were crucial for Souter, but Scalia gave them less attention because he focused on *Erie* and its iconic meaning. Debates over ATS litigation should follow Congress's statutory imperatives, and these are not typically illuminated by the new myth's obsession with "common law" and "enclaves."

Of course, doubts about *Erie*'s new myth do not prove that Souter's conclusions are correct. For example, even if Congress originally authorized litigation based on customary international law, two questions remain. First, was *Erie*, as one critic wrote, a "[c]onstitutional amendment by decision,"²⁵¹ which undermined the ATS's legal underpinnings? Such issues of constitutional status divided Brandeis and Reed in 1938,²⁵² and if *Erie* truly were a valid constitutional decision, that might justify Scalia's overlooking the ATS's statutory meaning. With full respect to dead horses, however, one must again ask what was *Erie*'s constitutional basis. This Article has claimed that *Erie*'s federalism arguments are wrong and do not apply to customary

249. *Id.* at 743 (Scalia, J., concurring in part and concurring in the judgment) ("[C]reating a federal command . . . out of 'international norms,' and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.").

250. See Bradley et al., *supra* note 7, at 919-20 ("An oft-cited example is the federal piracy statute, which provides that '[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.'") (citing 18 U.S.C. § 1651 (2000)).

251. Broh-Kahn, *supra* note 100, at 57.

252. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 91 (1938) (Reed, J., concurring in part).

international law.²⁵³ Thus, if new-myth advocates would use *Erie* to overthrow the ATS's original meaning, they need a constitutional hook for their separation-of-powers narrative, and that constitutional basis seems quite hard to find.²⁵⁴

A second question for *Sosa*'s majority is whether Congress's decision to authorize a small set of ATS actions in the eighteenth century was dynamic enough to support a very different group of lawsuits in the twenty-first century, including human rights litigation.²⁵⁵ Controversies over statutory dynamism have nothing to do with *Erie*, however, and it is precisely because Scalia put so many eggs in *Erie*'s iconic basket that other statutory issues received slight attention.²⁵⁶ Regardless of Scalia's conclusions, his focus on *Erie* was counterproductive. The new myth's categorical abstraction rests on the notion that *Sosa* is decisively similar to Tompkins's railroad suit, but that analogy is too undertheorized and counterintuitive to be persuasive.

Souter's attention to *Erie* also has distortional costs. Although Souter identified the right dilemma—determining what the First Congress did—his endorsement of the new myth yields two potential problems. First, *Erie* may have altered the Court's legal standard for ATS litigation. The Court repeatedly cited *Erie* in requiring plaintiffs to demonstrate an international norm of "definite content and acceptance among civilized nations" comparable to the three torts of 1789.²⁵⁷ If the Court's focus on *Erie* was misguided, a more lenient test might have been appropriate. On the other hand, Scalia claimed that Souter's *Erie* arguments were mere tokenism,²⁵⁸ and it seems at least possible that the Court's holding would not change much if the new myth were debunked. Perhaps *Sosa*'s compromise was supportable independent of *Erie*. For example, to allow robust ATS suits might convert federal courts into magnets for actions against human rights violators around the world, thereby embroiling courts in international politics, requiring rulings on topics beyond federal courts' standard diet, and producing countless unpaid damage judgments.²⁵⁹ These subconstitutional values mean that the Court's result was overdetermined, making it hard to isolate *Erie*'s precise doctrinal impact.

A more serious problem with Souter's reliance on *Erie* is its potential effect on the new myth outside the ATS context. In *Sosa*, Souter deflected the

253. *Supra* Part I.B.

254. Thus far, scholars have generally invoked "constitutional values" influencing judicial analysis, but have not drawn firm conclusions about constitutionality per se. *See, e.g.*, sources cited *supra* note 108.

255. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1554 (1987).

256. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 749-50 (2004) (Scalia, J., concurring in part and concurring in the judgment) (addressing such issues obliquely at best, as a matter "not necessary to resolution of the present action").

257. *Id.* at 732 (majority opinion).

258. *Id.* at 744 (Scalia, J., concurring in part and concurring in the judgment).

259. *Id.* at 727-28 (majority opinion).

new myth's force by citing the statute's historical context and dynamic interpretation. But that strategy may not work elsewhere. Innovative scholars of the future thus might read *Sosa* to require "great caution" before recognizing "new" common law *in any circumstance*, unless there are specific pre-*Erie* justifications for an exception, as appeared with respect to the ATS.²⁶⁰

The Court did not voice this broad principle, and the next Section offers reasons to doubt it. Yet the Court did endorse the new myth in general terms, *Sosa* did apply *Erie* to the remote context of ATS litigation and customary international law, and the new myth's conceptual boundaries are certainly nebulous. Indeed, if *Sosa* offers one lesson, it might be that powerful doctrinal results can emerge from a combination of brilliant scholarship (e.g., the Revisionists), non-*Erie*-based skepticism (e.g., general doubts about customary international law), and a failure to grasp *Erie*'s conceptual limits.

It may seem odd that *Erie*, a domestic decision concerning federalism at most, has so deeply influenced debates over customary international law. But that anomaly would be made worse if *Sosa*'s ruling about customary international law could, in turn, amplify the new myth's effect on domestic law. The absence of Chief Justice Rehnquist and Justice O'Connor leaves the current Court perhaps one vote shy of endorsing the Scalia-Revisionist position outright. Having now reviewed the new myth's potential to affect customary international law, the next Section addresses absurdities that might result if the new myth were applied rigorously in other contexts.

D. Absurd Results: Two Examples

Thus far, my critique of the new myth has been conceptual. First, I showed that new-myth principles were absent from *Erie* itself; then, I challenged new-myth notions of common law and permissible enclaves; finally, I applied my critique to modern academic and judicial versions of the myth.²⁶¹ This Section changes gears to consider practical objections: Does *Sosa*'s endorsement of the new myth render my intellectual critique doctrinally futile? And if the new myth's coherence issues were somehow set aside, would the new myth produce good results as a matter of policy?

This Section responds with two examples where the Court implicitly rejected the new myth's broadest consequences, and where such consequences would have been unacceptable. My examples, which illustrate the new myth's varied political impact, are habeas stripping and military commissions.

For each, I will argue that the Court implicitly chose not to apply the new myth; thus, the Court is not as serious about the new myth as *Sosa* might suggest. Even if *Sosa* makes today an important time to resist *Erie*'s expansion,

260. Souter's opinion counsels courts to take "great caution" in creating remedies for violations of new norms of international law. *Id.* at 227-28.

261. See *supra* Part II.A-C.

the Court's rejection of the new myth elsewhere proves that such resistance is not yet futile.

I do not claim that the new myth yields unsavory results in every circumstance. Instead, my point is that the new myth can please only some of the people some of the time. Even the new myth's most ardent advocates apply the theory to only a limited number of contexts, and while this selectivity shows the new myth's unsteady practical appeal, it also shows that the new myth's categorical approach is itself misguided.

1. *The Detainee Treatment Act*

The Detainee Treatment Act of 2005 (DTA) repealed habeas jurisdiction for Guantanamo prisoners to challenge the legality of their detention, and it gave the D.C. Circuit "exclusive jurisdiction" to review enemy combatants' detention and military-commission convictions of war criminals.²⁶² Congress did not, however, create an explicit cause of action allowing detainees to file such petitions for review.

When President Bush signed the DTA, he issued a statement interpreting the statute:

In light of the principles enunciated by the Supreme Court . . . , and noting that the text and structure of [the DTA] do not create a private right of action to enforce [the DTA], *the executive branch shall construe [the DTA] not to create a private right of action.*²⁶³

Bush effectively claimed that Congress had enacted the DTA as a purely jurisdictional statute, but had failed to create a statutory cause of action.

Bush's argument about the DTA mirrors Scalia's analysis of the ATS in *Sosa*.²⁶⁴ Like the ATS, the DTA created jurisdiction to hear certain legal claims, but jurisdictional statutes do not generally imply a cause of action.²⁶⁵ According to Scalia's opinion and Bush's signing statement, federal courts

262. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1005(e)(1)-(3), 119 Stat. 2680, 2741-43.

263. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005) (emphasis added); see generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1247-49 (2006). President Bush's primary focus in this signing statement may have been to hamstring the "McCain Amendment" concerning abusive detention practices. See Detainee Treatment Act of 2005 § 1003; see also Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 568 (2007); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 103-05 (2007). As the Bush signing statement indicates, however, its legal theory was by no means limited to the McCain Amendment.

264. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 744 (2004) (Scalia, J., concurring in part and concurring in the judgment).

265. See *id.* at 724 (majority opinion); *id.* at 741-42, 744 (Scalia, J., concurring in part and concurring in the judgment); Meltzer, *supra* note 108, at 541.

must not create common-law causes of action in such circumstances, because that would violate the new myth's view of constitutional separation of powers.²⁶⁶ Applying Scalia's *Sosa* analysis to the DTA would mean that uncharged Guantanamo detainees, having lost their habeas remedy, might also lack review in the D.C. Circuit, thereby rendering the DTA's jurisdictional provisions a statutory dead letter—just like Scalia's view of the ATS.

Although the new myth's logic might apply to the ATS and the DTA equally, some readers may feel that a common-law cause of action is more apt in the latter context than the former, perhaps because it seems more legitimate to deny a private damage action to enforce international human rights than to immunize illegal executive detention by the United States. Predictably, I would endorse that impulse because it only confirms that the Scalia-Revisionist argument in *Sosa* is indefensible with respect to the DTA. Such intuitions show that the new myth's flat, categorical resistance to federal common law is unsustainable.

In *Hamdan v. Rumsfeld*, every Justice rejected the Bush signing statement's strict view of the DTA.²⁶⁷ As a jurisdictional matter, *Hamdan* considered whether Guantanamo detainees could pursue habeas actions that were pending when the DTA was passed.²⁶⁸ Justice Stevens's majority opinion provided a detailed discussion of the DTA, which clearly assumed (as had Congress) that detainees could obtain review under the DTA despite the absence of an explicit cause of action.²⁶⁹

Scalia disagreed that *Hamdan's* habeas action was proper, but he strongly concurred that the DTA provides effective judicial review, despite the absence of a statutory cause of action.²⁷⁰ It is important that no Justice in *Hamdan*

266. See *Sosa*, 542 U.S. at 741-42 (Scalia, J., concurring in part and concurring in the judgment). Although President Bush did not cite *Erie* itself as legal support, he did cite *Alexander v. Sandoval*, 532 U.S. 275 (2001), which tracks earlier cases concerning "implied causes of action" that new-myth advocates have long viewed as an extension of *Erie*. See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005); see also Brown *supra* note 8, at 617-18 (tracing efforts by then-Justice Rehnquist and Justice Powell to apply *Erie* to implied-cause-of-action cases).

267. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006). The United States' *Hamdan* brief did not mention the Bush signing statement. See Brief for Respondents, *Hamdan v. Rumsfeld*, No. 05-184, 126 S. Ct. 2749 (2006). In *Sosa*, however, the United States did argue a position much like Scalia's, and if that view had prevailed, the DTA and the ATS might well have seemed indistinct. See *Sosa* Respondent Brief, *supra* note 207, at 1-14. For example, although Guantanamo detentions do not raise *Erie's* concerns over state law and state courts, neither does customary international law. *Supra* Part II.C.2. Indeed, the new myth's main contribution is to exchange old *Erie's* dusty federalism for shiny separation-of-powers principles, and the latter are crucial to Guantanamo detentions. See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 476-78 (2007).

268. *Hamdan*, 126 S. Ct. at 2764-65 (plurality opinion).

269. *Id.* at 2762-69.

270. *Id.* at 2813 (Scalia, J., dissenting). Scalia explained that the DTA was not a "suspension" of habeas corpus because it provided detainees with the "collateral remedy" of D.C.

discussed *Sosa's* *Erie*-based "caution" about recognizing common-law actions under an otherwise empty grant of jurisdiction. Thus, although *Hamdan's* jurisdictional holding arose in a legal context quite similar to *Sosa*, i.e., a jurisdictional statute without a statutory cause of action, the Court ignored the new myth altogether.

The difference between *Sosa* and *Hamdan* also sharpens attention to the new myth's conceptual problems. Why should litigation under the ATS, but not the DTA, be limited by *Erie*-inspired "judicial caution"? Why would one context but not the other involve common law, or perhaps a protected enclave? Can *Erie's* myth be redrawn to accommodate different results in different circumstances? Or do such divergences prove the new myth's failure?

Neither Scalia nor other new-myth supporters have addressed such questions. What is clear, however, is that straightforward application of the new myth—on the same terms set forth in *Sosa*—would have produced absurd results with respect to the DTA, and the Court implicitly rejected that conclusion.²⁷¹

2. *Military Commissions*

To many readers, this Subsection's asserted link between federal common law and military commissions will seem unconventional, and one can see why. Military commissions, like other aspects of wartime detention, are often characterized solely as matters of executive power, governed by rules of exclusively statutory or constitutional status. At a superficial level, the convention of ignoring common-law rules might seem incontrovertible. Military commissions are typically viewed as concerning the power of Presidents, not courts.

On the other hand, our legal tradition does not allow Presidents to convene military commissions in secret or out of judicial sight. Instead, federal courts have repeatedly decided cases concerning military commissions, and such decisions have required judges to decide (a) the limits of military commissions' jurisdiction, (b) the propriety of crimes that have been charged, and (c) whether the applicable procedures are acceptable.²⁷² When a President asserts power to convene military commissions, the Constitution and statutory authorities are inevitably pressed forward. Yet in this Subsection, I will suggest

Circuit review, which he found adequate to test the legality of the detainees' imprisonment. *Id.* at 2818. That argument would have been impossible if a common-law cause of action were unavailable under the DTA.

271. The Military Commissions Act of 2006 (MCA) does not change this Part's analysis. Although the MCA explicitly creates a cause of action for reviewing military commission verdicts, it did nothing to create a cause of action for reviewing Guantanamo detentions. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2604 (codified at 10 U.S.C. § 948j(b) (2006)).

272. *See, e.g., In re Yamashita*, 327 U.S. 1, 44 (1946) (Rutledge, J., dissenting); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

that some elements in each of these three fields involve judicial decision-making that approaches federal common law.

If the new myth were taken seriously, the legitimacy of such judicial decisions might depend on the type of law applied: constitutional, statutory, or common law. In the military-commission context, however, that characterization can be especially difficult. Of course, results-sensitive jurists might dodge such problems by recognizing a common-law enclave to cover military commissions, yet we shall see that broader transsubstantive principles may be hard to find.

My ultimate goal is not to prove that particular decisions about military commissions involve common law or that they fall outside post-*Erie* enclaves. As a practical matter, the Court's *Hamdan* decision, concerning a Guantanamo detainee's military commission, has already rejected new-myth resistance to common law governing military commissions' jurisdiction, crimes, and procedures.²⁷³ My aim is simply to show that the new myth's categories are more difficult than expected, and are therefore poor guides in general analysis of federal judicial power.

a. "Our Common-Law War Courts"

The most basic question about military commissions is whence their authority derives. Until 2006,²⁷⁴ the conventional answer involved some combination of the President's title as Commander in Chief and a particular section of the Uniform Code of Military Justice (UCMJ).²⁷⁵ Yet legal authorities have long described the military commission as "our common-law war court[]." ²⁷⁶ As one expert explained, "It has no statutory existence, though it is recognized by statute law."²⁷⁷ The following analysis suggests that the conventional explanations for military commissions' existence are partly correct, yet common-law reasoning also plays a vital role.

With respect to Article II, there is no explicit constitutional source for the Executive's power to prosecute, judge, and punish our military enemies, as opposed to merely capturing or killing them.²⁷⁸ Military commissions go beyond core war-making activities such as disabling enemies, because they concern individuals who are already subdued, and they impose penalties

273. See generally *Hamdan*, 126 S. Ct. at 2763-98.

274. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2608-09 (codified at 10 U.S.C. § 949a (2006)).

275. See U.S. CONST. art. II; 10 U.S.C. § 821 (2000) (current version at 10 U.S.C. § 821 (2006)).

276. *Hamdan*, 126 S.Ct. at 2829 (quoting *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952)).

277. S. Rep. No. 130, at 40 (1916) (statement of Judge Advocate General Enoch A. Crowder).

278. See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1265-1266 (2002); see also *Hamdan*, 126 S. Ct. at 2773.

through the deliberately legal trappings of adjudication. Perhaps for this reason, the Court has never sanctioned a military commission's existence based on the President's constitutional power alone.²⁷⁹

Until recently, military commissions also lacked a clear basis in statutory law. Congress acknowledged military commissions only by backhanded inference; statutes outlining the general framework of United States military law simply stated that the grant of jurisdiction to courts-martial "shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions."²⁸⁰ No general statutory provision *granted* military commissions jurisdiction or explained how courts should interpret the "law of war" to be applied in military commissions.²⁸¹

If one took the new myth seriously, the prospect of "common-law war courts" might be inherently unsettling, even in the context of national security. The longstanding law concerning military commissions operated without clear statutory or constitutional authorization, and also without statutory or constitutional limits. Thus, one can imagine new-myth arguments that federal courts either (a) lacked common-law authority to recognize military commissions in the absence of statutory authorization or (b) lacked common-law authority to condemn them wherever the President deemed them apt. One hundred sixty years of common-law practice, however, renders either of these results quite extreme.

When the modern Court analyzed presidential authority to convene military commissions in *Hamdan*, it voiced no new-myth concerns about common law in the field of military commissions. Thus, the Court indicated that military commissions might be available despite their indirect statutory authorization.²⁸² Indeed, *Hamdan* explicitly acknowledged military commissions' common-law status: "The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity."²⁸³ Citing Civil War and World War II precedents, the *Hamdan* majority blurred lines between constitutional, statutory, and common law.²⁸⁴ Even Congress's enactments in this field had "simply preserved what power, under the Constitution and the common law of war, the President had had before [such statutes' enactment in] 1916."²⁸⁵ On this self-consciously hybrid basis, "[the Uniform Code of Military Justice], the [Authorization of Use of

279. See Katyal & Tribe, *supra* note 278, at 1278-83.

280. *Hamdan*, 126 S. Ct. at 2774 & n.22 (quoting 10 U.S.C. § 821 (2000)).

281. See Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed during Internal Armed Conflicts*, 167 MIL. L. REV. 74, 101-02 (2001).

282. *Hamdan*, 126 S. Ct. at 2772-74.

283. *Id.* at 2772-73.

284. *Id.* at 2773-74.

285. *Id.* at 2774.

Military Force], and the DTA at most acknowledge a general Presidential authority to convene military commissions . . . where justified under the 'Constitution and laws,' including the law of war."²⁸⁶

Hamdan's recognition of military commissions as "common-law war courts" does not deny that such commissions may ultimately be consistent with the new myth. For example, some readers may accept constitutional or statutory arguments for military commissions. Or perhaps an "enclave" allows federal courts to recognize and limit military commissions as a matter of permissible common law. Nonetheless, the Court's apparent satisfaction with common law in this context suggests that *Erie's* new myth may not state a universal constraint on judicial role.²⁸⁷ If the Court had used new-myth categories to determine whether military commission jurisdiction was common law or a permissible enclave, it might or might not have reached a different result. But such analysis would certainly have asked the wrong questions.

b. *Our Common-Law War Crimes*

The common-law "war crimes" tried in military commissions pose other problems for *Erie's* new myth. Federal common-law crimes were abolished for civilian prosecutions in 1812.²⁸⁸ New-myth advocates view that decision as *Erie's* precursor because it limited federal courts' discretion to make substantive criminal law.²⁸⁹ By contrast, Congress has historically made little effort to define the war crimes tried in military commissions. Military commissions held unique common-law authority to punish "those enemies who . . . have violated *the law of war*," including customary international law.²⁹⁰

If the new myth were applied rigorously, it might undermine federal courts' use of customary international law to evaluate charges tried in military commissions. For example, the new myth might require a statutory definition for every crime tried in a military commission, and thereafter recognized in a

286. *Id.* at 2775.

287. Although the MCA creates more explicit statutory authorization for military commissions than had previously existed, the Act does not change the importance of *Hamdan's* decision to reject the new myth. Also, the MCA disclaims any effect on the President's common-law authority to establish military commissions "for areas declared to be under martial law or in occupied territories should circumstances so require." Military Commissions Act of 2006, Pub. L. No. 109-366, § 2, 120 Stat. 2600, 2600 (codified at 10 U.S.C. § 948a (2006)). The Act further leaves unspecified whether the President may invoke common-law authority to try United States citizens in military commissions.

288. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); Kathryn Preyer, *Jurisdiction To Punish, Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic*, 4 L. & HIST. REV. 223 (1986); Robert C. Palmer, *The Federal Common Law of Crime*, 4 L. & HIST. REV. 267 (1986); Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, 4 L. & HIST. REV. 325 (1986).

289. See Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1151-52 (2006).

290. *Ex Parte Quirin*, 317 U.S. 1, 28-29 (1942) (emphasis added).

federal court. An alternative would be to recognize the criminal law of military commissions as an enclave of permissible common law, though that enclave's basis and scope would need to be defined.

Hamdan unanimously bypassed new-myth objections to common-law war crimes, though the Justices divided in their reasoning. Justice Stevens's plurality opinion endorsed a narrow view of common-law criminal liability. He stressed the common-law nature of crimes tried in military commissions, noting that "[t]he common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists."²⁹¹ For Stevens, even prior legislation concerning military commissions had merely "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute."²⁹²

Although Stevens concluded that *Hamdan*'s alleged war crimes should not be tried by military commission,²⁹³ the legal standard he used bears particular note:

When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.²⁹⁴

Stevens was obviously concerned about concentrating power in the executive branch. But he could have cited parallel doubts, based on the new myth, concerning federal courts' power to recognize such common-law crimes without statutory authority.²⁹⁵

Justice Thomas's dissenting opinion (joined by Scalia and Alito) endorsed a broader view of common-law crimes. "[T]he common law of war . . . , as with the common law generally, . . . is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present."²⁹⁶ Indeed, Thomas was so supportive of common-law war crimes that he rejected any requirement of "plain and unambiguous" precedent to support such culpability.²⁹⁷

Both Stevens and Thomas saw common law as enhancing executive

291. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (plurality opinion); *see also id.* at 2777.

292. *Id.* at 2780.

293. *Id.* at 2761, 2778.

294. *Id.* at 2780.

295. As Stevens explained in a footnote: "The caution that must be exercised in the incremental development of common-law crimes by the judiciary is . . . all the more critical when reviewing developments that stem from military action." *Id.* at 2780 n.34.

296. *Id.* at 2829 (Thomas, J., dissenting).

297. *Id.* at 2830.

power, not judicial power.²⁹⁸ But in the military-commission context, executive power and judicial power are sides of a coin. A wider range of common-law war crimes boosts presidential power to punish war criminals outside the Article III criminal system; it also implies judicial power to validate such punishment. The debate over Hamdan's charge, for example, concerned whether conspiracy was punishable under the law of war.²⁹⁹ No statute or constitutional provision answered that question. To judicially recognize conspiracy as a common-law crime would augment both the President's power to punish Hamdan, and the Court's power to approve that punishment. Every Justice in *Hamdan* accepted that some common-law prosecutions may occur in military commissions, based on nothing more than the customary international law of war. In addition, whenever courts evaluate the substance of charges in a military commission, they make common law. Such decisions retain their common-law status regardless of whether they favor (Thomas) or disfavor (Stevens) the President's litigating position.

Recall the nineteenth-century abolition of civilian common-law crimes.³⁰⁰ Such crimes were thought to unduly expand federal courts' power to legislate criminal liability because judges were ultimately responsible for authorizing common-law prosecutions and penalties. On the other hand, common-law convictions also bolstered federal prosecutors' power to maintain order.³⁰¹ The issue of judicial power drew predominant attention in nineteenth-century civilian prosecutions; executive power did so in *Hamdan*. Yet both contexts involve both issues. The effect of common-law crimes on presidential power should not distract from collateral new-myth concerns about judicial power to create common law.

Notably, Scalia and Thomas, who had most resisted application of customary international law in *Sosa* to benefit human rights plaintiffs under the ATS, were most willing in *Hamdan* to apply customary international law to support the President's military commissions. Of course, my point is not that the two contexts are identical, or that the votes in *Sosa* and *Hamdan* are inconsistent. Rather, I suggest that the new myth's acontextual, abstract, categorical opposition to common law is often unsustainable in practice as it is in theory. And in confronting the varied contexts where federal courts rely on common law, even Scalia and Thomas endorse *Erie's* new myth only sometimes.³⁰²

298. See, e.g., *id.* at 2786 (plurality opinion); *id.* at 2823 (Thomas, J., dissenting).

299. Compare *id.* at 2775-86 (plurality opinion), with *id.* at 2834-38 (Thomas, J., dissenting).

300. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

301. See Presser, *supra* note 288, at 335 (noting that the eighteenth century's common law of crimes was thought "necessary to the preservation of our early republic" as "a power to deal with unanticipated threats").

302. Again, the MCA's definition of statutory crimes for commissions does not change *Hamdan's* rejection of the new myth. Also, the MCA itself contains several common-law

c. *Our Common-Law War Procedures*

A third context where common law may affect military commissions is procedure. In a postwar dissent, Justice Rutledge argued that procedures in military commissions should be governed by common law.³⁰³ And although *Hamdan* did not explicitly adopt this position, I believe the Court may have done so in practice.³⁰⁴

Modern military commissions have long used lower procedural standards than ordinary criminal trials, allowing hearsay evidence, permitting flexible substantive liability, and restricting defense preparations.³⁰⁵ Defendants have challenged such procedures using constitutional law, statutory law, international law, and common law as well.³⁰⁶

In *Hamdan*, the petitioner objected that his military commission might illegally convict him using evidence he had never seen, and the Court agreed on two grounds. First, *Hamdan's* military commission violated a principle of "parity" that presumptively forced military commissions to use the same procedures as courts-martial for United States service members.³⁰⁷ Second, the commission violated the Geneva Conventions' requirement that war crimes be prosecuted in a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."³⁰⁸

What type of law supports these procedural restrictions: statutory, constitutional, or common law? The *Hamdan* Court explained:

The UCMJ [Uniform Code of Military Justice] conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself . . . and with the 'rules and precepts of the law of nations' . . . — including, *inter alia*, the four Geneva Conventions signed in 1949. . . .

components. Some offenses are defined to include customary "law of war," which will require common-law interpretation as before. Also, the MCA's stated purpose was to "codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission." Military Commission Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2624 (codified at 10 U.S.C. § 950p(a) (2006)); *see also id.* § 3, 120 Stat. at 2624 (codified at 10 U.S.C. § 950p(b) (2006)) ("Because the provisions of this subchapter . . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."). What remains unclear is whether defendants like *Hamdan* can be charged based on pre-MCA criminal acts, even when the charged crime—e.g., conspiracy—was not a crime under pre-MCA common law.

303. *In re Yamashita*, 327 U.S. 1, 42 (1946) (Rutledge, J., dissenting).

304. *See* Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 159–169 (2006) [hereinafter Green, *Wiley Rutledge*].

305. *See* Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1100 n.72 (2006); *see also* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 281–84 (2002).

306. *See, e.g., In re Yamashita*, 327 U.S. at 4.

307. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2788 (2006).

308. *Id.* at 2795–96.

The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.³⁰⁹

Because the Court based its result on the UCMJ's statutory provisions, many commentators (including the Revisionists) have viewed *Hamdan* as a purely statutory decision.³¹⁰ That is technically accurate, but also incomplete. Although the Court cited two statutory provisions,³¹¹ these statutes were at most vague enough to accommodate *Hamdan's* result. There was no statutory text, history, or structure to support *Hamdan's* requirement that military commissions presumptively apply procedural standards of courts-martial and the Geneva Conventions.³¹²

I have elsewhere argued that *Hamdan* is best viewed as a common-law decision, and I will not repeat such details here.³¹³ It is at least clear from reviewing the statutes cited in *Hamdan*, however, that the case was not "resolved by ordinary rules" of statutory interpretation, as Justice Kennedy insisted.³¹⁴ On the contrary, if *Hamdan's* procedural ruling contains any type of statutory analysis, it is a peculiarly common-law form of the art. Such blends of statutory and common-law reasoning are common in the military-commission context. Just as *Hamdan* cited vague statutory language to authorize the President's use of military commissions, the Court read other statutory vagueness as a license to craft procedural rules for "our common-law war courts."³¹⁵

If the law of military commissions constitutes an enclave of federal common law, *Hamdan's* procedural issues may yield surprising results. For example, the Justices who endorsed robust common-lawmaking with respect to Hamdan's criminal charge (Thomas, Scalia, and Alito) were least enthusiastic about the Court's innovations concerning military commission procedures.³¹⁶ And although this difference may be explained on technical grounds,³¹⁷ it is at least questionable whether such Justices would allow the imposition of common-law procedural standards upon military commission trials.

Regardless of how one characterizes *Hamdan's* reasoning, its result conflicts with *Erie's* new myth and perhaps with the Revisionists' view of customary international law as well.³¹⁸ *Hamdan* shows once more how common-law and statutory judging overlap, and the *Hamdan* Court's use of

309. *Id.* at 2786 (citations omitted).

310. *See, e.g.,* Bradley et al., *supra* note 7, at 925 n.294.

311. *See Hamdan*, 126 S. Ct. at 2797-98.

312. *See id.* at 2810 (Scalia, J., dissenting).

313. *See* Green, *Wiley Rutledge, supra* note 304, at 167-69.

314. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring).

315. *See id.* at 2772-74, 2794-98 (plurality opinion).

316. *See id.* at 2839-49 (Thomas, J., dissenting).

317. For example, Hamdan's counsel did not press common-law arguments in the Supreme Court, *see* Brief for Petitioner Salim Ahmed Hamdan at i, *Hamdan v. Rumsfeld*, No. 05-184, 126 S. Ct. 2749 (2006), nor did the *Hamdan* majority explicitly apply common-law reasoning.

318. *See* Bradley et al., *supra* note 7, at 881-90.

customary international law departs from *Sosa's* general "caution" about common-law decision-making. Admittedly, the factual contexts of *Sosa* and *Hamdan* are quite different, but my thesis is again that such differences matter, which is why the new myth's categorical limits on judicial power are inapt.

III

A NEW APPROACH: *YOUNGSTOWN*

This Article has thus far spoken in negative terms, rejecting *Erie's* new myth in many forms and on many grounds. The previous Part demonstrated that the new myth's preoccupation with common law and enclaves is unhelpful in analyzing judicial activity. And although a different framework is needed, that transition must seem improbable so long as *Erie* affects separation-of-powers debates.

This Part proposes an approach to federal common law that has no connection to *Erie*. Prior scholars who criticized *Erie* often took on the unenviable task of defending *Swift* or a similarly broad view of common-law authority.³¹⁹ By contrast, this Part suggests that the conventional choice of "*Swift* or *Erie*" is another aspect of the latter's iconic force. There are many ways to analyze federal common law entirely separate from *Swift* and *Erie*; thus, the new myth is not just problematic, it is unnecessary.

Two points clarify this project. First, Part II has shown that any model of federal common law must work within a category (common law) that lacks clear definition. Although admiralty and interstate disputes confirm that federal common law exists, efforts to separate common law from statutory or constitutional adjudication have proven prohibitively difficult.

My proposed solution is to integrate theories of common law with other kinds of judging, so that characterization problems ("is this common law or statutory law?") are less important. If analysis of common law depends on clearly defining "common law," the new myth's conceptual problems may return with a vengeance. Admittedly, there is a paradox in analyzing federal common law without defining that term. Yet, because "common-law judging" and "non-common-law judging" are so fluid, any framework for federal common law must analyze borderline cases in a way that holds true regardless of those labels.

Second, any framework for federal common law must cover the varied contexts where such law appears, which in turn limits such theories' normative aspirations. *Erie's* new myth separates "legitimate" from "illegitimate" judicial acts across a huge range of circumstances using extremely abstract categories. To me, analyzing what makes particular judicial acts "legitimate" raises complex questions of doctrine, tradition, history, politics, morality, and other values. Such issues are not answerable at high generality; they require specific

319. See generally sources cited *supra* note 5.

circumstances and cases. My model theorizes federal common law in a way that builds in the need for more specific inquiries, thereby leaving ultimate questions of legitimacy for resolution by the diverse factors that properly decide such matters.

Along these lines, I propose analogizing federal common law to *Youngstown Sheet & Tube Co. v. Sawyer*.³²⁰ What draws attention are not *Youngstown*'s facts, which involved presidential seizure of steel mills, but Justice Jackson's concurrence.³²¹ In his "somewhat over-simplified" framework, Jackson analyzed presidential power using three categories:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum
2. When the President acts in absence of either a congressional grant or denial of authority, . . . there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.³²²

It is unorthodox to seek lessons about judging in Jackson's discussion of presidents.³²³ Yet the simple message of Jackson's *Youngstown* triptych is congressional primacy within constitutional constraints.³²⁴ *Youngstown* states that presidential actions should be judged against a network of legal authorities, including statutes and constitutional requirements. I believe that is precisely the right foundation for analyzing federal common law.

Comparisons between presidential and judicial power may have deeper constitutional roots than is conventionally thought. Of the three branches,

320. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

321. See, e.g., Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power & the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006).

322. *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

323. For other examples, see Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433, 1469-1472 (1984), and Barrett, *supra* note 189, at 5.

324. The term "congressional primacy," as used in the text, refers to the source of legal authority, not its implementation. See Westen & Lehman, *supra* note 2, at 327-30. Thus, for example, nothing here casts doubt on judicial authority "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Nor is my position relevant to works concerning "popular constitutionalism." See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

Congress has a formidable list of enumerated powers under Article I.³²⁵ By contrast, the President and (even more) the courts draw most of their everyday authority from very general language concerning the “executive Power” and “judicial Power.”³²⁶ Also, it is clear that both presidential execution of the laws and judicial application of the laws derive from Congress’s decisions to enact such laws in the first place. From this “somewhat over-simplified” perspective, it may seem sensible that both presidential and judicial power should be categorized based on their contingent relationships to congressional action or inaction.

To apply Jackson’s framework to courts, consider three examples: First, what if Congress authorized federal courts to make common law? To borrow Jackson’s first category, the courts’ common-law authority would be “at its maximum.”³²⁷ Common law pursuant to statutory authorization is usually valid unless “the Federal Government as an undivided whole lacks power.”³²⁸ The ATS and DTA are examples of this category, and the Court’s decision to apply a common-law cause of action is correspondingly appropriate.³²⁹

Second, what if Congress forbade federal courts from making common law? Parallel to Jackson’s third category, federal courts’ common-law authority would be “at its lowest ebb.”³³⁰ Courts can breach Congress’s instructions only where the Constitution commands it, because courts that make common law in the face of congressional prohibition place “at stake . . . the equilibrium established by our constitutional system.”³³¹ Depending on one’s interpretation of the Rules of Decision Act, classic *Erie* cases with overlapping state and federal law may fall in this category. Under this approach, it would not be unconstitutional for courts to apply federal general common law, but such common law would be barred by a statute that courts lack proper authority to override.³³²

325. U.S. CONST. art. I, § 8.

326. See U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1; Beale, *supra* note 323, at 1473-74. Although Article III provides a fairly detailed list of the “cases” and “controversies” over which federal courts may exercise jurisdiction, the more important question is what judges may do with that jurisdiction, i.e., what the “judicial power” entails.

327. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

328. See *id.* at 636-37. There are a few distinctive constitutional limits on what courts can do, as compared with other branches. See generally *Massachusetts v. EPA*, 127 S. Ct. 1438, 1452-55 (2007); Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 488-89 (Henry P. Johnston ed. 1890-1893) (refusing to offer an advisory opinion). Such limits have limited relevance to analysis of federal common law, however.

329. See *supra* Parts II.C, II.D.1.

330. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

331. See *id.* at 638. One constitutionally charged example may involve suspensions of habeas corpus. See generally *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

332. If the Rules of Decision Act did not bar *Swift*’s federal general common law, classic *Erie* cases would exemplify Jackson’s second category, the “zone of twilight.” See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Even under this branch of the Jacksonian framework,

Finally, if Congress has neither granted nor denied common-law authority, there is a “zone of twilight” wherein such power “is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”³³³ As Jackson wrote, “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite” courts to interject common-law decision-making.³³⁴ Before 2006, the jurisprudence surrounding military commissions may have exemplified this category, leaving courts open-minded but cautious in accepting common-law war courts, recognizing common-law crimes, and crafting common-law procedures.

This Article cannot explore the full potential of a *Youngstown* model of federal common law, nor offer detailed examples. Jackson’s words speak for themselves, and to reject *Erie* as a model for federal common law may open many avenues for future research. Let me finish by specifying two advantages of the *Youngstown* approach over *Erie*’s new myth.

First, a *Youngstown*-based analysis of federal common law renders particular definitions of “common law” insignificant. *Youngstown* offers a unified theory of judicial work, where it does not much matter whether a judicial act is classified as common law. A *Youngstown* model suggests that common-lawmaking—like other forms of judging—should respect congressional directions where they exist, unless the Constitution requires otherwise. This focus on congressional intent and constitutional meaning supplants the new myth’s preoccupation with common law and enclaves. Unless constitutional issues are at stake, analysis of federal common law typically focuses on legislative intent and function—exactly as *Youngstown* prescribes.

Second, a *Youngstown* approach allows for realism about congressional silence. The new myth drives judicial action into binary categories of “authorized” or “unauthorized” by other sources of power. By contrast, *Youngstown* recognizes that Congress often neglects issues of federal common law, and such inaction only sometimes implies disapproval.³³⁵

there are strong subconstitutional reasons to disfavor federal general common law. *See, e.g., supra* note 101.

333. *Id.* at 638. The fact that presidents confront different “imperatives” and “imponderables” from those facing judges does not change the limited role for “abstract theories” regarding both. Justice Frankfurter’s concurring opinion recognized a similar point: “[T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. *The Constitution is a framework for government.*” *Id.* at 610 (Frankfurter, J., concurring) (emphasis added).

334. *See id.* at 637 (Jackson, J., concurring).

335. *See, e.g.,* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 541-45 (2005) (discussing congressional silence in the separation-of-powers context). *See generally* Henry Wolf Bicklé, *The Silence of Congress*, 41 HARV. L. REV. 200, 200 (1927) (describing Virgil’s genius as one of “saying much in little and often in silence”) (citing J. W. MACKAIL, VIRGIL AND HIS MEANING TO THE WORLD OF TO-DAY 67 (1922) (quoting John Dryden)).

The histories and functions of the ATS and DTA, for example, suggest that federal judges should have common-law power to give such legislative acts meaning. In other settings, congressional silence may mean the opposite. One benefit of a *Youngstown*-based theory is its flexible approach to congressional inaction, which in turn allows the model to apply across a wide spectrum of judicial work.

Flexibility is not free, however. Indeed, the very term “zone of twilight” reflects the indeterminacy in Jackson’s “middle” category.³³⁶ *Youngstown*’s vagueness stems from the nature of its object. For Jackson, it was descriptively misleading and normatively unwise to identify presidential powers using rigid conceptual categories.³³⁷ That task is similarly untenable with respect to common-law judging. The United States has a long constitutional history of judicial flexibility and innovation, which has largely defied conceptual categorization.³³⁸ Against this background, it is more than possible that *Youngstown*’s “zone of twilight” captures the difficulty of evaluating judicial action where Congress has done nothing. To transfer Jackson’s words again from a presidential to a judicial context:

The actual art of [judging] under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. . . . [Judges’] powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.³³⁹

336. See, e.g., Katyal, *supra* note 321, at 99.

337. Jackson’s views on presidential power were self-consciously influenced by his own work in the Executive Branch:

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); see also EUGENE C. GERHART, ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA’S ADVOCATE 125-27 (2003).

338. For a remarkable work about common-law judging and its relationship to statutory law, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). Calabresi’s hypothesis that common-law courts could be granted power “to treat statutes in precisely the same way that they treat the common law” has been an inspirational force behind this Article, which also draws heavily upon Professor Calabresi’s class and (more modestly) upon Judge Calabresi’s jurisprudence. *Id.* at 82.

339. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

CONCLUSION

The contrast between a *Youngstown*-based approach and *Erie*'s new myth is stark. The former is context-specific and incremental; the latter is built from categorical, universalizing ideas and terminology. In deconstructing the new myth and *Erie*'s iconic status, this Article has avoided advocating any particular level of judicial activity, whether high or low, common law or otherwise.³⁴⁰ Instead, I suggest only that all analysis of judicial activity should beware categorical principles that, despite their simplicity, neglect practical realities. Indeed, perhaps the new myth's deepest intellectual problem is its invitation to overlook certain basic facts of judging. For example, it is clear from experience that judicial interpretation of vague statutes involves many of the same skills and techniques required to interpret vague common-law precedents. In both circumstances, the judge's task is by nature a conservative one of seeking conclusions and support by reference to prior legal commitments.³⁴¹ Once more, the distinction between common law and other forms of judging blurs.

The success of *Erie*'s new myth in modern legal culture is an object lesson in the need for a modest, contextualized approach to judging. Nothing in this Article suggests that judges or scholars should forgo discussions about judicial role and limits on judicial power. But those debates are distorted by misreading a legal icon like *Erie*. New-myth advocates typically hold a tightly constrained vision of federal judging in our democracy, while other commentators see things differently. But on all sides, let us at least see such arguments for what they are, standing or falling on their own merits, without connection to *Erie*'s grand reputation.

340. I should also note that my efforts to displace *Erie* from debates over separation of powers and judicial role need not undermine *Erie*'s effect on subconstitutional choice-of-law issues. Cf. Clermont, *supra* note 23 at 46-57 (arguing that *Erie*'s significance in such fields is underappreciated).

341. See Westen & Lehman, *supra* note 2, at 336 ("In each case, within the constraints of *stare decisis*, the court must conform to existing legislative policy, just as it must continually amend and modify its course of decisions to account for changes in legislative policy. In each case, too, the court must fill in gaps in legislatively declared policy by making its best judgment of what represents, not its personal morality or some universal morality, but the 'political morality' of the society for which it speaks—or what Learned Hand called 'the common will.'") (quoting Ronald Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37, 41-42; LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (3d ed. 1960)).