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FEDERALIZED AMERICA: REFLECTIONS ON *ERIE V. TOMPKINS*
AND STATE-BASED REGULATION

*Samuel Issacharoff**

The 75th anniversary of Erie v. Tompkins permits a critical reassessment of Justice Brandeis's landmark opinion. This article joins the growing body of critical academic literature, focusing on the implausibility of the claimed reasons for overturning Swift v. Tyson. Erie's claim to safeguard a constitutional place for state law rings hollow when viewed in historic perspective, especially if one looks at the underlying question of the role of common law tort claims to control railroad accidents. While the doctrinal claims of Erie may not hold up, the concern about the regulatory consequences of federal court prohibitory injunctions continues to resonate. The article tries to resuscitate this aspect of Erie, perhaps best understood as the Progressive response to the perceived excesses of the Lochner period. Read this way, the concerns of Erie continue to manifest themselves in current controversies over claims of implied preemption, despite the distance from the actual doctrinal claims of Erie.

INTRODUCTION: *ERIE V. TOMPKINS*¹ IN OUR TIME

Life's enduring mysteries present us with the unlikely, but nonetheless hypothetical, account of Harry Tompkins IV, an entirely upright and decent individual, notwithstanding his fictional status. On our account, Harry was leaving work on April 25, 2013 in Wilkes-Barre, Pennsylvania only to discover that his car was not working. A friend was finally able to give him a lift back to nearby Hughestown late that night—a dark night as it turns out. Tompkins was grateful for the ride and, in order not to impose further on his friend, said he could be dropped off and would walk the short distance across the field by the rail line on his own. Improbably enough, while walking on a path that he and others had used countless times, Tompkins was struck and injured.² A train had passed close by with something appar-

* Reiss Professor of Constitutional Law, New York University School of Law. Dan Hulsebosch, Cathy Sharkey, and Stephen Gardbaum gave me valuable comments, as did Michael Greve and the participants in the American Enterprise Institute roundtable on Erie. Maria Ponomarenko and Nikolaus Williams provided indispensable research assistance.

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

² In the original *Erie* case, the plaintiff, Tompkins, was walking to his home in Hughestown, Pennsylvania, at 2:30 a.m. on July 27, 1934. *Tompkins v. Erie R. Co.*, 90 F.2d 603, 603 (2d. Cir. 1937), *rev'd & remanded*, *Erie*, 304 U.S. at 64.

ently projecting from one of the train's cars. Tompkins suffered serious injury, including a badly broken arm.

Tompkins was not only injured, but duly outraged. How could this happen in this day and age? The Tompkins family had lived in Hughestown for generations. Family lore had it that the first Tompkins in this proud family line of Harrys had moved heaven and earth to establish the principle that railroads had a duty of care to those traversing a "commonly used beaten footpath," the phrase that seemed to ring in Harry's head. That first Harry had gone to his grave with bitter resentment for the disabling injuries he had suffered and for which the Supreme Court decreed there would be no compensation to a mere trespasser.³ And how, wondered Harry, could this have happened to his family after all these years, a wound recurring as if ordained by some recessive familial genetic predisposition?

So, seventy-five years to the date on which his great-grandfather's claim for justice had been defeated by the arrogant Erie Railroad, Harry once again took up the good family fight to right the historic wrongs that the powerful railroad companies had visited on the ordinary people of this country. The family could never understand how the great progressive Justice Brandeis could have reached out for constitutional issues not presented in the case, and then ruled for the railroad on the basis of the inviolability of Pennsylvania state substantive law.⁴ Even worse, by the 1930s, the railroads crisscrossed America using interchangeable carriage stock and seamlessly transported goods. The invocation of state-by-state liability rules for the national railroad grid seemed anachronistic even then. But Brandeis used the Tompkins case to strike a blow for state autonomy, and the poor Hughestown family waited generations to revisit the issue.

We start with the Tompkins great-grandson for a reason. In *Erie*, Justice Brandeis sought to reaffirm a vision of scaled-down America, one that resisted the power of the trusts in the economic domain and the encroachments of the government in the domain of liberty.⁵ Even his early writing on the tort of invasion of privacy in his famous article with Charles Warren included an undisguised view of the institutionalized press as yet another threat to liberty.⁶

³ *Erie*, 304 U.S. at 90.

⁴ *Id.* at 78–80.

⁵ William Forbath makes this point forcefully in tying Brandeis's constitutional vision to the objective of "sustaining a politically and economically independent citizenry." William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L. J. 115, 1126 (2011); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 489–91 (1997) (describing New Deal jurisprudence of the *Erie* period as providing greater role for state regulation of large business combinations); *see also* Mark A. Graber, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 87–91 (1991) (tying free speech to issues of local political community in Progressive thought).

⁶ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

Brandeis famously invoked three alternative arguments for the insult created by the application of federal common law to a dispute between an innocent pedestrian and an apparently negligent railroad: reliance on the federally-derived general common law to define the railroad's tort liability would offend some long-forgotten original draft of the Rules Enabling Act,⁷ it would not promote any desired uniformity in the application of state laws,⁸ and it would offend the constitutional division of powers between the federal government and the reserved powers of the states.⁹ I will return to these arguments, particularly the latter two, to show their spotty jurisprudential grounding. But, we begin instead with a practical look at what would happen 75 years later if *Tompkins IV* had sought to reenact the battle of Hughestown and avenge the insults his family had long endured at the hands of the despised Erie Railroad.

Harry the latter would soon discover that the world of 2013 looks nothing like the state-centered world of small enterprise envisioned by Brandeis. To begin with, his adversary had itself long been transformed by a combination of market forces and regulatory overhaul. The Erie Railroad went out of business decades ago, first merging out of bankruptcy into the Erie-Lackawanna, then emerging from a second reorganization as part of Conrail, then spinning off from the formation of the Amtrak passenger rail system, and now primarily operating in remnants as a mere subsidiary of the giant CSX holding company.¹⁰ By 2013, the idea of a state-based freight railroad is not only a stretch as a matter of law, it could not even be presented as plausible factually—again, allowing for the selective invocation of facts in our fictional account.

But, just as significant is the transformed legal environment in the intervening seventy-five years. For all the Brandeisian concern over state authority, the brute fact is that the railroads are now a national operation under the aegis of national law. Even at the time of *Erie*, the Interstate Commerce Commission exercised jurisdiction over fare issues and had rudimentary authority over railroad safety as well, which it exercised on matters such as couplers and railroad gauges.¹¹ That was followed by the Federal Employers' Liability Act (FELA), enacted in 1908, which established a compensation system for employees injured as a result of railroad negligence.¹²

⁷ *Erie*, 304 U.S. at 71–73.

⁸ *Id.* at 76–77.

⁹ *Id.* at 78–79.

¹⁰ See *The Erie Railroad*, AMERICAN-RAILS.COM, <http://www.american-rails.com/erie-railroad.html> (last visited, Dec. 6, 2012), for a nutshell history of the Erie Railroad.

¹¹ The ICC was expressly established by the Interstate Commerce Act of 1887, Pub. L. 49-104, 24 Stat. 379 (current version at 49 U.S.C. § 10101 (2012)), to regulate railroads. Its powers were expanded steadily by a series of amendments in the late nineteenth and early twentieth centuries to reach all aspects of railroad rate setting and various safety issues.

¹² Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (2012).

Even at the time of *Erie*, the primacy of federal law in regulating railroads was well established. Consider, for example, *Napier v. Atlantic Coast Line Railroad*, a challenge to various safety features mandated by state law.¹³ In strikingly modern sounding terms, the question confronted by the Court was whether the Boiler Inspection Act (BIA)¹⁴ and its subsequent amendment “occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation.”¹⁵ According to the Court, in an opinion by none other than Justice Brandeis, the state requirements were presumed proper as an exercise of state police power unless “[t]he intention of Congress to exclude states from exerting their police power [was] clearly manifested,” in turn requiring that “Congress [must] manifest the intention to occupy the entire field of regulating locomotive equipment.”¹⁶ By the time of the 1915 amendments to the Act, the Court concluded that Congress had manifested such an intention by delegating to the ICC a “general” power to regulate “the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.”¹⁷

Indeed, in its most recent review of the BIA in 2012, under its current name of the Locomotive Inspection Act of 1915, the Supreme Court relied on *Napier* to preempt a state law claim for mesothelioma that resulted from a design defect that had exposed the plaintiff to asbestos.¹⁸ According to the Court, *Napier’s* holding that the LIA “occup[ied] the entire field of regulating locomotive equipment”¹⁹ categorically “admit[ted] of no exception for state common-law duties and standards of care.”²⁰

More significant for our contemporary (if fictional) Tompkins claim is the general preemptive force of federal law in defining the background norms for all railroad negligence claims. Under the Federal Railroad Safety Act (FRSA), as most recently amended in 2007,²¹ the Secretary of Transportation is authorized to “prescribe regulations and issue orders for every area of railroad safety.”²² The Secretary has “exclusive authority” to impose civil liability for FRSA violations.²³ In order to ensure that laws and regulations regarding railroad safety are “nationally uniform to the extent practicable,” the FRSA includes a preemption clause that allows states to

¹³ 272 U.S. 605 *passim* (1926).

¹⁴ *Napier v. Atlantic Coast Line R.R.*, 36 Stat. 913 (1911), *amended by* 38 Stat. 1192 (1915).

¹⁵ *Napier*, 272 U.S. at 607.

¹⁶ *Id.* at 611.

¹⁷ *Id.*

¹⁸ *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1264 (2012).

¹⁹ *Id.* (quoting *Napier*, 272 U.S. at 611).

²⁰ *Id.*

²¹ Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (1970) (current version at 49 U.S.C. §§ 20201–20144; 21301–21304 (2012)).

²² 49 U.S.C. § 20103(a) (2012).

²³ 49 U.S.C. § 20111 (2012).

retain laws and regulations relating to railroad safety, but only until a federal regulation or order is issued “covering the subject matter of the State requirement.”²⁴ As it presently stands, the FRSA preemption language leaves narrow room for state law to operate:

Nothing in this section should be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party (A) has failed to comply with the Federal standard of care established by regulation or order . . . (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order . . . or (C) has failed to comply with a State law, regulation, or order.²⁵

The effect is to render state law interstitial. A state may impose an “additional or more stringent” requirement to remedy a “local safety or security hazard” as long as it does not conflict with federal law or “unreasonably burden interstate commerce.”²⁶ State law continues to supply the cause of action for a personal injury caused by a railroad, but federal law provides the substantive rights and duties that may be asserted through the state law cause of action.²⁷ Thus, federal law preserves for “railroad accident victims the right to seek recovery in state courts when they allege railroads violate safety standards imposed by a railroad's own rules, certain state laws, or federal regulations.”²⁸ However, federal law allows state law and its remedies to operate only when a regulated party has failed to conform to federal law. Thus, the federal legal regime makes “clear that when a party alleges a railway failed to comply with a federal standard of care established by regulation or with its own plan, rule, or standard created pursuant to a federal regulation, preemption will not apply.”²⁹

To make matters worse for our injured Harry Tompkins IV, current Pennsylvania law establishes—just as it did seventy-five years ago—that railroads only owe trespassers a duty, in the words of a 2003 statute, to avoid a “willful or wanton failure to guard or warn against a dangerous condition, use or activity.”³⁰ Even this limited articulation of state law treatment of trespassers is itself conditioned by the suffocating reach of federal power over the regulation of railroads. For example, if poor Harry argued that the train’s speed caused the accident, he would find that state law “excessive speed” claims are preempted by federal regulations estab-

²⁴ 49 U.S.C. § 20106(a)(1)–(2) (2012).

²⁵ 49 U.S.C. § 20106(b) (2012). The Supreme Court has addressed this preemption language, preserved from earlier forms of the statute, in two cases, holding in both that federal railroad regulation can preempt common law tort claims. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 670 (1993).

²⁶ 49 U.S.C. § 20106(a) (2012).

²⁷ 49 U.S.C. § 20106(c) (2012).

²⁸ *Lundeen v. Canadian Pac. R.R. Co.*, 532 F.3d 682, 690 (8th Cir. 2008).

²⁹ *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1215 (10th Cir. 2008).

³⁰ 42 PA. CONS. STAT. ANN. § 8339.1(b) (West 2003).

lishing maximum train speeds for certain classes of track preempted such a claim.³¹ Even a claim that the railroad failed to inspect the train sufficiently before leaving the prior station may be preempted by federal regulations that are “intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime.”³² And the list goes on to include negligent design claims against railroads.³³ There are even federal regulations relating to the structure and support of the track and the track roadbed,³⁴ and these too have been found to preempt state laws regarding walkways adjacent to tracks.³⁵

Whatever *Erie* stands for, or whatever it might have been thought to have stood for, one thing is clear: the operation of the railroads in the U.S. today is thoroughly federalized and that much of the legal architecture for the federalized regime was already in place in 1938. Except for the formality that a latter-day Tomkins would bring his claim as a state law tort, state regulation has been hollowed out in the name of the integrated administration of the national railway system, a goal that sounds much more like that of Justice Story than Justice Brandeis. As Story wrote in an 1834 treatise on conflicts:

To no part of the world is [the jurisprudence of the conflict of laws] of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states.³⁶

³¹ See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993). The regulation in question establishes maximum allowable operating speeds for both freight and passenger trains on five classes of track as well as excepted track. *Id.* (citing 49 C.F.R. § 213.9 (2013)). The different classes of track are defined in subsequent regulations by rail gage, alignment, curves, track structure, geometry, etc. *Id.* (citing 49 C.F.R. §§ 213.51–213.143 (2013)).

³² *In re Derailment Cases*, 416 F.3d 787, 793–94 (8th Cir. 2005) (“The [Federal Railroad Administration] FRA has adopted regulations that require inspections of freight cars at each location where they are placed in a train.”) (citing 49 C.F.R. § 215.13(a) (2013) (“At each location where a freight car is placed in a train, the freight car shall be inspected before the train departs.”)).

³³ See, e.g., *Toadvine v. Norfolk S. Ry. Co.*, Nos. 96-6221/6237, 1997 WL 720431 at *2 (6th Cir. Nov. 13, 1997) (holding that federal regulations preempted plaintiff’s claim that she fell from railroad car due to negligently designed car ladders and grab irons caused).

³⁴ 49 C.F.R. §§ 213.31–213.143 (2013).

³⁵ See, e.g., *Mo. Pac. R.R. Co. v. R.R. Comm’n of Tex.*, 823 F. Supp. 1360, 1367 (W.D. Tex. 1990), *aff’d*, 948 F.2d 179 (5th Cir. 1991) (holding that “the FRA has acted to completely occupy the field of railway safety specifically related to the roadbed, track structure, and walkways”).

³⁶ 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, 1532 (1984) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 9 (Boston 1834)).

In the remaining sections I will argue that not only has *Erie* failed in practice, but that its core logic fails on each of its stated bases. I will then conclude with a mild defense of *Erie* on grounds of the limited institutional competence of the courts to craft comprehensive regulatory systems through the happenstance of the cases that come before them, with particular attention to the risks associated with the doctrine of implied preemption.

I. IN SEARCH OF A PRINCIPLE

One of the enduring problems of *Erie* is that Brandeis offered three distinct arguments in support of overturning *Swift v. Tyson*.³⁷ First, Justice Story misinterpreted § 34 of the Federal Judiciary Act.³⁸ Second, Justice Story's interpretation of § 34 was unconstitutional.³⁹ And third, the practical effects of *Swift* were undesirable while the expected benefits did not materialize.⁴⁰ The opinion did not tie any of the three arguments to the other, nor did it address whether any of the three would have been sufficient by itself—though presumably the constitutional argument should have provided the ultimate grounding for the holding that federal common law could not displace state substantive law. Instead, the three appear unified by a more-or-less unspoken alternative vision of social and economic organization. To surface this alternative account, it is best to walk initially through *Erie*'s stated sources of infirmity of the inherited regime of *Swift v. Tyson*.

A. *Interpreting Aging Statutes*

Perhaps the most bizarre part of *Erie* was the statutory claim that 150 years of institutionalized practice should be overturned without any indication of congressional discontent with the Court's interpretation. Brandeis hinged the statutory argument on the recent discovery of legislative history of proposed statutory language, which was not only forgotten but most importantly was never enacted. In *Erie*, Brandeis claimed that the work of a "competent scholar" somehow should overturn a century of settled practice in order to bring the interpretation of the Rules of Decision Act with legislative objectives from 1789.⁴¹ I can do no better than Suzanna Sherry in trying to engage with the difficulty of this form of statutory interpretation. Even leaving aside Professor Sherry's less-than-subtle claim that *Erie* is the

³⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71–80 (1938); see generally *Swift v. Tyson*, 41 U.S. 1 (1842).

³⁸ *Erie*, 304 U.S. 71–74.

³⁹ *Id.* at 78–80.

⁴⁰ *Id.* at 73–78.

⁴¹ *Id.* at 72.

“worst decision of all time,”⁴² Professor Sherry properly identifies why this argument fails—and must fail—along a number of lines.

The doctrinal morass begins with Justice Joseph Story’s attempt to forge a common commercial legal regime for the new American Republic. The first Judiciary Act had created a federal court system most unlike our own, with the jurisdiction of the new federal lower courts limited to cases arising from diversity of citizenship.⁴³ The corresponding limitation from § 34 of the Judiciary Act, known as the Rules of Decision Act, restricted the law generating powers of the new federal courts by obligating them to apply state decisional law in the exercise of their new-found diversity powers. In *Swift v. Tyson*, Story finessed the statutory command of the Rules of Decision Act by distinguishing the sources of law as critical to state decisional law. For Story, legislative enactments had the force of decisional law in diversity cases, while common law did not.⁴⁴

For Brandeis, as for a generation of Progressive critics of the Supreme Court, the expansion of federal commonlaw power, together with the accompanying aggressive use of constitutional doctrines under the Due Process Clause, was a source of retrograde insult to the emerging role of social regulation. Story’s account of the Rules of Decision Act, as limited only to formal legislation, became the first target of *Erie*. Brandeis, relying on the work of Charles Warren, sought to undermine this statutory reading and restore the common law to co-equal status with legislative enactments as a source of state law meriting complete deference under the Rules of Decision Act.⁴⁵ For Brandeis, this new-found ambiguity in the original legislative intent called into question the entire legal edifice that had been constructed around *Swift v. Tyson*.

Such an extravagant claim for drafting notes for a version of a statute never enacted is surely a stretch as a matter of statutory interpretation. Professor Sherry goes even further and directly attacks Charles Warren’s specific statutory claim regarding the Rules of Decision Act, on which Brandeis relied. Warren argued that a newly discovered draft of § 34 of the Judiciary Act of 1789 (i.e., the RDA) conclusively showed that the enacted version was meant to include unwritten state law.⁴⁶ According to Professor Sherry, however, the legislative history was not as conclusive as Brandeis (and Warren) claimed. First, there is no support for Warren’s conclusion

⁴² Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie As the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 130 (2011).

⁴³ The first Judiciary Actempowered federal courts to hear “all suits of a civil nature at common law or in equity” between parties from different states. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (repealed 1948); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928).

⁴⁴ *Swift v. Tyson*, 41 U.S. 1, 7 (1842).

⁴⁵ *Erie*, 304 U.S. at 71–74.

⁴⁶ Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86 (1923).

that the changes were merely stylistic and that Congress did not intend to change the substantive meaning of the section between drafts. It is equally conceivable that the changes were meant to be substantive, reflecting Congress's intent to *exclude* common law from the RDA. Without further evidence, which neither Warren nor Brandeis had, it is impossible to determine the intent of the changes. Moreover, legislative history showing the placement of § 34 with sections dealing with federal suits, in general, and not with the sections on diversity suits, suggests that § 34 was intended as a general instruction to the courts and not one specific to diversity cases.⁴⁷

More intriguingly, Professor Sherry argues that *Swift* was closer to Congress's actual intent than *Erie*. The § 34 language mention of "laws of the several states" was probably contemporaneously understood to refer to the collective states. Reference to the states individually was often indicated by the term "respective states."⁴⁸ This proposition is supported by language in the Process Act, passed shortly after the Judiciary Act, which used the phrase "in each state respectively" to instruct federal courts to use state procedural law.⁴⁹ This understanding, according to recent work by Caleb Nelson, also corresponds to the practice in the states at that time, in which state supreme courts also looked to general law principles in coordinating a common legal enterprise.⁵⁰ Indeed, in that sense, *Erie* failed on its own terms as the common law enterprise was and remained one of finding a shared legal environment corresponding to a largely interchangeable national economy,⁵¹ with efforts like the Uniform Commercial Code as the resulting coordination point. While the UCC is the product of a codification movement, there is ample evidence that state courts saw the UCC as their common law undertaking in the nineteenth century. Thus, state courts prior to *Swift* commonly spoke of the "general commercial law," the "law merchant," and the "mercantile law"; and in addition, these courts would look broadly to other state courts, federal courts, and foreign courts to determine what that law should be.⁵² At the very least, there is strong reason to doubt the claim by Justice Holmes in dissent in the blockbuster case of

⁴⁷ Sherry, *supra* note 42, at 134.

⁴⁸ *Id.* at 134.

⁴⁹ Process Act of 1789, ch. 21, § 2, 1 Stat. 93 (1789); Sherry, *supra* note 42, at 135.

⁵⁰ Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 942 (2012).

⁵¹ Both "pre- and post-*Erie* federal diversity decisions have in fact been a force for bringing about a greater uniformity in the common law of the states." *Id.* at 949 n.77 (quoting Letter from Richard Posner to Henry Friendly (Jan. 3, 1983), in William Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982-86*, 51 AM. J. LEG. HIST. 395, 404 (2011)).

⁵² J. Benton Hurst, Note, *De Facto Supremacy: Supreme Court Control of State Commercial Law*, 98 VA. L. REV. 691, 697 (2012).

Black & White v. Brown & Yellow, that confusion rather than coordination was the ensuing norm in national law.⁵³

For example, after reviewing the merits of a rule in an 1854 case, the Supreme Court of Vermont stated that “[t]he more important question growing out of the case is, perhaps, what is the true commercial rule established upon this subject? And it is of vital importance in regard to commercial usages[] that they should, as far as practicable, be uniform throughout the world.”⁵⁴ Uniformity was the “ultimate desideratum,” and it was “always a question of time” as to achieving it.⁵⁵ Or, as the Ohio Supreme Court stated in 1842 in overruling its own precedent:

It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law[] is of much interest to the mercantile world.⁵⁶

There is an inherent risk in using contemporary understandings to update old statutes, let alone relying on musty notes of a version of a statute never enacted.⁵⁷ Surely in the century following *Swift*, Congress could have corrected the mistaken judicial view of the scope of federal common law authority, assuming that Brandeis (via Warren) had the better of the interpretive argument. But there is a paradox in Brandeis claiming the authority to disrupt expectations well settled through nearly a century of the *Swift* regime. One of the critiques of the *Swift* regime was that cases such as *Black & White v. Brown & Yellow*⁵⁸ revealed the disruption to the ordinary expectations of citizens leading their daily lives if the happenstance of judicial forum could alter their legal rights and responsibilities. It is hard to imagine that pivoting on the meaning of critical statutes is not less disruptive when the alteration of law is not the result of the deliberative political process but of the new research of a “competent scholar.”

⁵³ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting); see also Nelson, *supra* note 50, at 978–79.

⁵⁴ Hurst, *supra* note 52, at 711 (quoting *Atkinson v. Brooks*, 26 Vt. 569, 578 (1854)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 712 (quoting *Carlisle v. Wishart*, 11 Ohio 172, 191–92 (1842)).

⁵⁷ There is extensive literature on the justification for the “dynamic” school of statutory interpretation that takes us far beyond the scope of this inquiry. The debates take as a point of departure the claims made in William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496–97 (1987).

⁵⁸ *Black & White Taxicab*, 276 U.S. at 518.

B. *The National Enterprise and the Constitution*

For nearly a century, the doctrine that a national economic market required a coordinated national commercial law seemed unexceptional. As I have previously recounted with Catherine Sharkey,⁵⁹ Justice Story's vision of courts as important agents of national integration was uncontroversial, and seemed to correspond to the initial perceived need for diversity jurisdiction as a means of securing the recoverability of commercial debts across the developing national market.⁶⁰ Even prior to *Swift*, Justice Story had long espoused the need for commercial integration as a central tenet in developing the law of the new Republic. Writing in *Van Reimsdyk v. Kane*, Story explained that the difference in the application of local versus national law derived from the subject of the regulation. The more national the scale of the underlying legal engagement, the more the national courts must craft new national law:

In controversies between citizens of a state, as to rights derived under that statute, and in controversies respecting territorial interests, in which, by the laws of nations, the *lex rei sitae* governs, there can be little doubt that the regulations of the statute apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature; I think it can hardly be maintained, that the laws of the state, to which they have no reference, however, narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has provided a national court.⁶¹

Story later emphasized this point in *Williams v. Suffolk Insurance Co.*:

[U]pon commercial questions of a general nature, the courts of the United States possess the same general authority, which belongs to the state tribunals, and are not bound by local decisions. They are at liberty to consult their own opinions, guided, indeed, by the greatest defe-

⁵⁹ See generally Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353 (2006) (addressing the emergence of partial federalization of areas historically governed by state law); see also Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1188–92 (2011) (discussing the centralizing power of judicial review).

⁶⁰ According to Madison's notes of the Constitutional Convention, the concept of diversity jurisdiction was not much debated in the convention itself, while the wording was left to the Committee of Detail. See 1–2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 *passim* (Max Farrand, ed. 1911); see also, Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242–46 (1985) (tracing the language of diversity jurisdiction through the drafts of the Committee of Detail).

⁶¹ *Reimsdyk v. Kane*, 1 Gall. 371, 381 (1812), *remanded sub nom.* Clark's Ex'rs v. Van Reimsdyk, 9 Cranch 153, 153 (1815).

rence for the acknowledged learning and ability of the state tribunals, but still exercising their own judgment, as to the reasons, on which those decisions are founded.⁶²

Swift was an unexceptional application of the principles that Story had long articulated. Moreover, *Swift* largely followed contemporary practice, and leading state courts “seemed persuaded that it would lead to a desirable uniformity in commercial matters.”⁶³ As Judge William Fletcher notes, the decision seemed a clarification of the role of the “general common law” as it applied to commercial transactions unaffected by the particularized concerns of “local law.”⁶⁴

According to Brandeis, however, the doctrine of *Swift v. Tyson* was “an unconstitutional assumption of powers by courts of the United States.”⁶⁵ The Constitution itself does not address the range of substantive powers of the federal courts, except by requiring that they be created and empowered by affirmative acts of Congress. In order to find a limiting principle on what powers might be exercised by federal court, Brandeis pushed into the murky constitutional divides between state and federal powers in general. In order to cabin constitutionally—rather than as a matter of statutory interpretation—the power of the statutorily promulgated federal courts, Brandeis was forced to argue a corresponding limitation on all federal power, including that of Congress:

Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.⁶⁶

Brandeis thereby rooted the constitutional infirmity of *Swift* in the limited federal power in all matters having to do with the administration of state commercial enterprise, not just in the particular fact of judicial declaration of the federal interest: “The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision *which Congress was confessedly without power to enact as statutes.*”⁶⁷

Generations of commentators have become enthralled with the bizarre constitutional underpinnings of *Erie*. If taken to its logical core, Brandeis’s

⁶² *Williams v. Suffolk Ins. Co.*, 29 F. Cas. 1402, 1405 (C.C.D. Mass. 1838).

⁶³ Alfred B. Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519, 524 n.36 (1940–41); *see also* *Stalker v. McDonald*, 6 Hill 93, 95 (N.Y. 1890); *Treon v. Brown*, 14 Ohio 482, 487–88 (1846); *Carlisle v. Wishart*, 11 Ohio 172, 192 (1842).

⁶⁴ Fletcher, *supra* note 36, at 1517. Fletcher points in particular to Blackstone as upholding commercial transactions governed by “a great universal law” that was “regularly and constantly adhered to.” *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES *67).

⁶⁵ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938).

⁶⁶ *Id.* at 78.

⁶⁷ *Id.* (emphasis added).

argument could be rooted in the reserve powers guaranteed to the states by the Tenth Amendment. On this theory, a federal judiciary could not vest the power to generate its own general common law as that power to create law would reach beyond the legislative powers specifically enumerated to the federal government, which would in turn necessarily encroach on states' rights.⁶⁸

But could this possibly be true? And could it be a conceivable claim of a constitutional limit on the economic reach of the federal government, at the very height of the New Deal? Brandeis's claim that Congress lacked the power to make "substantive rules of common law applicable in a state" was strikingly discordant with the contemporaneous, judicially-approved expansion of federal power during the New Deal. The same Court that decided *Erie* also upheld New Deal legislation that shifted the locus of economic and social regulatory power to the federal legislative and executive branches. Given Congress' broad power to regulate interstate commerce, subsequently recognized by the Court in decisions like *Wickard v. Filburn*,⁶⁹ it is difficult to believe that the federal government could not regulate large swaths of state common law. It is especially difficult to take Brandeis's argument at face value considering that the very claim in question was clearly subject to congressional regulation under the Commerce Clause. Indeed, as set forth only partially in the opening sections, the subject matter of *Erie* could hardly have involved a more paradigmatic case of expanding federal power. Railroads were one of the quintessential interstate commercial activities of the early twentieth century. In short, accepting Brandeis's argument at face value would pose a serious threat to Commerce Clause jurisprudence that has not seen a federal statute regulating economic activity struck down in seventy-five years, with only the Affordable Care Act decision of this past Term reviving any sort of constitutional limits under the Commerce Clause.⁷⁰

⁶⁸ See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702–03 (1974); Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 9 N.Y.U. L. REV. 383, 394–98 (1964). Article I, § 8 of the Constitution enumerates the specific powers granted to Congress. U.S. CONST. art.I, § 8. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST.amend. X; see also Gardbaum, *supra* note 5, at 490 ("Contrary to the nationalist account, most of these changes derived less from considerations of the proper roles of state versus national legislatures (that is, considerations of federalism) than from a fundamental change in thinking about the proper roles of legislatures (whether state or federal) and courts with respect to matters of public policy. In other words, the constitutional revolution as a whole had more to do with separation of powers than with federalism, ushering in a new understanding of the respective legislative and judicial functions.").

⁶⁹ *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (upholding regulation of wheat grown for home consumption under the Commerce Clause).

⁷⁰ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2587–88 (2012).

To give constitutional mooring to *Erie* requires a rejection of the ill-formulated federalism arguments in favor of a different constitutional divide. Many prior readers of *Erie* have cast doubt on the constitutional arguments questioning the scope of federal power.⁷¹ A number of subsequent commentators have gone further to articulate a separation-of-powers argument as the true basis for *Erie*'s constitutional holding.⁷² The constitutional limitation here turns not on the division of authority between the state and federal governments, but on the constitutional limits inherent in the exercise of the judicial function. Even if the broad federalism principles relied on by Brandeis no longer seem valid, there is still a version founded in what may be called "judicial federalism."⁷³ Under this argument, even if Congress has the power to regulate substantive rules of common law applicable in a state under the Commerce Clause, those legislative powers are limited to Congress under separation-of-powers principles. On this view, *Erie* should be understood not as a case about the limits of federal power, but as the resolution of the boundaries of federal *judicial* power,⁷⁴ a point to which I return in the concluding section.

C. *Settled Expectation and the Source of Law*

Perhaps the best rationale for *Erie* may be found in Brandeis's claim that "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue."⁷⁵ Here, Brandeis launches two related arguments against the market integration argument that Story so highly valued. In the first instance, this is essentially a functionalist critique about the capacity of courts to generate a body of commercial law that would harmonize a di-

⁷¹ See generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA 178–79* (2000) (rejecting as "oblique" and "reluctant" the state authority claims in *Erie*); Ely, *supra* note 68, at 702 (rejecting the federalism rationale for *Erie*).

⁷² See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13–19 (1985) (describing how federalism is only applicable when federal law interferes with state interests, where otherwise federal common law will apply).

⁷³ *Id.* at 16.

⁷⁴ By contrast to the ill-crafted federalism claim, as argued in Edward Purcell's definitive account of Brandeis's constitutional vision, Brandeis's longstanding hostility to far ranging judicial authority "was rooted firmly and purposely in his acute awareness of its tactical uses." PURCELL, JR., *supra* note 71, at 122.

⁷⁵ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938). Brandeis offered four specific criticisms: discrimination against citizens, uncertainties in drawing lines between categories of law, a lack of uniformity in the law within a state, and forum-shopping. *Id.* at 73–81. The discrimination point is not only unsubstantiated, but misreads the procedural posture of removal—only in-state defendants faced with a state court filing by an in-state plaintiff could not avail themselves of removal to federal court, an odd source of discrimination. See PURCELL, JR., *supra* note 71, at 162.

verse national market. To the extent that *Swift* and the nineteenth century vision of a seamlessly integrated national commercial market rested on a generally understood and applied legal framework, courts remained only one among many actors capable of creating or interpreting legal obligations. Second, even within the domain of courts, federal courts remained only one legal actor. Thus, even the judicial articulation of legal norms had to confront the two-courts problem in which state courts might not yield to the harmonizing federal vision.

For Brandeis, this critique led powerfully to the issue presented in cases like *Black & White v. Brown & Yellow*, which presented a rather extreme version of forum shopping. Under the facts presented, a party's citizenship was endogenous to the legal environment, meaning that a strategic player could decide which body of law would control its behavior. In that case, a taxicab company in Bowling Green, Kentucky could manipulate its citizenship by reincorporating across the border in Tennessee in order to claim federal court diversity jurisdiction. Had the company sued its local taxicab rival in state court to enforce its exclusive dealing arrangement at a local train station, it would have been barred by state law prohibitions on restraints of trade. Federal court offered not just a different forum, but a different body of substantive law.⁷⁶ Rather than promote uniformity, the "fact that federal courts were not bound to follow state courts on matters of general law meant that there were frequently two different rules of law in force inside a single state, either of which was available to a party able to get into federal court."⁷⁷

Uncertainty about the role of federal courts in governing any particular dispute compromised Story's functional account of market organization. For Brandeis, this was enough to proclaim *Swift's* failure, even without a richer account of the underlying mischief that the two-court problem could motivate. That argument was left to Justice Harlan, who later explained in *Hanna v. Plumer*, "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs."⁷⁸

Harlan thus offered the single compelling normative account for the *Erie* intuition of inconsistency in legal obligations, what in shorthand is known as the *Black & White v. Brown & Yellow* problem. One may readily

⁷⁶ The facts of the taxicab dispute are now a source of legal and casebook legend, as well recounted by Robert J. Condlin, "*A Formstone of our Federalism*": *The Erie/Hanna Doctrine and Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 483 (2005).

⁷⁷ Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie to Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 7 (2012).

⁷⁸ *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

question either how widespread the *Black & White* problem really was,⁷⁹ or whether it was really a matter of regulatory failure in corporate reorganization rather than forum selection rules.⁸⁰ But the claim was that uncertainty in controlling law created a distinct harm outside the litigation setting regardless of the constitutional or statutory allocation of specific powers to federal courts.

Once cast in these terms by Harlan's influential concurrence in *Hanna*, the potential mischief in *Erie* plays out at the level of law's obligation to the citizenry. The central insight is that the law's commitment to "private ordering" requires clarity in the legal commands confronting all individual actors as they go about their lives with expectations about what property rights entail, what contracts will be honored, and what duties of care they owe and should expect. When law provides the greatest certainty to such primary conduct, then individuals may pursue their happiness and welfare in ways that maximize their ambition and abilities. That legal clarity in turn requires that there be one source of authority for the decisions citizens make on a day to day basis. For Harlan, in giving meaning to Brandeis's critique, the importance of clarity in controlling law meant that the mischief created by the ability to seek conflicting legal authority as to the enforceability of an exclusive franchise agreement at a railroad terminal had to be resolved by allowing only one law-giving authority. And, the same principle meant that both the Erie Railroad and the poor Tompkins family would have to live by one controlling legal command as to the duties owed to those traversing the "commonly used beaten footpath."

The paradox of *Erie* is why one would expect greater uniformity to come from the states, particularly when the conduct in question is likely to be national in scope—as shown by the discussion of the evolution of railroad liability law in the opening section. Caleb Nelson well argues that the problems resulting from disuniformity (making *ex ante* planning more difficult and creating incentives for forum shopping *ex post*) might be greater under *Erie* than *Swift*.⁸¹ This is critical for any assessment of how successful Brandeis could be in critiquing Story on these grounds. A personal anecdote might elucidate this point.

Once when presenting this issue to an academic audience in Europe, I found the lecture going well and the legal arguments quite accessible to them given the ongoing European struggles with economic integration.

⁷⁹ See generally MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 221–242 (2012) (discussing the impact of *Erie* on the states' powers to regulate interstate commerce).

⁸⁰ Nelson notes that the attention on the leading *Erie*-era example of the forum shopping problem, *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), was arguably misplaced. See Nelson, *supra* note 50, at 964 n.132. The manipulative conduct of the taxicab company was as much due to the ease with which corporations could choose their state of incorporation as their ability to forum-shop. *Id.* However, the former was something that could have been readily changed through Congressional legislation if really viewed as a problem. *Id.*

⁸¹ Nelson, *supra* note 50, at 968.

When I came to the holding of *Erie*, however, the audience became visibly uncomfortable and finally someone interrupted me to explain that I must have misspoken: the audience assumed that I had mangled the holding of *Erie* and that any ruling seeking to promote uniformity of practice must therefore have resorted to the elevation of *federal law*. The European audience followed the logic thoroughly until they came to the conclusion. For Europeans—as for Story more than a century before—economic market integration required higher order law to apply, not localism. Indeed, it is hard to construct the logic whereby problems of competing and inconsistent authority are resolved by fractionating regulatory authority rather than concentrating it.

For the European audience, the question is presented as one of competence of the claimed legal authority actually to resolve the issue in question within its dominion. This is a longstanding source of debate in Europe going back to the rise of collectivism and Marxism. The fundamental European counterargument remains canonical:

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.⁸²

This principle of subsidiarity, enshrined in Catholic doctrine by Pope Leo XIII in 1891 in the famous encyclical *Rerum Novarum*, has emerged as the mainstay of European Community law, particularly as regards administrative regulation.⁸³ The basic principle of subsidiarity in EU law is intended to limit Brussels's reach by creating a presumption of local regulatory autonomy, or at the very least, a presumption in favor of national level regulation as opposed to EU commands. For its enthusiasts, "subsidiarity is celebrated as a check on the monopolistic tendencies of the modern state; it is a plea for localism and doing things at the lowest possible level."⁸⁴

⁸² UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CATECHISM OF THE CATHOLIC CHURCH 512–13 (1995), available at <http://www.usccb.org/catechism/text/pt3sect1chpt2.htm#7>; cf. Pius XI, *Quadragesimo anno* I, 184–86.

⁸³ The Maastricht Treaty's subsidiarity provision reads: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member-States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." Treaty Establishing the European Community, art.3b, Feb. 7, 1992, 1992 O.J. (C 224) 9.

⁸⁴ Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of Lasallians, Families, Schools—and the Poor*, 45 J. CATH. LEGAL STUD. 131, 133 (2006).

But subsidiarity operates only insofar as the issues remain local.⁸⁵ The European railroads began as the product of national consolidation under Bismarck and the Saint-Simonean ministers of Louis Napoleon. Indeed, some nations like Russia used different size railroad gauges to slow foreign armies, and the British colonial authorities used railbeds with different gauges within India to prevent economic integration and the potential of political unification.⁸⁶

Today, in furtherance of economic integration, European rail lines operate under the regulations of Brussels. Subsidiarity would have little to say about the coordinated regulation of common carriers designed to move across communities, not give expression to the local values of the way stations serviced by modern transport. Nor would the principle of subsidiarity be offended by the use of centralized laws of mercantile exchange in integrated national and multinational markets. In the language preferred by Europeans, Brandeis's invocation of state law authority failed to establish the competence of local law to govern the relevant unit of economic activity.

II. COURTS AND THE PROJECT OF ECONOMIC INTEGRATION

Many of these concerns are far from new. John Hart Ely probed at the broader claims of Brandeis and helpfully trimmed *Erie* down to a statutory case delineating the lines between the older Rules of Decision Act and the recently enacted Rules Enabling Act.⁸⁷ That argument both takes away the rhetorical excesses of the putative constitutional claim and gives a sense of the moment as one of creating a role of procedural innovation in the federal courts.

Much as Ely's argument is salutary, it does not go far enough in addressing Brandeis's extraordinarily obvious reach for strong principles of limitation, including constitutional principles that were not even addressed by the litigants in *Erie*.⁸⁸ Instead it is better to begin with Thomas Merrill's

⁸⁵ For a fuller account of Justice Brandeis deeply rooted commitment to small production and local endeavors, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 80–142 (1984) (describing Brandeis's lifelong crusade against the “curse of bigness”); see also Michael Lind, *LAND OF PROMISE: AN ECONOMIC HISTORY OF THE UNITED STATES* 229 (2012).

⁸⁶ Aaron K. Perzanowski, *Rethinking Anticircumvention's Interoperability Policy*, 42 U.C. DAVIS L. REV. 1549, 1560 (2009). For a discussion of the use of higher-level authorities to achieve the benefits of coordination, including of common railroad gauges, see Timothy S. Wu, Note, *Cyberspace Sovereignty? The Internet and the International System*, 10 HARV. J.L. & TECH. 647, 657–58 (1997).

⁸⁷ Ely, *supra* note 68, at 724 (tying *Erie* to the underlying procedural objectives of the Rules Enabling Act).

⁸⁸ PURCELL, JR., *supra* note 71, at 132–33 (contrasting the reach for unstated questions with Brandeis's opinion two years earlier setting forth the principle of constitutional avoidance in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)).

argument that *Erie* is a case not about federalism but about the institutional role of federal courts in the “displacement” function that necessarily follows from the exercise of federal supremacy and the ensuing subordination of state authority.⁸⁹ The argument here is not that federal power does not extend to conduct such as the liability rules governing railroads, an argument that was strained even as Brandeis wrote and that today would have no traction at all. Rather, the claim is that there is a softer form of constitutional constraint that applies when courts rather than the political branches undertake a realignment of power between the states and the federal government. This argument is anticipated by Michael Greve, who leads an effort to reexamine *Erie*, but acknowledges that the opinion might end up resting on “some combination of separation of powers and federalism arguments.”⁹⁰

The American system of “dual federalism” creates inherent conflict in regulatory authority but one in which the combined force of a national market and the Supremacy Clause push incessantly toward the centralization of federal power.⁹¹ Despite this pressure toward increased exercise of federal authority, the political process can realign regulatory authority toward the states, including through resistance to federal legislative initiatives. These “political safeguards of federalism”⁹² operate such that states can police against federal *legislative* encroachment on state prerogatives by virtue of the states’ representation in Congress.⁹³ Such state reassertions of authority are thwarted when the asserted federal power comes from the courts rather than Congress, and particularly when embroidered in the language of constitutional authority.

On this reading, *Erie* emerges as a caution on a particular exercise of federal power through federal courts, a specific discussion entirely absent in Brandeis’s opinion. *Erie* becomes a case not about the always elusive line between substance and procedure, or some curious notion of the reserve powers under the Tenth Amendment, but of the dangers inherent in the further reaches of federal judicial power. *Erie*’s otherwise inexplicable doctrinal overreach was the note of triumph of the Progressive vision against the hated ghost of *Lochner*⁹⁴ and its associated doctrines of federal constraint on regulation.⁹⁵ The evil of the federal common law was not that it constituted a reallocation of regulatory authority from state to federal power, but

⁸⁹ Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 744–46 (2008).

⁹⁰ MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 375 (2012).

⁹¹ See Issacharoff & Sharkey, *supra* note 59 (developing this argument).

⁹² See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 234 (2000).

⁹³ Merrill, *supra* note 89, at 742.

⁹⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹⁵ See PURCELL, JR., *supra* note 71, at 40–43 (describing the multiple doctrinal forms of the assertion of federal power during the late nineteenth and early twentieth centuries).

rather than its use by the judiciary was likely to be antagonistic to governmental authority to regulate.

It is always treacherous to read into an opinion a logic—or worse yet, a motivation—not apparent in the text itself. *Erie* is the anti-*Lochner* of a revitalized faith in the regulatory power of the state. This is not the anti-*Lochner* of Justice Holmes' famous dissent and its refusal to interpose any constitutional constraint on what a legislature might do.⁹⁶ Holmes not only saw no warrant for judicial intervention in the product of majoritarian processes, but anticipated that “people who no longer hope to control the legislatures . . . look to the courts as expounders of the Constitutions.”⁹⁷ Rather, the legislature envisioned by Brandeis was one capable of reasoned, orderly regulatory conduct, meriting the gracious margin of deferential review set out by Justice Harlan in his *Lochner* dissent.⁹⁸ When the *Lochner* Court elevated its liberty-based view of substantive due process, it acted not so much in furtherance of federal supremacy but against any regulatory authority whatsoever.

If indeed *Erie* does not stand for the primacy of state regulatory authority in contrast to federal power, then it is easier to reconcile with the massive expansion of federal authority during the New Deal period. If this is correct, the opinion should instead be read as a reaction to the use of federal *judicial* power to limit regulation of economic activity. This reading orders the apparent constitutional tension between Brandeis's bizarre invocation of the constitutional limits on federal power. Coming only one year after *NLRB v. Jones & Laughlin* and *West Coast Hotels v. Parrish*, and in the uninterrupted streak of New Deal cases culminating in *Wickard v. Filburn*, such a presumption of state autonomy fits poorly with constitutional doctrine of the day.⁹⁹

⁹⁶ *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting) (“I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).

⁹⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467–68 (1897). The more extreme forms of Holmes's skepticism toward any constitutional constraint on the legislature would come later, as expressed in one of his famous First Amendment dissents: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting). The most famous expression came in a letter to Harold Laski, claiming that, “if my fellow citizens want to go to Hell I will help them. It's my job.” Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe Howe ed., 1953).

⁹⁸ See *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting) (“No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives.” (quoting *Atkins v. Kansas*, 191 U.S. 207, 223 (1903))).

⁹⁹ See, e.g., *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

When courts, as opposed to Congress, interpose federal authority on regulatory initiatives, the question is not which regulatory scheme prevails, but whether there can be regulation, even of the common law sort. Courts are inherently limited in setting a regulatory agenda, a product of the constraints on the judicial power imposed by case or controversy requirements and limitations on agenda setting.¹⁰⁰ On this view, *Erie* allows courts to continue playing a role in allocating regulatory responsibility among distinct institutional players¹⁰¹ but not in foreclosing regulation under judicial mandate. The persistent injunctions of the *Lochner* period hollowed out the regulatory sphere in which progressive legislation might temper the harsh consequences of market-ordered mass society. The risk in the prohibitory intervention is that the absence of regulatory authority results in a legal void, one where injuries may necessarily go unremedied because the gap-filling role of the common law is not available.

In turn, this view of *Erie* resonates in the modern federalism preoccupation with preemption.¹⁰² Much of preemption law fits comfortably within a legal-process style inquiry into spheres of legal oversight over primary behavior. The preemption case law is dominated by the tension between federal regulatory authority and the residual force of state law usually expressed through common law liability rules. However, one distinct and relatively undeveloped area of preemption law concerns implied preemption. It is here that the *Erie* debate resurfaces most clearly.

Implied preemption turns not on the scope and force of congressional action, but on the inherent domain of federal exclusivity. When acting to strike down state law as violative of implied preemptive domain of federal interests, the Court is pronouncing a non-statutory basis for substituting uncodified federal law for the enforcement of state law—either statutory or common law, though much more likely in the common law setting.¹⁰³ Implied preemption challenges the Court to identify a controlling body of law in a fashion broadly analogous to the way that the *Lochner* era cases forced

¹⁰⁰ Henry Monaghan interestingly argues that the Court has developed greater agenda-setting mechanisms, but even so, they do not approach the capacity of agencies or the incrementalism of repeated common law cases. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669 (2012) (placing this argument in the context of “a powerful drive to ensure that . . . the Court possess wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants”).

¹⁰¹ *Seegenerally* HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2001) (leading from *Erie* to the legal process approach to judicial review that dominated post-WW II legal thinking under the tutelage of the authors).

¹⁰² Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 131 (2004) (“Doctrines limiting federal preemption of state law thus go straight to the heart of the reasons why we care about federalism in the first place.”); *see generally* Roderick H. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007) (arguing that anti-preemption rules of statutory construction enhance national lawmaking).

¹⁰³ Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

the Court to articulate a broad constitutional vision as the basis for curbing state law.

In some settings, implied preemption may result from a concern for conflict that would be created with an existing body of federal law, what is termed conflict preemption: “[e]ven where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.”¹⁰⁴ But, the Court has developed a doctrine of implied preemption that reaches further and is triggered by a determination that federal law must occupy the entire field, regardless of whether there is a conflict with an actual statute or regulation. In this broader domain of field preemption, state law must be displaced where the Court deems that state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁵ The challenge becomes determining how the federal interest is expressed. The question of the source of law in turn galvanizes the dissents in implied preemption cases. Dissenting Justices have sought to rein in the scope of judicially-mandated federal supremacy by expressly invoking the role of Congress, and not the courts, as the source of federal supremacy.¹⁰⁶

As a formal matter, implied preemption is defined by the regulatory orbit of federal statutes,¹⁰⁷ and hence exists at a significant removal from the general federal common law of the pre-*Erie* period. The Court does not rely on broad constitutional principles enshrined in the liberty provisions of the Constitution. Such judicial common law reasoning applied in the preemption domain “would undercut the principle that it is Congress rather than the courts that preempts state law.”¹⁰⁸ In practice, however, implied preemption exists in areas the Court defines as corresponding to a broader federal ambition than that defined by any statute, and is triggered by a judicial determination that “the requisite congressional intent is implied from substantive statutes outside of any jurisdictional preemption provision.”¹⁰⁹ Regardless of whether Congress could have occupied the field pursuant to the Commerce Clause, the doctrine only emerges where Congress has not exercised its regulatory authority. As a result, “the Court is discerning con-

¹⁰⁴ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

¹⁰⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁰⁶ *See, e.g., Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 531 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Our precedents do not allow us to infer a scope of preemption beyond that which clearly is mandated by Congress’ language.”).

¹⁰⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (defining the scope of implied preemption by “the depth and breadth of a congressional scheme that occupies the legislative field”).

¹⁰⁸ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

¹⁰⁹ David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1137 (2012).

gressional intent from the broader structure of statutes” rather than from congressional action itself.¹¹⁰

The rise of implied preemption creates further judicial pressure to the expansion of federal power, as Thomas Merrill’s more recent work on the subject recognizes.¹¹¹ The danger presented here is that the Court is interposing a federal vision of the importance of the area of specific law in the absence of a comprehensive regulatory structure. In the implied preemption context, the question is not federal versus state regulatory authority, but oftentimes a regulatory void in which the absence of the common law baseline may result in a lack of an enforcement or remedial regime. As characterized by Ernest Young, the critical question becomes the perceived broad federal statutory mandate and the Court’s perception of the “acceptable degree of conflict between those purposes and state regulatory measures.”¹¹² Put another way, absent a declaration from Congress as to its intended statutory goals, implied preemption represents an unmoored claim of federal intent to occupy a field.¹¹³

Unlike forms of preemption that at least purport to rely on the “bro-mide”¹¹⁴ of congressional intent, implied preemption is an invitation to a regulatory void that resonates in the field-clearing domain of *Lochner*. The source of authority is not the text of a congressional statute but the Supremacy Clause of the Constitution directly.¹¹⁵ Displaced is state regulatory authority developed through the right to sue, which in turn means that “[t]ort law in America is built on the bedrock of state common law.”¹¹⁶ By contrast, implied preemption once again removes the gap-filling function of the state common law, but enables no federal common law substitute, except in the domain of preemption law itself. This void has prompted strong voices on the Court seeking to resurrect the putative “presumption against preemption” doctrine in the case of implied preemption:

¹¹⁰ AshutoshBhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 200 (2009).

¹¹¹ Merrill, *supra* note 89, at 741 (“The Court’s preemption doctrine . . . systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area.”).

¹¹² Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 132 (2004).

¹¹³ See Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39, 53–54 (2005) (“[T]here should be a constitutional requirement that Congress can only exercise this power [of preemption] expressly. There must be some statutory text in which Congress specifies that it is altering the default constitutional position of concurrency plus supremacy. In the context of preemption, a purely implied exercise of an implied power—in which the courts fill in the nuances of congressional silence— . . . violates the duty that Congress has to exercise its best judgment on the necessity of preemption.”).

¹¹⁴ Merrill, *supra* note 89, at 740.

¹¹⁵ See Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist*, 5 N. Y.U. J.L. & LIBERTY 63, 84 (2010) (“Implied preemption derives its constitutional authority from the Supremacy Clause.”).

¹¹⁶ Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2 (1997).

Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States’ historic police powers—are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so.¹¹⁷

The distinction between implied preemption and the congressional assertion of federal supremacy is found most directly in the opinions of Justice Thomas, a persistent critic of implied preemption. Thomas, often writing in dissent, directly ties the dangers of implied preemption to the absence of an elaborated regulatory alternative. This concern comes to the fore in the Court’s divided opinions in *Wyeth v. Levine*,¹¹⁸ a challenge to an adverse reaction to the administration—as opposed to the design or testing—of a drug approved by the Federal Drug Administration, which had also approved the manufacturer’s drug warning label. The Court found the state law liability action not preempted on a showing that the warnings did not sufficiently address risks of which the manufacturer was aware. Concurring in the judgment, Justice Thomas criticized implied preemption as permitting “this Court to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from the constitutionally enacted federal law authorizing the federal regulatory standard that was before the Court.”¹¹⁹ For Thomas, implied preemption gives rise to impressionistic, ad hoc regulatory interventions by the Court based on “freewheeling” reliance on “broad federal policy objectives, legislative history, or generalized notions of congressional purposes” that push “beyond the scope of proper judicial review.”¹²⁰

III. CONCLUSION

The implied preemption discussion leads us back to a revisionist account of *Erie* as a caution on judicial creation of incomplete and conflicting regulatory schemes. It is possible to recast Justice Story’s vision of an integrated national market as a necessary stage in the forging of a national un-

¹¹⁷ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting). The extent to which this presumption holds is a matter of some conjecture. See Merrill, *supra* note 89, at 738 (“[the] preemption doctrine is highly formulaic, although no one seems to believe that the formal categories provide significant guidance to courts and litigants in resolving particular cases”); see also Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) (claiming that the Court has abandoned the presumption altogether); Susan Raeker-Jordan, *The Preemption Presumption that Never Was: Preemption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1380 (1998) (“The retreat from *Cipollone* restored the Court’s earlier doctrine, which poses significant threats to federalism, state sovereignty, and, in particular, state common-law actions for damages.”).

¹¹⁸ See generally *Wyeth v. Levine*, 555 U.S. 555 (2009).

¹¹⁹ *Id.* at 601 (Thomas, J., concurring).

¹²⁰ *Id.* at 583, 602, 604.

ion. Perhaps the initial stages of national consolidation offer a role that courts are well suited to play as agents that break down regionalism, particularism, and the overriding temptation of local officials to offer forms of protectionism. This is not just the history of American judicial constitutionalism as a strong force of national integration¹²¹, but one that has unfolded more contemporaneously in the strong judgments of the European Court of Justice.¹²²

One consequence, however, is that courts prove better at striking down barriers than at recreating a comprehensive and sensible regulatory regime. *Erie* emerges from this recasting as an awkward accompaniment to the Court's unleashing of the regulatory state during the New Deal period. The substantive doctrines that emerged in cases like *Wickard* put economic regulation basically beyond the reach of constitutional constraint. *Erie* denied to federal courts the ability to craft common law doctrines that might backhandedly restore the judiciary's anti-regulatory zeal associated with the *Lochner* period and the Court's repudiation of the early New Deal initiatives. The New Deal showed Congress and the emerging administrative state forging a transformation between the federal government and the economy. *Erie* was a shot across the bow of the remaining potential source of federal *prohibitory* power. That, rather than any of Justice Brandeis's unsatisfying claims in *Erie*, may be the lasting contribution of the case.

Erie then becomes an object lesson in the institutional role of courts in the grand project of national economic integration. Courts can mediate conflict among states, and can root out retrograde barriers to market expansion born of sectionalism or special interest protectionism. But that negative projection of integrative power only goes so far in the modern era. At some point, the political branches must assume responsibility for that project. *Erie* cautions that when the political branches take up the mantle, the judiciary should cautiously cede ground.

¹²¹ Friedman & Delaney, *supra* note 59, at 1159 ("The rise of horizontal supremacy was facilitated by a powerful constituency that needed the Supreme Court to ensure vertical authority over the states: business.").

¹²² Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT'L L.J. 243, 255–56 (2006).