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2007

Erie's Constitutional Source

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Recommended Citation

Bradford R. Clark, Erie's Constitutional Source, 95 Cal. L. Rev. 1289 (2007).

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Erie's Constitutional Source

Bradford R. Clark†

Introduction

The constitutional rationale of *Erie Railroad Co. v. Tompkins*[1] has remained elusive for almost seventy years. Three decades ago, Paul Mishkin argued in a brief but influential article that *Erie* rests on "constitutional principles which restrain the power of the federal courts to intrude upon the states' determination of substantive policy in areas which the Constitution and Congress have left to state competence."[2] Professor Mishkin wrote his article in response to John Hart Ely's recent attempt to debunk "the myth of Erie."[3] Mishkin understood *Erie* as imposing a constitutional restraint on the federal courts, but read Ely as treating "the Constitution as relevant only in terms of Congress' power to displace state substantive law" and not as an independent restriction on "the power of the federal courts to do so."[4] Mishkin grounded his contrary understanding "on the structure established by the Constitution whereby the states, and their interests as such, are represented in the Congress but not in the federal courts."[5] Invoking the separation of powers, Mishkin concluded that "the Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law."[6]

Professor Mishkin's article remains a key reference in the field because

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1. 304 U.S. 64 (1938).
2. Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 Harv. L. Rev. 1682, 1688 (1974).
3. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 704 (1974).
4. Mishkin, *supra* note 2, at 1682.
5. *Id.* at 1685.
6. *Id.* at 1682.

scholars continue to debate the precise contours—and even the existence—of the constitutional basis for the Supreme Court's decision in *Erie*. Mishkin's unique contribution was to link federalism with the constitutional separation of powers. This account of *Erie*'s constitutional rationale is insightful and, in my view, correct. It may be fortified, however, by an additional structural argument that ties *Erie* directly to the Supremacy Clause. That Clause recognizes only the "Constitution," "Laws," and "Treaties" as "the supreme Law of the Land,"[7] and thus incorporates three distinct sets of federal lawmaking procedures found elsewhere in the Constitution. By design, all of these procedures safeguard federalism by requiring the participation and assent of the states or their representatives in the Senate. For this reason, the constitutional structure strongly suggests that the Supremacy Clause establishes the exclusive basis for disregarding state law, and that more expansive judicial doctrines like *Swift* are unconstitutional. Reliance on these features of the constitutional structure is implicit in the *Erie* opinion and provides formal substantiation of Professor Mishkin's sound intuitions about *Erie*, the separation of powers, and federalism.

This paper has two parts. Part I describes the Supreme Court's decisions in *Swift v. Tyson* and *Erie* and the ongoing debate about the precise constitutional rationale underlying *Erie*. Part II explains how the Supremacy Clause incorporates separation of powers to safeguard federalism. Properly understood, *Erie* recognizes the exclusivity of the Supremacy Clause and enforces the political and procedural safeguards of federalism built into the Clause.

I
ERIE's Elusive Rationale

In *Erie*, "the Supreme Court instituted something of a constitutional revolution"[8] by holding that the *Swift* doctrine had been "'an unconstitutional assumption of powers by the courts of the United States'"[9] and should be abandoned. To this day, commentators continue to debate the existence and precise nature of the constitutional defect underlying the *Swift* doctrine.[10] Properly understood, *Erie* rests on recognition of the Supremacy Clause as the exclusive basis for displacing state law, and on the procedural and "political

7. U.S. Const. art. VI, cl. 2.

8. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1256 (1996) [hereinafter Clark, *Federal Common Law*].

9. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

10. *See* Erwin Chemerinsky, Federal Jurisdiction § 5.3 (2d ed. 1994) (stating that "[t]he constitutional basis for the *Erie* decision has confounded scholars"); Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 Va. L. Rev. 673, 676 (1998) (noting that *Erie*'s "holding has been subject to disagreement and controversy over the years").

safeguards of federalism"[11] built into the Clause. These interlocking features of the constitutional structure "compel[led]"[12] the Court in *Erie* to hold that federal courts lack constitutional power to displace state law in favor of their own notions of sound public policy.[13]

A. The Swift *Doctrine*

In *Swift v. Tyson*[14] the Supreme Court held that federal courts were free to disregard state court decisions and exercise independent judgment on questions of so-called general law. *Swift* began as a suit between citizens of different states involving an unsettled question of commercial law—i.e., whether acceptance of a negotiable instrument in satisfaction of a preexisting debt constituted consideration sufficient to confer upon the recipient the status of "a bona fide holder."[15] Although several prior New York decisions suggested that such consideration was inadequate,[16] the Supreme Court exercised its own independent judgment and concluded that the release of a preexisting debt was

11. The "political safeguards of federalism" refer to the role of the states "in the composition and selection of the central government." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 543 (1954).

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

13. The analysis of *Swift*, *Erie*, and the Supremacy Clause presented in this paper is drawn in part from my earlier writings on the subject. For further analysis, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1412–22 (2001) [hereinafter Clark, *Separation of Powers*]; Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. Pa. L. Rev. 1459, 1474–95 (1997) [hereinafter Clark, *Ascertaining*]; Clark, *Federal Common Law*, *supra* note 8, at 1256–64, 1277–92.

14. 41 U.S. (16 Pet.) 1 (1842).

15. *Id.* at 16.

16. In *Coddington v. Bay*, 20 Johns. 637 (N.Y. 1822), the New York Supreme Court for the Correction of Errors recognized "[t]he general rule . . . that where negotiable paper is transferred for valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner." *Id.* at 644–45 (Woodworth, J.). The court, however, concluded that the defendants in *Coddington* were not entitled to the benefit of the rule because they had not given "valuable consideration" for the notes. Strictly speaking, the question whether the release of a preexisting debt constitutes valuable consideration was not presented in *Coddington* because the defendants admitted that at the time they received the notes, the persons from whom they received them "were not, in a strict legal sense, indebted to [the defendants] in any amount whatever." *Id.* at 644 (Woodworth, J.). Nonetheless, several of the opinions suggested that an antecedent debt is not a valuable consideration under the rule. *See id.* at 648 (Woodworth, J.); *id.* at 651 (Spencer, C.J.); *id.* at 655 (Viele, Sen.). Although the Supreme Court for the Correction of Errors had not "pronounced any positive opinion upon" the question when *Swift* was decided, *Swift*, 41 U.S. (16 Pet.) at 18, several lower court decisions had ruled in accordance with *Coddington*'s dicta. *See, e.g.*, Payne v. Cutler, 13 Wend. 605 (N.Y. Sup. Ct. 1835); Rosa v. Brotherson, 10 Wend. 85 (N.Y. Sup. Ct. 1833); Wardell v. Howell, 9 Wend. 170 (N.Y. Sup. Ct. 1832). The Court in *Swift* noted that "the more recent [New York] cases ... have greatly shaken, if they have not entirely overthrown [the earlier] decisions," 41 U.S. (16 Pet.) at 17, but the Court was willing to assume arguendo that "the doctrine [was] fully settled in New York" that "a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders," *id.* at 17–18.

adequate consideration.[17] The Court viewed the question as one of "general commercial law,"[18] upon which the Court was free "to express [its] own opinion."[19]

Swift was arguably defensible when decided because state and federal courts alike considered questions of general commercial law at the time to be governed by the law merchant, a branch of the law of nations.[20] In the early nineteenth century, both sets of courts "considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal."[21] On this understanding, the courts of each sovereign felt free to exercise independent judgment to ascertain applicable customs and, when

17. *Swift*, 41 U.S. (16 Pet.) at 19–22.

18. *Id.* at 18.

19. *Id.* at 19.

20. *See* Clark, *Federal Common Law*, *supra* note 8, at 1277–92. The law merchant was "a particular system of customs . . . which, however different from . . . the common law, is . . . allowed, for the benefit of trade," and "which all nations agree in and take notice of." 1 William Blackstone, Commentaries *75, *264. Such law was traditionally based on the commercial customs and practices of merchants and was applied by all "civilized" nations to resolve disputes among merchants from different countries. *See id.* at *75 ("[A] particular system of customs ... called the custom of merchants, or lex mercatoria ... is ... allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions ...."). Nations and states followed the law merchant in order to facilitate international and interstate trade by establishing uniform rules to govern transactions among diverse citizens. *See id.* at *264 ("[A]s these are transactions carried on between the subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by ... the law merchant or lex mercatoria, which all nations agree in and take notice of."); Zephaniah Swift, A Digest of the Law of Evidence, in Civil and Criminal Cases, and a Treatise on Bills of Exchange, and Promissory Notes at ix (Hartford, Oliver D. Cooke 1810) ("In questions of commercial law, the decisions of Courts, in all civilized, and commercial nations, are to be regarded, for the purpose of establishing uniform principles in the commercial world."). *See generally* Francis M. Burdick, *What Is the Law Merchant?*, 2 Colum. L. Rev. 470 (1902). William Fletcher points out that "[t]he concept of a uniform law merchant was quite naturally imported into the treatment of commercial law by American courts," 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, 1518 (1984), because the general common law was regarded at the time as a "great universal law," "regularly and constantly adhered to." 4 Blackstone, *supra*, at 67.

21. Fletcher, *supra* note 20, at 1554. *Swift* made this point explicitly: "It is observable, that the courts of New York do not found their decisions [regarding the adequacy of consideration], upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law." *Swift*, 41 U.S. (16 Pet.) at 18. On questions of this kind, "the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial law to govern the case." *Id.* at 19. At the time, New York courts took the same approach. For example, in *Coddington v. Bay*, 20 Johns. 637 (N.Y. 1822), the New York Court for the Correction of Errors recognized "[t]he general rule ... that where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner." *Id.* at 644–45 (Woodworth, J.). The court considered the rule to be "well established," *id.* at 647 (Woodworth, J.), and consistent with "the usual course of trade." *Id.* at 651 (Spencer, C.J.). That the court recognized this rule as part of the general law merchant is suggested by Chief Judge Spencer's observation that the rule "is not only right in itself, but the contrary doctrine would destroy the circulation of notes, and would justly alarm the mercantile world." *Id.*

necessary, to reach conclusions contrary to those of the other.[22] Taken in historical context, the *Swift* Court arguably did no more than what New York law instructed it to do—i.e., to exercise independent judgment to ascertain the applicable rule of customary commercial law. For this reason, "*Swift* appears to have been regarded when it was decided as little more than a decision on the law of negotiable instruments."[23] So long as New York courts continued to decide interstate commercial disputes according to a general body of customary commercial law rather than "local usage," *Swift* was arguably consistent with the constitutional structure because federal courts were not disregarding *state* law. Indeed, given the prevailing assumptions about the nature and applicability of general law, the *Swift* Court saw no need even to defend its approach in constitutional terms.

Two subsequent developments severely undermined the constitutional legitimacy of the *Swift* doctrine and led the *Erie* Court to disavow it. As an initial matter, state courts gradually abandoned reliance on the general law merchant in favor of localized commercial doctrines. Following *Swift*, states increasingly regarded commercial law as an aspect of their local law rather than as a matter of general law. Both state courts and state legislatures participated in this shift. State courts eventually abandoned the ideal of a universal law merchant and began to formulate commercial doctrines as a matter of local law.[24] At the same time, state legislatures enacted specific statutes to govern commercial transactions within their jurisdiction.[25] Notwithstanding the states'

22. For example, in *Swift*, the Supreme Court looked to "the principles established in the general commercial law," rather than to the decisions of New York state courts, in deciding a dispute between citizens of different states arising under the law merchant. *Swift*, 41 U.S. (16 Pet.) at 18. The Court noted that such decisions "are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." *Id.* at 19. Likewise, New York courts considered themselves equally free to disregard the Supreme Court's decisions on questions of general commercial law. *See* Fletcher, *supra* note 20, at 1561 ("State courts generally followed common law decisions by the United States Supreme Court, but they were quite explicit in stating that they did not do so because of any legal compulsion."). Just two years after *Swift*, counsel urged New York's highest court to conform its decision "to the opinion of Mr. Justice Story in the recent case of *Swift v. Tyson*." Stalker v. M'Donald, 6 Hill 93, 95 (N.Y. 1843). Although recognizing that on "question[s] of commercial law, ... it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several states and of the United States, but also between our courts and those of England," the New York court declined to follow the rule embraced in *Swift* and described the Supreme Court as a "tribunal, whose decisions are not of paramount authority" on such questions. *Id.* at 95, 112. *Accord* Waln v. Thompson, 9 Serg. & Rawle 115, 122 (Pa. 1822) ("The decisions of the Supreme Court of the United States have no obligatory authority over this court, except in cases growing out of the constitution, of which this is not one.").

23. Fletcher, *supra* note 20, at 1514.

24. *See* Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 Yale L.J. 132, 140 (1897) (arguing for "statutory unity rather than [judicial] diversity, in matters of common interest").

25. *See* E. Allen Farnsworth & John Honnold, Commercial Law 5 (4th ed. 1985) (noting that "[b]y 1890 every state had at least one statute on negotiable instruments").

abandonment of the law merchant, federal judges continued to apply *Swift* and to disregard state court decisions in favor of their own conceptions of general commercial law. Accordingly, federal and state courts developed divergent approaches, injecting considerable instability into the *Swift* regime.

To make matters worse, federal courts simultaneously expanded the *Swift* doctrine well beyond its commercial law origins to encompass numerous questions traditionally governed by local law. One of the most significant steps in this expansion was the Court's decision to disregard state tort law in favor of so-called "general law." In an 1862 case concerning liability for negligence, the Court declared that "where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."[26] This trend continued and by the time the Court decided *Erie*, federal courts claimed the right to exercise independent judgment with respect to dozens of historically local law questions including negligence, punitive damages, and property rights.[27] Unlike commercial disputes, such matters had never been considered by state courts to be governed by general law.

These two developments—the continued application of the *Swift* doctrine to commercial questions and its expansion to traditionally local matters—transformed the *Swift* doctrine from largely defensible to essentially illegitimate. Federal courts now appeared to be freely disregarding state law with no clear warrant in the Constitution for doing so. These developments also made the outcome in diversity cases turn in large measure on whether they were brought in federal or state court. In *Baltimore & Ohio R.R. Co. v. Baugh*,[28] Justice Field openly challenged the constitutionality of the Court's decision to disregard the Ohio common law of fellow servant liability in favor of "general law." Although acknowledging that he had applied the *Swift* doctrine in the past, Justice Field believed that "there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states."[29] Justice Holmes took the same position, characterizing the *Swift* doctrine as "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[30]

26. Chicago v. Robbins, 67 U.S. (2 Black) 418, 428–29 (1862).

27. *See* Tony Freyer, Harmony & Dissonance: The *Swift* & *Erie* Cases in American Federalism 71 (1981) (observing that "the federal judiciary continued to enlarge the body of general law so that by 1890 it included some 26 doctrines"); *Erie*, 304 U.S. at 75–76 (detailing the expansion of the *Swift* doctrine).

28. 149 U.S. 368 (1893).

29. *Id.* at 401 (Field, J., dissenting).

30. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

B. The Erie *Opinion*

In *Erie Railroad Co. v. Tompkins*,[31] the Supreme Court declared the *Swift* doctrine to be an unconstitutional assumption of power by the courts of the United States. *Erie* began as a seemingly routine application of the *Swift* regime. While walking alongside the railroad tracks, Tompkins, a citizen of Pennsylvania, was struck by an object protruding from a passing train. Tompkins sued the railroad, a New York corporation, in federal court on the basis of diversity of citizenship.[32] The railroad's liability turned on the duty of care it owed to a pedestrian walking along the right of way. The railroad argued that Tompkins was a trespasser under Pennsylvania law and "that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful."[33] Tompkins, by contrast, argued that "the railroad's duty and liability is to be determined in federal courts as a matter of general law."[34] The court of appeals agreed with Tompkins,[35] and the railroad obtained review in the Supreme Court.

In an opinion by Justice Brandeis, the Supreme Court reversed and, although neither party asked it to do so, overruled *Swift*. The Court's opinion proceeded in four parts. First, the Court noted its disagreement with *Swift*'s interpretation of section 34 of the Judiciary Act of 1789,[36] also known as the Rules of Decision Act. According to the Court, *Swift* "held that federal courts exercising [diversity] jurisdiction . . . need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court."[37] The Court observed that there had been widespread doubt "as to the correctness of the construction given section 34,"[38] and relied on "the more recent research of a competent scholar" to establish "that the construction given to it by the Court was erroneous."[39]

Second, the Court pointed out the "political and social" defects of the *Swift* doctrine.[40] These included the lack of uniformity in state and federal court on questions of general common law,[41] uncertainty regarding the line between general and local law,[42] and discrimination resulting "from the wide range of persons held entitled to avail themselves of the federal rule by resort to the

31. 304 U.S. 64 (1938).
32. *Id.* at 69.
33. *Id.* at 70.
34. *Id.*
35. Tompkins v. Erie R.R., 90 F.2d 603, 604 (2d Cir. 1937).
36. *See* 28 U.S.C. § 1652 (1994) (codifying the current version of the Rules of Decision Act).
37. *Erie*, 304 U.S. at 71.
38. *Id.* at 72.
39. *Id.* (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51–52, 81–88, 108 (1923)).
40. *Id.* at 74.
41. *Id.*
42. *Id.*

diversity of citizenship jurisdiction."[43] For these reasons, the Court declared that "the doctrine rendered impossible equal protection of the law."[44] At the end of this section of its opinion, the Court made clear that these defects merely illustrated the "injustice and confusion incident to the doctrine,"[45] and were not sufficient to warrant overruling *Swift.* According to Justice Brandeis, "[i]f 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."[46]

In the third part of its opinion, the *Erie* Court turned to the Constitution. The Court did not invoke any specific provision of the Constitution, and the Court's constitutional rationale is set forth in a relatively brief passage:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. 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.[47]

Although this passage is somewhat cryptic, the Court made its conclusion unmistakably clear. The *Swift* doctrine was "'an unconstitutional assumption of powers by the Courts of the United States'"[48] because "in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."[49] What *Erie* failed to

43. *Id.* at 76.

44. *Erie*, 304 U.S. at 75.

45. *Id.* at 77.

46. *Id.* at 77-78. This statement is significant because Justice Brandeis was a strong proponent of stare decisis, at least in statutory cases. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."); *see also* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389, 1415–18 (2005) (discussing the importance of statutory stare decisis).

47. *Erie*, 304 U.S. at 78. As Professor Ely points out, the *Erie* opinion "has been faulted for failing to indicate precisely what constitutional provision *Swift v. Tyson*'s interpretation of the Rules of Decision Act violated." Ely, *supra* note 3, at 702.

48. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 534 (1928) (Holmes, J., dissenting)).

49. *Id.* at 80. The fourth part of the Court's opinion remanded the case to the circuit court with instructions to ascertain the precise nature of the duty owed by the defendant to the plaintiff under Pennsylvania law. *Id.* The circuit court had originally "declined to decide the issue of state law" because it erroneously "ruled that the question of liability is one of general law." *Id.* For an in depth and insightful history of *Erie*, *see* 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).

explain was the precise source of these constitutional commands.

C. Debating Erie's *Constitutional Rationale*

Because the constitutional rationale of *Erie* is unclear, commentators have offered sharply divergent views regarding the constitutional theory underlying the decision. Some argued that, in light of the Court's reinterpretation of the Judiciary Act, its constitutional discussion was mere dictum.[50] Similarly, some suggested that *Erie*'s reliance on the Constitution was unnecessary because the case could have been decided on grounds of policy or judicial practice.[51] As Alfred Hill has explained, however, "it is difficult to view as dictum the Court's statement of a legal proposition without which, we are assured in the opinion, and have no reason to doubt, the case would have been decided the other way."[52] Under these circumstances, if there was dictum in the *Erie* opinion, it was the Court's reinterpretation of section 34 of the Judiciary Act rather than its discussion of the constitutionality of the *Swift* doctrine.

Some commentators simply denied that state common law decisions bind federal courts at all and called for reinstatement of the *Swift* doctrine. For example, writing three years after *Erie*, one commentator criticized the decision as "judicial legislation" and "constitutional amendment by decision."[53] According to this view, Article III "invests the federal courts with complete independence of decision in all causes to which the federal judicial power is made to extend."[54] This means that "[i]n determining and disposing of such causes, the federal courts are an end unto themselves and need neither consult nor defer to the decisions of any other tribunal or judicial system."[55] In addition, the "grant of judicial power to the federal courts in Article III is not coextensive with, but is broader than, the grant of legislative powers to the Congress."[56] Likewise, other commentators wrote that "[a]ny attempt to attack

50. *See, e.g.*, Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 Yale L.J. 267, 278 (1946); Harry Shulman, *The Demise of* Swift v. Tyson, 47 Yale L.J. 1336, 1344, 1347 (1938).

51. *See* Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A.B.A. J. 609, 644 (1938) (suggesting that "the Court might well have avoided resort to statutory or constitutional grounds, and placed its decision solely on grounds of sound practice for the Federal courts").

52. Alfred Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U. L. Rev. 427, 439 (1958); *see also* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 385–86 (1964) ("A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.").

53. Lawrence Earl Broh-Kahn, *Amendment by Decision—More on the* Erie *Case*, 30 Ky. L.J. 3, 57 (1941).

54. *Id.* at 56.

55. *Id.*

56. *Id.* at 31. More recently, Professor Peter Strauss has suggested that, for contexts in which Congress has legislative power, "the constitutional description of judicial power … imagined that the federal courts Congress could create to exercise that power would be courts in the ordinary understanding—that is, common law courts or equity courts of that time." Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 909

Swift v. Tyson on constitutional grounds is untenable,"[57] and that the Court should "[r]everse *Erie* and return to *Swift v. Tyson*."[58]

Commentators were also quick to dispute any suggestion that *Erie* rests on traditional notions of limited federal power under the Tenth Amendment.[59] The Amendment, of course, provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[60] The Court's opinion might be interpreted to implicate this principle because it contains both general references to "the autonomy and independence of the States"[61] and the rights "reserved by the Constitution to the several States,"[62] and specific references to Congress's lack of "power to declare substantive rules of common law applicable in a State"[63] and "rules of decision which Congress was confessedly without power to enact as statutes."[64] Commentators characterized these references as "the Achilles tendon of the opinion"[65] because by 1938 it seemed clear that the Court would uphold Congress's constitutional power to prescribe the duty of care that interstate railroads owe to pedestrians.[66] In any event, even

(2002). During the *Swift* era, he points out, federal courts "quite clearly understood that their task was accommodating general law, never expressed by anyone but judges, to the realities of a new continent and a new age." *Id.* at 910. And the dictum of *Swift* itself, if not later Court decisions, placed it within easy reach of the Interstate Commerce Clause.

57. Arthur John Keeffe, John J. Gilhooley, George H. Bailey & Donald S. Day, *Weary* Erie, 34 Cornell L.Q. 494, 524 (1949).

58. *Id.* at 526. Some modern commentators have made similar arguments. *See, e.g.*, 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 (1993) (suggesting that *Erie* does not rest on constitutional grounds and should be reconsidered); G. Edward White, *A Customary International Law of Torts*, 41 Val. U. L. Rev. 755, 789 (2006) (stating that "the opinion in *Erie* is remarkably cryptic, assertive, and quite possibly wrong-headed as a matter of historical and jurisprudential analysis").

59. *See* Charles T. McCormick & Elvin Hale Hewins, *The Collapse of "General Law" in the Federal Courts*, 33 Ill. L. Rev. 126, 133–36 (1938); T.A. Cowan, *Constitutional Aspects of the Abolition of Federal "Common Law,"* 1 La. L. Rev. 161, 169–72 (1938).

60. U.S. Const. amend. X.

61. *Erie*, 304 U.S. at 78 (internal quotations omitted).

62. *Id.* at 80.

63. *Id.* at 78.

64. *Id.* at 72. Upon reflection, it is not surprising that Justice Brandeis endorsed a vision of limited federal power since he regarded states as useful "laboratories for experimentation." New State Ice Co. v. Leibmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). For an insightful discussion of this idea, *see, e.g.*, David L. Shapiro, Federalism: A Dialogue 85-88 (1995).

65. McCormick & Hewins, *supra* note 59, at 134.

66. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that Congress has the power to exercise control over intrastate activities that have a close and substantial relation to interstate commerce). Chief Justice Stone, who joined the *Erie* opinion, apparently was not fully persuaded by the Court's limited view of congressional power: "'[I] do not think it is at all clear that Congress could not apply (enact) substantive rules to be applied by federal courts. I think that *Erie Railroad Co. v. Tompkins* did not settle that question, notwithstanding some unfortunate *dicta* in the opinion.'" Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 480 (1956) (quoting Letter from Harlan Stone to Owen J. Roberts (Jan. 3, 1941)). *See generally*

if the *Erie* Court meant to endorse a narrower view of congressional power, that view has been "rendered unimportant by the expansion of congressional lawmaking power since 1938"[67] and was arguably dictum even at the time because Congress had not enacted an applicable federal statute.[68] Perhaps for these reasons, even commentators like Mishkin (who otherwise embraced *Erie*'s constitutional grounding) seemed unpersuaded by this aspect of the Court's opinion.[69]

Although garnering little attention when *Erie* was decided, the Supreme Court's statement that "the [*Swift*] doctrine rendered impossible equal protection of the law"[70] eventually led some modern commentators to suggest that the decision may rest on the equal protection "component" of the Fifth Amendment.[71] This reading, however, is both inconsistent with the structure of the Court's opinion and anachronistic. As discussed, *Erie*'s reference to "equal protection" appears in a preliminary section of the opinion describing the "political and social" defects of the *Swift* doctrine rather than the section specifically addressing "the unconstitutionality of the course pursued."[72] More fundamentally, at the time the Court decided *Erie*, it had not yet interpreted the Fifth Amendment's due process clause to (reverse) incorporate an equal protection component applicable to the federal government.[73] The

Clark, *Federal Common Law*, *supra* note 8, at 1258 (noting the Court's broad grant of federal authority in its Commerce Clause cases and its contemporaneous denial of similar authority in *Erie*).

67. Goldsmith & Walt, *supra* note 10, at 677. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress's power under the Commerce Clause extends to certain intrastate activities that, in aggregate, affect interstate commerce). *But see* Ely, *supra* note 3, at 703 (stating that the *Swift* doctrine "was unconstitutional because nothing in the Constitution provided the central government with the general lawmaking authority of the sort the Court had been exercising under *Swift*").

68. *See* Mason, *supra* note 66, at 480–81 (quoting Letter from Harlan Stone to Felix Frankfurter (Apr. 29, 1938)) ("Beyond [the federal courts' unconstitutional assumption of powers] it was unnecessary to go.").

69. *See* Mishkin, *supra* note 2, at 1684 n.10 (suggesting that Congress could have used its power under the Commerce Clause to enact a rule of decision act contrary to the result in *Erie*). *Cf.* Hill, *supra* note 52, at 445 (stating that "it seems fair to infer" that Justice Brandeis "meant that Congress has no power to adopt a code of laws governing wholly intrastate questions of contract or tort which would be binding upon the federal and state courts alike").

70. *Erie*, 304 U.S. at 75.

71. *See, e.g.*, Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 Duke L.J. 929, 998–99 (1996) (discussing the Fifth Amendment's equal protection component as a possible basis for the Court's decision in *Erie*); John R. Leathers, Erie *and its Progeny as Choice of Law Cases*, 11 Hous. L. Rev. 791, 795–96 (1974) (same).

72. *Erie*, 304 U.S. at 74, 77–78.

73. On the development of Fifth Amendment equal protection jurisprudence, *compare* LaBelle Iron Works v. United States, 256 U.S. 377, 392 (1921) (rejecting an equality-based challenge on the ground that "[t]he Fifth Amendment has no equal protection clause") *with* Korematsu v. United States, 323 U.S. 214 (1944) (subjecting federal racial classification to equal protection scrutiny for the first time). *See also* Bradford R. Clark, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 Colum. L. Rev. 1969, 1970–72 (1984) (discussing the origin and development of reverse incorporation).

unavailability of an equal protection claim against the federal government in 1938 confirms that *Erie* simply used the phrase in its broader, non-constitutional sense.[74]

Alfred Hill was one of the first commentators to seek to identify and defend *Erie*'s constitutional rationale at any length. His thesis was "that *Erie* does indeed have a constitutional basis—in the sense that our system of federalism is rooted in the Constitution, and that the failure of a federal court to give due regard to state law . . . inevitably thwarts the constitutional scheme of things."[75] His central insight was that "even if a particular area is one in which the federal government has power to make independent law, it does not follow that a federal court also has power to do so, for the power of the federal courts does not correspond in all respects with the power of the federal government as a whole."[76] For example, "there are vast reaches within the scope of the commerce clause which have always been deemed to be subject to the sovereign power of the states until preempted for the federal prerogative by action of Congress."[77] Unless and until Congress overrides state law, "the law of the states furnishes the rule of decision" for both federal and state courts.[78] In other words, the problem with the *Swift* doctrine was that federal courts increasingly "made" law unilaterally by disregarding state law without even purporting to rely on an applicable federal statute.[79]

74. *See* Chemerinsky, *supra* note 10, § 5.3 (stating that *Erie*'s reference to equal protection "appears to be a rhetorical rather than a constitutional argument because the Supreme Court had not yet applied the requirements of equal protection to the federal government"); Ely, *supra* note 3, at 713 (suggesting that *Erie*'s invocation of equal protection "was a metaphor" for unfairness rather than a constitutional pronouncement); White, *supra* note 58, at 795 (stating that, despite *Erie*'s evocative language, the Court "did not mean that *Swift* violated the Equal Protection Clause").

75. Hill, *supra* note 52, at 427–28.

76. *Id*. at 441; *see also id.* at 440 (explaining "the limited sense in which the judicial function is a law-making function").

77. *Id*. at 442.

78. *Id*.

79. *See* Purcell, *supra* note 49, at 172 ("Absent compelling reason, the federal courts should not make law even in areas within the national legislative power unless and until Congress made the initial decision to assert national authority in that area."). Professor G. Edward White has recently challenged *Erie*'s suggestion that federal courts lack power to declare common law rules in areas where Congress had not acted as both "historically inaccurate and jurisprudentially anachronistic." White, *supra* note 58, at 797. He points out that early republican commentators "treated the Constitution's language, which defined the 'judicial power' of the federal courts as extending to 'all Cases, in Law and Equity,' as giving the federal courts power to declare substantive common law rules." *Id.* at 798-99. The early controversy over federal common law crimes, however, reveals at least some disagreement on this point. For example, James Madison objected to this conception of the judicial power on the ground that it "would confer on the judicial department a discretion little short of a legislative power." James Madison, Report on the Virginia Resolutions (Jan. 7, 1800), *reprinted in* 6 The Writings of James Madison 380 (Galliard Hunt ed., 1906). Similarly, in rejecting federal common law crimes, the Supreme Court stated that before federal courts may exercise "jurisdiction in criminal cases," United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32 (1812), the "legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of

John Hart Ely essentially sidestepped this separation-of-powers aspect of *Erie* in his famous article, *The Irrepressible Myth of* Erie.[80] Instead, Professor Ely focused on Justice Harlan's substantive suggestion in *Hanna v. Plumer*[81] that "our constitutional system leaves [certain matters] to state regulation,"[82] and that federal courts undercut this allocation if they "can make substantive law affecting state affairs beyond the bounds of congressional legislative powers."[83] Ely labeled Harlan's approach "the state enclave theory" of *Erie*,[84] and argued that Harlan "helped perpetuate a constitutional misapprehension"[85]—namely, "the myth of Erie"[86] and "the belief that it carried some special constitutional magic of a sort that transcended ordinary issues of federal power."[87] According to Ely, the Constitution's "function in 'Erie contexts' is no different from its function respecting other issues of federal power."[88] In his view, the relevant question was whether "the Constitution provided *the central government* with a general lawmaking authority of the sort the Court had been exercising under *Swift*."[89] Because "the answer was no,"[90] Ely believed that *Erie* correctly overruled *Swift.*

Two prominent scholars were quick to question Professor Ely's conflation of federal legislative and judicial power, and to stress *Erie*'s distinctive character as a limitation on the lawmaking power of federal *courts* (as opposed to the federal government as a whole). First, in the course of reviewing the second edition of *Hart & Wechsler's The Federal Courts and the Federal System* (co-authored by Professor Mishkin), Henry Monaghan stressed that "*Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the jurisdictional statute provides."[91] Second, responding specifically to Ely, Professor Mishkin argued

the offence." *Id.* at 34. *See* Clark, *Separation of Powers*, *supra* note 13, at 1403-12 (discussing federal common law crimes in light of *Erie* and the constitutional structure).

80. 87 Harv. L. Rev. 693 (1974).

81. 380 U.S. 460 (1965).

82. *Id.* at 475 (Harlan, J., concurring).

83. *Id.* at 474–75 (Harlan, J., concurring).

84. Ely, *supra* note 3, at 701.

85. *Id.*

86. *Id.* at 704.

87. *Id.* at 705.

88. *Id.* at 706.

89. *Id.* at 703 (emphasis added).

90. Ely, *supra* note 3, at 704.

91. Henry P. Monaghan, Book Review, 87 Harv. L. Rev. 889, 892 (1974). Professor Monaghan elaborated on this point a year later in his *Foreword* to the Harvard Law Review: "[*Erie*] recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law." Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 11–12 (1975); *see also* Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 314 n.199 (1984) (explaining that "there is no general federal judicial power to

"that the Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law."[92]

More specifically, Mishkin took issue with Ely's apparent premise that in the absence of statutory constraints, "the courts would have the same range of lawmaking power as Congress—that any time Congress could validly displace state law, the federal courts are constitutionally equally empowered to do so."[93] Unlike Ely, Mishkin saw a constitutional difference between the power of Congress and the power of federal courts "to make federal law displacing state substantive policy."[94] Apart from any constitutional limits on the scope of federal power in general, "[p]rinciples related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress)."[95] Mishkin based his understanding primarily "on the structure established by the Constitution whereby the states, and their interests as such, are represented in the Congress but not in the federal courts."[96] According to Mishkin, these "constitutional underpinnings" may explain the vitality of the so-called "myth of Erie."[97]

II
The Role of the Supremacy Clause

At the time when Professors Mishkin and Monaghan wrote, scholars often relied on sound intuitions informed by the general constitutional structure or accepted traditions rather than on more formal excavations of the Constitution's text, history, and structure. With respect to *Erie*, their instincts find quite direct and elaborate support in the original design of the Supremacy Clause and associated aspects of the constitutional structure. The Supremacy Clause is the mechanism that the Founders chose to resolve conflicts between state and federal law. The Clause designates only three sources of law as "the supreme Law of the Land"—i.e., the "Constitution," "Laws," and "Treaties" of the United States. The Constitution elsewhere prescribes precise procedures to govern the adoption of each source of supreme federal law, and all of these procedures tended to preserve the governance prerogatives of the states by incorporating the political safeguards of federalism. These interlocking features of the constitutional structure suggest that the Supremacy Clause establishes the exclusive basis for overriding state law. Thus, in the absence of an applicable rule of decision supplied by the "Constitution," "Laws," or "Treaties" of the

displace state law").

92. Mishkin, *supra* note 2, at 1682.
93. *Id.* at 1683.
94. *Id.*
95. *Id.*
96. *Id.* at 1685.
97. *Id.* at 1688.

United States, federal courts simply lack constitutional authority to disregard state law. In this sense, the precise constitutional source of the *Erie* decision is the Supremacy Clause.

A. The Supremacy Clause

At the Constitutional Convention, the Founders decided from the start to preserve "the states as separate sources of authority and organs of administration" rather than to abolish them in favor of a consolidated central government.[98] At the same time, the Founders recognized the need to go beyond the Articles of Confederation and create a federal government capable of acting, within its assigned powers, "directly on the population rather than mediately through the states."[99] As a consequence, the Founders understood that there would be two governments often operating at the same time, within the same territory, and upon the same people.[100] Such a system would necessarily give rise to conflicts between state and federal law. Thus, it was crucial to the success of the enterprise to establish a mechanism for resolving such conflicts.

The Founders considered three potential alternatives: (1) military force to coerce state adherence to federal law; (2) congressional power to negative state law; and (3) judicial enforcement of "supreme" federal law over contrary state law.[101] The Founders quickly dismissed the first option,[102] and rejected the second after extensive consideration.[103] The third option—a Supremacy Clause—was initially rejected as part of the New Jersey Plan,[104] but later revived after the Convention granted the states equal suffrage in the Senate.[105]

The Supremacy Clause performs the essential function of instructing

98. Wechsler, *supra* note 11, at 543.

99. Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 169 (1996); *see also* Wechsler, *supra* note 11, at 543 ("Our constitution makers established a central government authorized to act directly upon individuals through its own agencies—and thus they formed a nation capable of function and of growth.").

100. *See* Clark, *Separation of Powers*, *supra* note 13, at 1347.

101. *See id.* at 1348–55; *see also* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 Geo. Wash. L. Rev. 91, 105–111 (2003) [hereinafter Clark, *Supremacy Clause*].

102. James Madison, *The Records of the Federal Convention (May 31, 1787)*, *in* 1 The Records of the Federal Convention of 1787, at 45, 54 (Max Farrand ed., 1911) ("A Union of the States containing such an ingredient seemed to provide for its own destruction.") (James Madison) [hereinafter Farrand's Records].

103. *See* Clark, *Separation of Powers*, *supra* note 13, at 1349–53. Delegates from the smaller states objected strongly to this mechanism. For example, Elbridge Gerry, of Massachusetts, remarked that "[t]he Natl. Legislature with such a power may enslave the States," and predicted that "[s]uch an idea as this will never be acceded to." James Madison, *The Records of the Federal Convention (June 8, 1787)*, *in* 1 Farrand's Records, *supra* note 102, at 162, 165.

104. *See* Clark, *Separation of Powers*, *supra* note 13, at 1351–52.

105. James Madison, *Notes on the Constitutional Convention (July 17, 1787)*, *in* 1 Farrand's Records, *supra* note 102, at 22.

federal and state courts to prefer "the supreme Law of the Land" over contrary state law. The Clause, however, is not entirely one-sided because it incorporates several powerful political and procedural safeguards of federalism. The Clause recognizes only three sources of law as "the supreme Law of the Land": "This *Constitution*, and the *Laws* of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States."[106] The negative implication of the Clause is that, in the absence of these sources, state law continues to govern.[107]

Elsewhere, the Constitution prescribes precise procedures to govern the adoption of each source of law recognized by the Supremacy Clause as "the supreme Law of the Land."[108] Although different in important respects, all of these procedures assign responsibility for adopting such supreme law solely to actors subject to the political safeguards of federalism. These actors include the President, the Senate, and the House of Representatives. Significantly, none of these procedures includes Article III judges. As Madison explained, the role of the states in the selection and composition of the President, the Senate, and the House of Representatives ensures that "each of the principal branches of the federal government will owe its existence to the favor of the State governments."[109] In this way, the constitutional structure retards "new intrusions by the center on the domain of the states."[110]

All of the lawmaking procedures prescribed by the Constitution magnify the effect of the political safeguards of federalism by denying any single participant in the lawmaking process the power to make federal law unilaterally. Rather, all forms of "the supreme Law of the Land" must be adopted by the Senate acting in conjunction with at least one other actor. For example, the Constitution provides that constitutional amendments ordinarily receive the approval of two thirds of the House and the Senate and three fourths of the states.[111] Similarly, the Constitution generally requires federal statutes to be approved by the House, the Senate, and the President.[112] Finally, the Constitution specifies that treaties be submitted by the President and approved

106. U.S. Const. art. VI, cl. 2 (emphasis added).

107. *Cf.* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 498 (1954) ("The federal law which governs the exercise of state authority is obviously interstitial law, assuming the existence of, and depending for its impact upon, the underlying bodies of state law.").

108. U.S. Const. art. VI, cl. 2.

109. The Federalist No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).

110. Wechsler, *supra* note 11, at 558.

111. *See* U.S. Const. art. V. Ordinarily, two thirds of the House and Senate propose amendments for ratification by the states. U.S. Const. art. V. Alternatively, "on the Application of the Legislatures of two thirds of the several States," *id.*, Congress "shall call a Convention for proposing Amendments." *Id.* This procedure has never been used but, in any event, the states (for whom the Senate was designed to serve as a proxy) would participate directly both in calling the Convention and in ratifying its proposals.

112. *See* U.S. Const. art. I, § 7.

by two thirds of the Senators present.[113] Although the effectiveness of the political safeguards of federalism has waned over time,[114] federal lawmaking procedures continue to constrain federal lawmaking simply by establishing multiple "veto gates,"[115] and thus effectively creating a supermajority requirement.[116] If any of the specified veto players withholds its consent, then no new supreme law is created and state law remains undisturbed.[117] Thus, the Constitution is carefully structured to restrict both *who* may exercise lawmaking power on behalf of the United States (actors subject to the political safeguards of federalism) and *how* they may exercise it (only with the participation and assent of at least one other similarly-situated actor).

The constitutional structure suggests, moreover, that the lawmaking procedures established by the Constitution are the *exclusive* means of adopting "the supreme Law of the Land"[118]—a point crucial to understanding *Erie*. The

113. *See* U.S. Const. art. II, § 2, cl. 2.

114. For example, the Seventeenth Amendment has reduced the states' influence in the Senate by replacing appointment of Senators by state legislatures with popular elections. *See* U.S. Const. amend. XVII. Changes in constitutional law have also limited the states' ability to influence the House of Representatives through control over voter qualifications and districting. *See* U.S. Const. XV (race); *id.* amend. XIX (sex); *id.* amend. XXIV (poll tax); *id.* amend. XXVI (age). Finally, the states' modern practice of appointing presidential electors on the basis of winner-take-all popular elections has reduced the role of state legislatures in selecting the President and all but eliminated the possibility that the President will be selected by the House of Representatives voting by states.

115. *See* McNollgast [Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast], *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo. L.J. 705, 707 & n.5 (1992).

116. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 74–75 (2001); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 Duke L.J. 948, 956; Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & Pol. 705, 712 (1997).

117. *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm. & Mary L. Rev. 1733, 1792 (2005) ("A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy."). Some commentators and judges have even pointed to the existence of the political safeguards of federalism as a reason to curtail judicial review of the scope of federal powers. *See* United States v. Morrison, 529 U.S. 598, 647–51 (2000) (Souter, J., dissenting) (joined by Justices Stevens, Breyer, and Ginsburg); *id.* at 660–61 (Breyer, J., dissenting) (joined by Justices Stevens, Souter, and Ginsburg); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 551 (1985); Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 175 (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1557 (1977). Whatever the merits of this suggestion, *see* Clark, *Supremacy Clause*, *supra* note 101, there is widespread agreement that the political safeguards built into the original constitutional structure were meant to preserve the governance prerogatives of the states.

118. *See* INS v. Chadha, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *see also* Clark, *Separation of Powers*, *supra* note 13, at 1328–72 (arguing that the text, structure, and history of the Constitution suggest that the procedures specified in the Constitution are the exclusive means of adopting the "Constitution," "Laws," and

Senate is the only federal institution required by these procedures to participate in *all* forms of federal lawmaking.[119] It is common knowledge that the Founders specifically designed the Senate to represent the states in the new federal government. By requiring the participation and assent of the Senate in all forms of federal lawmaking, the Founders effectively gave the states (through their representatives in the Senate) the ability to veto all attempts to adopt "the supreme Law of the Land." As George Mason explained at the Constitutional Convention:

> The State Legislatures . . . ought to have some means of defending themselves agst. encroachments of the Natl. Govt. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment.[120]

If agents of the federal government—and more specifically, federal courts—were free to adopt supreme law outside of the lawmaking procedures prescribed by the Constitution, they could deprive the states' representatives in the Senate of their essential gatekeeping role under the constitutional structure.[121]

B. Erie *and the Supremacy Clause*

The Supremacy Clause provides substantial support for Professor Mishkin's account of *Erie*. Although Mishkin neither cites nor discusses the Clause, his analysis seems to presuppose its effect. For example, he denies "that any time Congress could validly displace state law, the federal courts are constitutionally equally empowered to do so."[122] In his view, "[p]rinciples related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by

"Treaties" of the United States).

119. The only potential exception is the possibility that the states themselves will trigger a convention for proposing constitutional amendments under Article V, thus relieving the House and Senate of this responsibility. *See supra* note 111.

120. James Madison, *Notes on the Constitutional Convention* (June 7, 1787), *in* 1 Farrand's Records, *supra* note 102, at 155–56.

121. The Founders understood that these procedural safeguards of federalism would make it more difficult to adopt all forms of supreme federal law, but thought that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." The Federalist No. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

122. Mishkin, *supra* note 2, at 1683; *see also* Hill, *supra* note 52, at 441 (stating that "even if a particular area is one in which the federal government has power to make independent law, it does not follow that a federal court also has power to do so"); Monaghan, *supra* note 91, at 11–12 (stating that "federal judicial power to displace state law is not coextensive with the scope of dormant congressional power").

Congress)."[123] Mishkin's invocation of the separation of powers is an essential step toward identifying *Erie*'s constitutional source. Taken alone, however, this step may not suffice to persuade those who doubt *Erie*'s constitutional foundation. The general notion of separation of powers is susceptible of numerous understandings and no single theory has gained universal acceptance.[124] Moreover, at the time when Mishkin wrote, commentators tended to discuss separation of powers in general terms. Thus, the key to understanding *Erie* is to focus on the precise interaction between the separation of powers and the political safeguards of federalism—interaction necessitated by operation of the Supremacy Clause.

Since 1974, the Supreme Court has decided a large number of separation of powers cases and has made clear that the "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."[125] One of the ways in which the Founders incorporated the separation of powers into the Constitution was to prescribe precise lawmaking procedures to govern the adoption of each source of supreme federal law. All of these procedures require the participation and assent of multiple actors, thus allowing each to function as a check on the others. For example, in order for a "Bill" to become a "Law," it must be passed by both the House of Representatives and the Senate and then presented to the President for his approval.[126] If the President disapproves, the bill will become law only if approved by two thirds of both Houses.[127] Under these procedures, the House, the Senate, and the President all check each other in the lawmaking process.

In the modern era, the Supreme Court has made clear that constitutionally prescribed lawmaking procedures are "integral parts of the constitutional design for the separation of powers,"[128] and that courts should vigorously enforce such procedures. For example, in *INS v. Chadha*, the Court invalidated the "legislative veto" on the ground that it allowed one House to exercise "essentially legislative" power[129] and was therefore inconsistent with "the

123. Mishkin, *supra* note 2, at 1683.

124. *See, e.g.*, M. Elizabeth Magill, *The Real Separation In Separation of Powers Law*, 86 Va. L. Rev. 1127 (2000); Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513 (1991); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 Sup. Ct. Rev. 225; Martin H. Reddish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism In Separation of Powers Theory*, 41 Duke L.J. 449 (1991); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 Va. L. Rev. 1253 (1988); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987).

125. Buckley v. Valeo, 424 U.S. 1, 124 (1976).

126. U.S. Const. art. I, § 7, cl. 2.

127. *Id.*

128. INS v. Chadha, 462 U.S. 919, 946 (1983).

129. *Id.* at 952.

Framers' decision that the legislative power of the Federal Government [should] be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[130] Similarly, in *Clinton v. City of New York*,[131] the Court invalidated the Line Item Veto Act, which allowed the President to "cancel" certain tax and spending provisions after they became law.[132] According to the Court, "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each."[133] Because such action occurred outside the Constitution's exclusive lawmaking procedures, the Court "conclude[d] that the Act's cancellation provisions violate Article I, § 7, of the Constitution."[134]

In prior writings, I have argued that strict adherence to federal lawmaking procedures not only furthers the Constitution's separation of powers, but also safeguards federalism both by making federal law more difficult to adopt and by assigning lawmaking power exclusively to actors subject to the political safeguards of federalism.[135] The Supremacy Clause is the provision that actually secures these protections. By recognizing only the "Constitution," "Laws," and "Treaties" as "the supreme Law of the Land," the Clause necessarily incorporates the precise lawmaking procedures prescribed elsewhere in the Constitution for the adoption of each source of supreme federal law.[136] And by conferring supremacy only on laws adopted according to these procedures, the Supremacy Clause provides an express constitutional basis for the Supreme Court's decision in *Erie* to abandon the *Swift* doctrine.[137]

Although *Erie* does not cite the Supremacy Clause, the first sentence of the Court's constitutional analysis essentially paraphrases the effect of the Clause: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[138] This formulation presupposes that federal courts have no independent lawmaking authority to displace state law. Rather, they may override state law only when authorized to do so by a provision of "the supreme Law of the Land."[139] Under the Constitution, such preemptive federal law can only be adopted pursuant to the "finely wrought and exhaustively considered"[140] procedures set forth in the

130. *Id.* at 951.
131. 524 U.S. 417 (1998).
132. *Id.* at 436.
133. *Id.* at 438.
134. *Id.* at 448.
135. *See* Clark, *Separation of Powers*, *supra* note 13, at 1324.
136. *See supra* notes 106–110 and accompanying text.
137. *See* Clark, *Separation of Powers*, *supra* note 13 at 1414 ("Careful analysis reveals that *Erie*'s constitutional holding is best understood as an attempt to enforce federal lawmaking procedures and the political safeguards of federalism they incorporate.").
138. *Erie*, 304 U.S. at 78. Of course, the Supremacy Clause refers not only to the "Constitution" and "Laws," but also to "Treaties." *See* U.S. Const. art. VI, cl. 2.
139. U.S. Const. art. VI, cl. 2.
140. *Chadha*, 462 U.S. at 951.

Constitution.[141] These procedures assign federal lawmaking exclusively to the political branches of the federal government and to the states. By design, these procedures give federal courts no role in the process. *Erie* arguably invoked this omission when it proclaimed that "[t]here is no federal general common law,"[142] and that "no clause in the Constitution purports to confer . . . power upon the federal courts"[143] "to declare substantive rules of common law applicable in a state."[144]

The *Swift* doctrine ran afoul of the Constitution by permitting federal courts to displace state law outside the Supremacy Clause in favor of their own body of judge-made law. Whatever its original justification, the *Swift* doctrine

141. To be sure, several potential counterexamples have arisen since *Erie* was decided. For example, federal administrative agencies now regularly promulgate rules that preempt state law. *See* Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737 (2004). Even in this context, however, the Supreme Court has conditioned preemption on congressional authorization. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) (stating that "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it"); Clark, *Separation of Powers*, *supra* note 13, at 1430-38. Another potential counterexample is the rise of sole executive agreements—i.e., international agreements made by the President alone without the participation or assent of either house of Congress. The Court has recently stated that such agreements are generally "fit to preempt state law, just as treaties are." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 (2003). For a critique of this position, *see* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption In Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004); *see also* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 Va. L. Rev. (forthcoming 2007). An examination of these doctrines is beyond the scope of this paper.

142. 304 U.S. at 78. One might think that modern "federal common law" contradicts this understanding of *Erie*. Federal common law usually refers to rules of decision that purport to have the force of federal law, but whose content cannot be traced by traditional methods of interpretation to the Constitution, laws, and treaties of the United States. *See* Clark, *Federal Common Law*, *supra* note 8, at 1247. Even with respect to such rules, however, the pull of *Erie* and the Supremacy Clause is in evidence. The Supreme Court has rejected open-ended federal common lawmaking and attempted to confine judicial lawmaking to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes . . ., and admiralty disputes." Tex. Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981). As I have argued elsewhere, many of the rules that make up these enclaves have arguably been mischaracterized because they are actually "consistent with, and frequently required by, the constitutional structure," and thus do not constitute authentic "federal common law." Clark, *Federal Common Law*, *supra* note 8, at 1251. *Cf.* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 35 (1985) (suggesting that some federal common lawmaking—i.e., "delegated" and "preemptive" lawmaking—is legitimate because authorized by Congress). Even admiralty—the most entrenched enclave of federal common law—has recently been called into question as inconsistent with *Erie*. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 459 (1994) (Stevens, J., concurring in part and concurring in the judgment) (suggesting that the Court's modern admiralty doctrine represents "an unwarranted assertion of judicial authority to strike down or confine state legislation . . . without any firm grounding in constitutional text or principle"); Clark, *Federal Common Law*, *supra* note 8, at 1360 (comparing federal common law in admiralty to general commercial law under *Swift*); Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 279 (1999) (arguing that "we would do better to follow *Erie* by largely abandoning the effort to construct federal common law rules in admiralty cases that arise within state territorial waters").

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

144. *Id.*

eventually degenerated into an excuse for federal courts to make their own body of law in diversity cases. As Justice Field stressed in dissent, the "general law" applied by federal courts under the *Swift* doctrine was "little less than what the judge advancing the doctrine [thought] at the time should be the general law on a particular subject."[145] Judicial lawmaking on this scale circumvented the political and procedural safeguards built into the Supremacy Clause, and in this sense "invaded rights . . . reserved by the Constitution to the several States."[146] *Erie* made clear that under the Constitution "[t]here is no federal general common law."[147] Rather, the "common law so far as it is enforced in a State . . . is not the common law generally but the law" as declared by the courts of that state.[148] Because the *Swift* doctrine allowed federal courts to disregard such state law in favor of general law of their own choosing, the *Erie* Court felt "compel[led]" to abandon the doctrine[149] as "'an unconstitutional assumption of powers by courts of the United States.'" [150]

Viewing *Erie* through the lens of the Supremacy Clause also helps to explain the "development of two separate lines of cases"[151] to determine whether federal courts should apply state or federal law to matters that fall "within the uncertain area between substance and procedure."[152] Under *Erie*, federal courts sitting in diversity are bound to apply the substantive law of the state in which they sit, but remain free to apply federal procedural rules. The line between substance and procedure is murky at best, and the Supreme Court has devised two seemingly contradictory approaches for deciding whether to apply state or federal rules. On the one hand, in the absence of an applicable federal statute or federal rule, the Court employs tests that encourage the application of arguably substantive state law over a contrary federal practice.[153]

145. *Baugh*, 149 U.S. at 401 (Field, J., dissenting). *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395, 431 (1995) (explaining that by the time *Erie* was decided, changing conceptions of state law revealed the "fundamentally political reality" that "what a judge was doing when he decided an open question of common law was making law rather than finding law").

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

147. *Id.* at 78.

148. *Id.* at 79. Of course, when state law is not clear, federal courts often risk usurping state authority by "predicting" how the state's highest court would rule. *See* Clark, *Ascertaining*, *supra* note 13, at 1495–1517. When possible, federal courts can avoid this risk by certifying unsettled questions of state law to the state's highest court for authoritative resolution. *See id.* at 1544–56; *see also* Guido Calabresi, *Federal and State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. Rev. 1293 (2003) (advocating various types of certification).

149. *Erie*, 304 U.S. at 77–78.

150. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 534 (1928) (Holmes, J., dissenting)).

151. Hanna v. Plumer, 380 U.S. 460, 471 (1964).

152. *Id.* at 472.

153. Over time, the Court has instructed courts to choose between state law and federal practice by asking whether "the outcome of the litigation" would be "substantially different" in federal rather than state court, Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945); whether the state rule was "intended to be bound up with the definition of the rights and obligations of the parties,"

On the other hand, when there is a federal statute or rule on point, the Court employs a strong presumption in favor of applying arguably procedural federal law over contrary state law.[154]

The Supremacy Clause reconciles these two approaches by providing a constitutional basis for choosing between state and federal law. In the absence of an applicable federal statute or rule (promulgated pursuant to a federal statute), the negative implication of the Supremacy Clause precludes federal courts from displacing substantive state law. Accordingly, under the Clause—and thus under *Erie*—courts should err in favor of applying state substantive law absent positive federal law to the contrary. By contrast, when Congress—or the Supreme Court acting pursuant to the Rules Enabling Act[155]—adopts a federal rule on point, the rule qualifies as "the supreme Law of the Land."[156] Under these circumstances, the only question for the judiciary is whether the particular rule falls within Congress's constitutional power to enact.[157] If so, the Supremacy Clause instructs courts to follow the federal rule notwithstanding contrary state law, whether characterized as "substantive" or "procedural."

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958); and whether the application of state law furthers "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468. If a federal court answers in the affirmative, then it should apply state law absent "affirmative countervailing considerations." *Byrd*, 356 U.S. at 537; *see id.* at 538 (finding that "the federal policy favoring jury decisions of disputed fact questions" constitutes an adequate countervailing consideration).

154. *See* Stewart Org., Inc. v. Ricoh, 487 U.S. 22, 27 (1988) (stating that when "a federal statute covers the point in dispute," a federal court need only "inquire whether the statute represents a valid exercise of Congress' authority under the Constitution"); Burlington N. R.R. v. Woods, 480 U.S. 1, 8 (1987) (stating that so long as a federal rule falls within the scope of the Rules Enabling Act, the only question is whether the rule "regulates matters which can reasonably be classified as procedural, thereby satisfying the constitutional standard for validity").

155. 28 U.S.C. § 2072 (1994).

156. The Supreme Court has long permitted Congress to assign rulemaking power to federal courts on the theory that such power is not "strictly and exclusively legislative." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825). The Court has recognized that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812), and that these powers include authority to adopt rules of practice and procedure for federal courts, notwithstanding contrary state rules applicable in state court. *See* Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222–23 (1818).

157. The Supremacy Clause recognizes only "Laws . . . made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. This language contemplates that courts will review the constitutionality of federal statutes before treating them as "the supreme Law of the Land." *See* Clark, *Supremacy Clause*, *supra* note 101, at 99–105. Of course, Congress has broad constitutional power under Article III and the Necessary and Proper Clause "to make rules governing the practice and pleading in [federal] courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna*, 380 U.S. at 472.

Conclusion

The *Swift* doctrine permitted judges to displace traditional doctrines of state common law in favor of their own independent notions of sound public policy. *Erie* overruled *Swift* on the ground that it was inconsistent with "'the autonomy and independence of the States.'"[158] Such language has led commentators to analyze *Erie* largely in terms of traditional principles of federalism. Paul Mishkin's key insight was to link federalism with the constitutional separation of powers. As he put it, federal "courts are inappropriate makers of laws intruding upon the states' views of social policy in the areas of state competence."[159] The Supremacy Clause supplies specific textual, historical, and structural support for Mishkin's conclusions because the Clause incorporates federal lawmaking procedures that, by design, exclude participation by federal courts. The myth of *Erie*, it turns out, actually rests on the sound structural inference that the Supremacy Clause precludes federal courts from acting outside its terms to displace state law.

158. *Erie*, 304 U.S. at 78 (quoting *Baugh*, 141 U.S. at 401 (Field, J., dissenting)).
159. Mishkin, *supra* note 2, at 1686–87.