ARTICLES

Erie and the Constitution's Constraints on General Law

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The Constitution of 1787 was the instrument by which the people of the states made a partial and conditional transfer of sovereign authority to a new federal government. To preserve the states' residual sovereignty, the Constitution established a system of conditional federal supremacy. Specifically, it made the federal government's ability to displace state law contingent on compliance with specific structural and procedural safeguards. The Supremacy Clause identifies only three sources of "the supreme Law of the Land" capable of displacing contrary state law—the Constitution, laws enacted pursuant to it, and treaties made under its authority. For each of these sources of law, the Constitution specifies exclusive procedures for adoption. These structural constraints preserve residual state authority unless and until it is displaced by properly enacted "supreme Law of the Land." In the absence of such law, the states retain the authority to govern matters within their own territory according to their own law.

Federal courts, therefore, possess no freestanding authority to displace governing state law absent a contrary—and valid—source of supreme law. This structural limitation, however, does not forbid judicial application of general law in all circumstances. From the Founding, federal courts applied traditional branches of the law of nations—such as the law merchant, the law maritime, and the law governing sovereign relations—when state law adopted them, Congress authorized their use, or the Constitution's structure required their application. In these contexts, federal courts acted in conformity with the lawful authority of the federal government or the states.

Federal courts were using general law in this limited, constitutionally grounded way when the Supreme Court decided Swift v. Tyson *in 1842. In the second half of the nineteenth century, however, federal courts expanded their use of general law by developing a broader doctrine of "federal general common law." They*

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used this newly created category of law to displace state law in diversity cases without any valid source of supreme federal law authorizing them to do so. In 1938, Erie Railroad Co. v. Tompkins *declared that practice unconstitutional. The* Erie *Court held that the federal judiciary may not invoke general common law as an independent source of authority to displace state law without a valid predicate in the Constitution or an act of Congress.*

At the same time, the Supreme Court did not preclude the legitimate, constitutionally authorized uses of general law. On the same day that it decided Erie*, the Court applied general law—recast as federal common law—to uphold the constitutional equality of the states in resolving an interstate water rights dispute. In subsequent cases, the Court confined federal common law to narrow enclaves tied to uniquely federal interests or structural features of the Constitution. The only way to make sense of these decisions, taken together, is that the Court did not repudiate all federal judicial use of general law. Rather, the Court prohibited federal courts from using general law except in the ways the Constitution permits: to interpret constitutional and statutory provisions in light of background context, to implement the Constitution's structural allocations of power, to enforce the equality and territorial integrity of the states, or to enforce a federal statute or state law that authorizes or incorporates its use.*

This Article argues that recent calls to revive general common law conflate these traditional, limited uses of general law with broader categories of unwritten law that early federal courts did not apply without proper federal or state authorization. By treating general law as a freestanding source of judicial authority to displace state law, such proposals risk intruding on the residual authority of the states and circumventing the exclusive lawmaking procedures required to adopt all forms of supreme federal law. The Constitution does not permit that move. Federal courts may apply general law only when the Constitution, a valid federal statute or treaty, or state law supplies a lawful predicate. Erie *recognized and restored that structural command—and remains essential to preserving the constitutional balance between national supremacy and residual state sovereignty.*

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INTRODUCTION

Erie Railroad Co. v. Tompkins[1] is one of the most consequential decisions in American constitutional law. Properly understood, it did not revolutionize federalism; it restored the Constitution's original structural safeguards. The people of preexisting "Free and Independent States"[2] adopted the Constitution to make a partial and conditional transfer of sovereign authority to a new federal government. This transfer of authority resulted in two governments with overlapping authority within the same territory. The Constitution resolved potential conflicts between state and federal law by designating three sources of federal law as "the supreme Law of the Land"—the Constitution, laws, and treaties of the United States.[3] Elsewhere, the Constitution prescribes procedures for the adoption of each source of supreme federal law. The Constitution thus established a system of conditional federal supremacy that preserves the states' residual authority to govern within their respective territories unless and

1 304 U.S. 64 (1938).
2 THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).
3 U.S. CONST. art. VI, cl. 2.

until it is displaced by duly enacted provisions of "the supreme Law of the Land."[4] *Erie* recognized and upheld this basic division of governmental authority. It held that federal courts may not invoke general common law to displace state law unless a valid source of supreme federal law authorizes or requires it.[5] The *Erie* Court observed that general common law, as the courts had come to apply it, was "often little less than what the judge advancing the doctrine thinks at the time should be the general law."[6] Accordingly, when federal judges applied general common law, they were often displacing state law on their own initiative without any warrant in supreme federal law for doing so. This judicial practice usurped residual state authority by circumventing the lawmaking procedures that the Constitution requires for federal actors to displace state law.

General law was a familiar source of rules in the eighteenth and early nineteenth centuries. During those years, the phrase largely referred to the traditional branches of the law of nations—including the law merchant, the law maritime, and the law governing relations among sovereigns.[7] The Founders adopted the Constitution against the backdrop of such law and designed it to accommodate the application of such law in appropriate circumstances. From the Founding through the mid-nineteenth century, federal courts applied these branches of general law when the Constitution authorized or required their application, when Congress directed their use, or when their application would not displace the operation of local state law because the states themselves would apply general law to the dispute at hand. When early federal courts applied general law in these circumstances, they did not violate the reserved powers of the states under the Constitution.

By the late nineteenth century, however, federal courts had transformed their use of general law into an expansive doctrine of "federal general common law"[8]—what became known as the

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4 *Id.*

5 *Erie*, 304 U.S. at 78–79.

6 *Id.* (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

7 Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 666 (2013) [hereinafter Bellia & Clark, *General Law in Federal Court*] ("Matters governed by general law [included] . . . commercial transactions between citizens of different states, maritime matters, and the relations between sovereign states.").

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

doctrine of *Swift v. Tyson*.[9] Courts increasingly invoked general common law to displace state law in diversity cases without grounding their decisions in any valid source of supreme federal law. It was this practice—not the more limited applications of traditional general law—that generated the constitutional problem that the Court redressed in *Erie*. Following that decision, the Court continued to use general law in traditional ways that the Constitution authorized or required, but it recharacterized such law in certain cases as "federal common law."[10]

Recent scholarship urges federal courts to revive broader forms of general common law[11] and to reconsider *Erie* itself.[12] Some scholars argue that because federal courts routinely applied general law from the Founding through 1938, *Erie* marked a sudden break from prior practice—one that is difficult to reconcile with originalist commitments.[13] These claims rest on a basic category mistake because general law is a "they," not an "it." By ignoring the distinction between the traditional law of nations and broader conceptions of unwritten law common to multiple jurisdictions, these scholars conflate distinct bodies of unwritten law that interacted with the Constitution in different ways. Traditional general law—what we call "the general law of nations"—was a transnational source of law beyond the authority of any one jurisdiction to control. Recent scholarship, however, defines "general common law" more broadly to include unwritten local law that some collection of jurisdictions follows to govern local matters, including aspects of the common law that the states adopted from

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9 41 U.S. (16 Pet.) 1 (1842).

10 *E.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (quotation marks omitted); *see also infra* notes 498–517 and accompanying text.

11 *See infra* Part III.A. For one concise revivalist account, see Stephen E. Sachs, Professor, Harvard L. Sch., Lecture Delivered on the Author's Appointment as Antonin Scalia Professor of Law, Life After *Erie* 10–11 (Nov. 1, 2023) [hereinafter Sachs, Life After *Erie*] (available on SSRN).

12 *See, e.g.*, Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1255 (2017) [hereinafter Sachs, Pennoyer *Was Right*] (stating that "the rejection of *Erie* is the beginning of wisdom"); *cf.* Jack Goldsmith, Erie *and Contemporary Federal Courts Doctrine*, 46 HARV. J.L. & PUB. POL'Y 727, 732 (2023).

13 *See* Jack L. Goldsmith & Curtis A. Bradley, *General Law Revivalism and the Problem of 1938*, 136 YALE L.J. 26, 32, 46–53, 86–91 (2026).

England.[14] Some scholars describe this broader conception of general common law to include interpretive rules,[15] substantive rules of decision,[16] and evolving principles that drive constitutional meaning.[17] This broad conception of general common law ignores important historical distinctions between different sources of unwritten law and raises serious constitutional concerns.

When scholars fail to distinguish between (1) the general law of nations and (2) commonly adopted rules of local law, and instead conflate them into one undifferentiated category of general common law, they obscure a critical structural limitation on the power of federal judges to displace state law. The Constitution empowers federal courts to apply the traditional law of nations in limited contexts. It does not authorize them to treat widely shared local common law as a freestanding source of general common law capable of displacing the residual governance authority of the states. It is not possible to understand the proper role of unwritten law in federal court if one treats all historical sources of unwritten law as an undifferentiated mass. Only by disaggregating different historical sources of unwritten law can one ascertain the proper and improper uses of general law in federal courts—both before and after *Erie*.

This Article argues that revivalist proposals misapprehend both the nature of general law at the Founding and the Constitution's constraints on the use of unwritten law. *Erie* upheld residual state sovereignty by rejecting the federal courts' embrace of expansive notions of general common law—unmoored from the Constitution or acts of Congress—to displace the operation of state law. But its reasoning does not prohibit courts from using certain kinds of general law where the Constitution or other validly enacted federal law requires them to do so. After *Erie*, the Supreme Court has generally adhered to this distinction. Thus, there is no reason, as some scholars claim, to overrule *Erie* or, as

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[14] William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1190 (2024) (citing 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, 1517 (1984)).

[15] *Id.* at 1201.

[16] *Id.* at 1197.

[17] Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 914 (2023) (urging courts to look to the "general law of the country *today*," rather than just that of 1791, to interpret the Fourth Amendment's guarantees (emphasis in original)). For criticism of this approach, see generally Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010 (2023).

others argue, to grudgingly accept it on stare decisis grounds as an erroneous but untouchable precedent. Rather, the core holding of the case—that the Constitution requires a validly enacted source of supreme federal law to displace state law—was correct at the Founding and in 1938, and it remains so today.

Under this principle of conditional federal supremacy, federal courts may apply the general law of nations in limited contexts: (1) to uphold the constitutional equality and territorial integrity of the states, and (2) to implement the Constitution's allocation of war and foreign relations powers to the political branches. In addition, federal courts may apply broader conceptions of general common law (3) as background for interpreting constitutional and statutory provisions, (4) when Congress has authorized or required federal courts to do so in duly enacted statutes (which are themselves supreme), and (5) as a rule of decision when state law treats general law as controlling. What *Erie* forbids—in keeping with the principle of conditional federal supremacy—is the use of freestanding general common law to override state law outside these constitutionally authorized contexts. The Constitution preserved residual state sovereignty by restricting supremacy to three sources of federal law and conditioning displacement of state law on adherence to exclusive federal lawmaking procedures. *Erie* recognized and enforced these conditions. Revivalist proposals would circumvent or abandon them by inviting federal courts to disregard these structural safeguards.

This Article proceeds in four parts. Part I explains the conditional nature of federal supremacy and the limited role of general law at the Founding. It describes the three principal branches of the law of nations and their early judicial application. Part II explains how federal courts gradually expanded the traditional concept of general law into a broader doctrine of federal general common law and why *Erie* repudiated that transformation as unconstitutional. Part III examines contemporary proposals to revive general common law—a concept that revivalists define to include not just traditional general law, but a wide assortment of unwritten law ultimately subject to local sovereign control. These proposals conflict with the Constitution's original design and structural safeguards. Part IV identifies the constitutionally permissible—but limited—uses of general law after *Erie*, most of which align with current judicial practice. Properly understood, *Erie* did not create—but rather restored—structural limits that

the Constitution established from its inception. While calls to revive general law continue, proponents have yet to offer a persuasive constitutional basis for reconsidering *Erie* or expanding the judiciary's authority beyond the Constitution's carefully balanced—and exclusive—framework for displacing state law.

I. GENERAL LAW AND THE CONSTITUTION

In recent years, scholars have urged federal courts to make greater use of general common law. They define such law broadly to encompass unwritten rules followed across multiple jurisdictions, regardless of whether those rules reflect inherited traditions, shared customs, common practices, fundamental rights, or independent convergence on similar legal principles.[18] To assess such proposals, it is necessary first to examine the constitutional framework that governs when federal courts may displace state law, and then to revisit the early history of general law in the United States. The constitutional framework and the historical role of general law within it reveal a crucial and often overlooked distinction. The traditional general law of nations played a legitimate and well-defined role in early American jurisprudence because the Constitution authorized or required its application in certain circumstances. The federal courts' later embrace of more expansive conceptions of general common law contravened the constitutional structure because it displaced state law with no warrant in supreme federal law. It was this unwarranted interference with residual state sovereignty that the Supreme Court ultimately rejected in *Erie*.

A defining feature of the federal system is that it allows two sovereigns—one state and one federal—to govern the same people, within the same territory, at the same time. This overlapping sovereignty results from the Constitution's partial reallocation of the states' preexisting territorial authority to a newly created central government. The people of the several states, however, were unwilling to alienate their states' exclusive territorial sovereignty without building strict conditions into the constitutional structure to preserve their residual sovereignty. The trade-off for allowing certain sources of federal law to displace state law was that politically accountable federal actors had to adopt each source pursuant to precise procedures that made adoption both more difficult and more responsive to state interests. The Supremacy

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[18] *See infra* Part III.

Clause recognizes only the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States as "the supreme Law of the Land," capable of displacing "Contrary" state law.[19] Elsewhere, the Constitution prescribes precise procedures governing the adoption of each source of supreme federal law. These procedures require the participation and assent of multiple politically accountable actors, including in every case the Senate—the institution specifically designed to represent the states—or the states themselves. Notably, the Constitution gives federal courts no role in these procedures. These structural constraints were the price that the people who drafted and ratified the Constitution required for allowing the displacement of state law.[20] Under this arrangement, in the absence of supreme federal law, the Constitution preserves the states' residual sovereign authority to govern themselves through local law.

At the Founding, federal courts applied general law without upsetting this compromise. The phrase "general law" referred primarily to rules governing relations among sovereigns and their citizens—what jurists of the time identified as the "law of nations."[21] This shared body of transnational rules had developed across centuries to facilitate commerce, resolve disputes, and avoid conflict.[22] This general law of nations included three principal branches: the law merchant, the law maritime, and the law of state-state relations.[23]

In England, the common law incorporated these branches of the law of nations.[24] Upon independence, the American states adopted English common law, including the law of nations, into their own legal systems.[25] The Constitution was drafted with the

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19 U.S. CONST. art. VI, cl. 2.

20 *See* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1431 (2008) [hereinafter Clark, *Constitutional Compromise*].

21 *See* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 4–5 (2017) [hereinafter BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION].

22 Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279 (1996) [hereinafter Clark, *Federal Common Law*] (noting that the law of nations was "developed and refined by a variety of nations over hundreds and, in some cases, thousands of years"); *see also* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 889–91 (2005) [hereinafter Bellia, *State Courts and Federal Common Law*] (describing general law).

23 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 3–4 (describing these branches).

24 *See infra* text accompanying notes 66–67.

25 *See infra* text accompanying notes 86–88.

understanding that both federal and state courts would continue to apply such law when appropriate. Article III of the Constitution vested federal courts with jurisdiction over several categories of disputes precisely because they implicated the law of nations.[26] Federal courts applied general law—not because it was federal law, but because the Constitution authorized or required its application in certain circumstances, or because the states chose to apply general law rather than local law to certain matters.

This limited use of general law continued through the early decades of the Republic. But in the latter half of the nineteenth century, federal courts extended general law beyond its traditional bounds. They used it during this period to override state law in matters historically subject to local authority and governed by local rules.[27] That more expansive use of general law generated the structural concerns that the Court ultimately confronted in *Erie*.[28] To understand *Erie*'s constitutional reasoning, one must appreciate, as this Part explains, that general law had a narrow and defined scope at the Founding, that its early applications were consistent with the constitutional structure, and that its later expansion departed from the Constitution's carefully crafted framework for displacing state law.

This Part proceeds in three sections. Part I.A explains foundational features of the constitutional structure that framed early judicial uses of general law. Part I.B recovers the historical meaning of general law and contrasts it with local law—a distinction central to early constitutional practice but later obscured. Part I.C illustrates how early federal courts properly applied the three principal branches of the law of nations, consistent with the Constitution's division and allocation of authority.

A. Conditional Supremacy and Residual State Sovereignty

To understand the proper uses of general law in federal court, it is necessary to recall the nature of state sovereignty from independence through ratification. The states predated the Constitution as "Free and Independent States,"[29] possessing the full sovereign authority that status entailed under the law of nations. When the people of the states adopted the Constitution,

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[26] *See* Clark, *Federal Common Law*, *supra* note 22, at 1288–89.

[27] *See* Bellia & Clark, *General Law in Federal Court*, *supra* note 7, at 697–98.

[28] *See id.* at 699–701; Clark, *Federal Common Law*, *supra* note 22, at 1257–59.

[29] THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).

they transferred limited and enumerated powers to the federal government. The Constitution, however, does not confer sovereign authority on the states. Rather, in keeping with background rules governing the alienation of sovereign rights, it begins from the premise that the states retained all sovereign authority that the instrument does not clearly delegate to the federal government.[30] The states' sovereignty under the Constitution is therefore residual: They retained all sovereign powers not clearly and validly transferred to the federal government—either in express terms or by unavoidable implication from the constitutional text. Moreover, the Constitution preserved this residual state sovereignty not only by limiting the scope of federal powers, but by conditioning the exercise of those powers on compliance with specific lawmaking procedures.

Following the Declaration of Independence and Revolutionary War, the former British colonies became "Free and Independent States"[31]—sovereigns with full rights and powers under the law of nations.[32] The states formed a weak union under the Articles of Confederation that preserved nearly full state sovereignty but proved inadequate to serve the states' collective domestic and international interests.[33] The Confederation Congress lacked power to legislate directly within the states; it could only requisition the states, and the states often failed to comply with its demands without consequence.[34] Recognizing that the Articles were beyond repair, the delegates to the Constitutional Convention of 1787 set out to construct a new framework of government—one that could

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[30] *See* THE FEDERALIST NO. 32 (Alexander Hamilton); Anthony J. Bellia Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 WM. & MARY L. REV. 485, 514–18 (2024) [hereinafter Bellia & Clark, *State Sovereign Immunity*]; Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 523–36, 547–51 (2022) [hereinafter Bellia & Clark, *The Constitutional Law of Interpretation*].

[31] THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).

[32] Anthony J. Bellia Jr. & Bradford R. Clark, *Constitutional Federalism and the Nature of the Union*, 66 WM. & MARY L. REV. 281, 313–14 (2024) [hereinafter Bellia & Clark, *Constitutional Federalism*]; Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 858–60 (2020) [hereinafter Bellia & Clark, *International Law Origins of Federalism*].

[33] *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 862–63.

[34] *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 2 THE WRITINGS OF JAMES MADISON 361, 364 (Gaillard Hunt ed., 1901) (stating that because acts of Congress depend "for their execution on the will of the State legislatures," they are "nominally authoritative, [but] in fact recommendatory only").

stabilize the Union by redistributing sovereign authority between and among the states and a newly created federal government.

Under the Articles, the states retained exclusive territorial sovereignty, and Congress therefore had no power to tax or regulate individuals directly. Requisitions were nominally binding on states, but Congress had no means to enforce compliance.[35] To correct this defect, the Virginia Plan initially proposed authorizing Congress to use military force against delinquent states.[36] This proposal was a nonstarter. As delegate George Mason warned, a central government could not use coercion and force effectively against member states, and he thus proposed a government that acted upon individuals, not states.[37] James Madison, moved by Mason's remarks, agreed that the delegates should pivot to a more constructive solution: They should empower the federal government to tax and regulate individuals directly within the states, thereby eliminating the need for enforcement against states themselves.[38] This approach required the people of the states to compromise their states' exclusive territorial sovereignty over certain matters and accept concurrent jurisdiction with a new federal sovereign.[39] The states' delegates were willing to make this cession, but only at a price. They insisted that the Constitution give the states a role in the composition and selection of all federal actors who would participate in the adoption of all forms of supreme federal law.[40]

This novel framework of overlapping territorial sovereignty inevitably created the possibility of conflict between federal and state law; thus, the Constitution required a mechanism for resolving such conflicts. Madison favored a congressional power to negative state laws,[41] but smaller states repeatedly defeated this proposal because they feared that larger states would use it to

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35 *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 862.

36 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS] (notes of James Madison from May 29, 1787).

37 *See id.* at 34 (notes of James Madison from May 30, 1787).

38 *See id.* at 54 (notes of James Madison from May 31, 1787); *id.* at 133 (notes of James Madison from June 6, 1787).

39 *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 30, at 497.

40 *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552–58 (discussing the role of the states in the federal political process).

41 *See* 1 FARRAND'S RECORDS, *supra* note 36, at 164 (notes of James Madison from June 8, 1787) (reporting that Madison "regard[ed] an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system").

dominate them.[42] Only after the Convention agreed to give the states equal representation in the Senate did a breakthrough occur: The Convention adopted a Supremacy Clause, providing that valid federal law would prevail over contrary state law.[43] The Clause did not give the federal government unchecked power to override state law. Rather, it conditioned federal supremacy on adherence to lawmaking procedures designed both to require broad consensus among politically accountable actors and to enable the states to influence—and sometimes prevent—the exercise of federal lawmaking power.

Although the Supremacy Clause established the primacy of federal law, it also imposed meaningful constraints designed to preserve the states' residual sovereign authority. First, it recognized only three sources of federal law as "the supreme Law of the Land": "This Constitution," "Laws of the United States . . . made in Pursuance thereof," and "Treaties made . . . under the Authority of the United States."[44] Second, it made these three sources of law supreme only if designated political actors adopted them according to precise lawmaking procedures prescribed elsewhere in the Constitution.[45] These sources—and the corresponding procedures for their adoption—are necessarily exclusive.[46] Each source must be adopted by actors subject to the political safeguards of federalism,[47] and the Senate (or the states) must agree to the adoption of all forms of supreme federal law. These requirements were not accidental. The Senate was the institution designed to represent the states, and the smaller states refused to move forward with the Constitution unless the states received equal suffrage in that

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42 *See id.* at 168; *see also* 2 FARRAND'S RECORDS, *supra* note 36, at 28 (notes of James Madison from July 17, 1787).

43 *See* 2 FARRAND'S RECORDS, *supra* note 36, at 21–22 (journal of the Constitutional Convention from July 17, 1787).

44 U.S. CONST. art. VI, cl. 2.

45 *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1355–57 (2001) [hereinafter Clark, *Separation of Powers*]. The Supremacy Clause constrained federal power in a third respect by providing a textual basis for judicial review of federal statutes alleged to exceed Congress's enumerated powers. *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 99–105 (2003).

46 *See* Clark, *Separation of Powers*, *supra* note 45, at 1331:

> These procedures enhanced the influence of the states by giving federal institutions designed to represent state interests—such as the Senate—a veto over all forms of federal lawmaking, and thus suggest that the Founders understood constitutionally prescribed lawmaking procedures to establish the exclusive means of adopting "the supreme Law of the Land."

47 Wechsler, *supra* note 40, at 543.

body. By including the Senate in all federal lawmaking procedures, the Constitution gave the states—through the Senate—an absolute veto over the adoption of all forms of supreme federal law. In the absence of such law, governmental authority defaulted to the states, not to federal courts. This structural safeguard was the price of union.[48]

By design, the Constitution gives federal courts no role in the creation of "the supreme Law of the Land." This feature of the Constitution is not surprising. The Constitution insulates federal courts from political influence by giving judges life tenure and salary protection.[49] It also excludes them from any role in federal lawmaking. Its drafters considered but rejected proposals for judges to participate in vetoing federal statutes as part of a council of revision.[50] Thus, while federal courts must apply duly enacted federal law over contrary state law, they have no warrant to recognize other sources of law to displace state law.[51] When courts disregard state law without a valid federal enactment, they usurp powers the Constitution reserves to the political branches and the states, and they circumvent the lawmaking procedures that preserve residual state sovereignty.[52]

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[48] *See* Clark, *Constitutional Compromise*, *supra* note 20, at 1436 (noting that the price of the small states' assent to the Constitution "was to give small states—through the Senate—disproportionate power to block any and all attempts by the federal government to override state law").

[49] *See* U.S. CONST. art. III, § 1.

[50] The Virginia Plan proposed—but the Convention rejected—establishing "a council of revision" composed of "the Executive and a convenient number of the National Judiciary" for the purpose of disapproving federal legislation. 1 FARRAND'S RECORDS, *supra* note 36, at 21 (notes of James Madison from May 29, 1787).

[51] Many scholars have addressed the extent to which it is possible for courts to find unwritten law, and the extent to which courts necessarily make it in using it. *See, e.g.*, Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 531 (2019); William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J.L. & RELIGION 255, 266 (2006); *see also* Bellia, *State Courts and Federal Common Law*, *supra* note 22, at 831 (explaining how courts can make law "as a necessary consequence of their best efforts to discern and apply existing principles of national law"). For purposes of the Supremacy Clause, the extent to which courts find or make general law in a particular instance is irrelevant. If only enacted federal law may preempt state law, then freestanding general law, no matter how found or made, does not qualify.

[52] Some forms of regulatory preemption of state law may sit uneasily with these principles, while others may better align with the Supremacy Clause. "Arguably, at least some rulemaking by executive agencies involves the exercise of executive power." Clark, *Separation of Powers*, *supra* note 45, at 1430–31. Putting aside the nondelegation doctrine, agency preemption is constitutionally permissible to the extent it can be traced to "the terms of a duly enacted statute"—which itself qualifies as "the supreme Law of the Land." *Id.* at 1433 (quotation marks omitted). The judicial lawmaking that occurred under the

This structural design explains why, in practice, the Supreme Court applied the general law of nations without controversy but ultimately rejected later, more aggressive uses of general common law in *Erie*. Because the Constitution (or state law) authorized judicial application of the general law of nations, federal courts did not violate residual state sovereignty when they applied it. In contrast, later judicial use of expansive general common law violated residual state sovereignty because it disregarded state law with no basis in supreme federal law for doing so. The Court's expanded use of general common law in the decades preceding *Erie* thus undermined the Constitution's carefully crafted framework for preserving residual state sovereignty through political and procedural safeguards.

B. General Law at the Founding

To understand *Erie*'s constitutional rationale, one must first appreciate the limited nature of general law at the Founding and why the Constitution permitted its application in appropriate cases. The Constitution was drafted and ratified against the backdrop of the general law of nations—a coordinated body of rules and customs that sovereigns embraced to foster peace and prosperity among themselves. Nations had a shared interest in adhering to these rules. A nation that disregarded them risked economic retaliation, diplomatic isolation, or even war. For example, a nation that violated the rights and immunities of foreign ambassadors under the law of state-state relations gave the offended nation just cause to retaliate, potentially through armed conflict.[53] Similarly, a nation that failed to apply general commercial law in an evenhanded way invited trade restrictions or other retaliatory measures.[54] The Founders thus had a strong incentive to design a federal government capable of applying general law in appropriate cases.

Eighteenth-century commentators equated general law with the law of nations and traced its authority to mutual custom,

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Swift doctrine, by contrast, lacked any such statutory predicate and thus cannot claim this justification. *See* Clark, *Federal Common Law*, *supra* note 22, at 1259–62.

[53] *See* 1 M. DE VATTEL, THE LAW OF NATIONS preliminaries, § 22, at 6–7 (London, J. Newbery et al. 1760) (1758) (describing this principle).

[54] *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 25 (explaining that failure to fairly apply the law merchant was "a threat to both interstate and international commerce (as well as friendly relations with other nations)").

the laws of nature, and compacts or conventions.[55] Emmerich de Vattel, the most influential publicist at the time, described the general law of nations as both "precepts[ ] prescribed by the law of nature to states" and "maxims[ ] and customs consecrated by long use" and observed among nations as binding norms.[56] Sir William Blackstone emphasized that the law of nations rested on the equality of sovereigns, fostering peaceful intercourse and mutually beneficial transactions.[57] Because no nation had "a superiority" over another, none could "dictate or prescribe the rules of this law" to others.[58] Sovereigns followed this body of law to promote mutual stability.

This general law of nations differed fundamentally from local common law.[59] Both sources of law were unwritten, but local common law addressed matters internal to one sovereign—such as property, local contracts, torts, crime, and judicial procedure—and was subject to that sovereign's plenary control.[60] Even if many jurisdictions adopted similar local rules because they shared customs or recognized fundamental rights from a shared legal ancestry, those rules were not general law in the sense that the law of nations was. English common law included both general law and local law as part of English municipal law, but general law and local law remained distinct concepts. Britain had full sovereign control over the content of its local law, but it had no power to dictate to the world the content of general law.

At the Founding, the distinction between general and local law was fundamental. No one sovereign had authority to dictate the content of the general law of nations. A sovereign could opt out of it, but under that same law of nations, there were legal consequences. Specifically, if one nation failed to respect another nation's rights under the law of nations, the offended nation would be justified in retaliating in response.[61] In contrast, a sovereign could dictate the content of its local law or even abandon

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55 *Id.*

56 1 VATTEL, *supra* note 53, preliminaries, §§ 7, 25, at 2, 7.

57 4 WILLIAM BLACKSTONE, COMMENTARIES *66–67.

58 *Id.* at *66.

59 In Britain, both general law and local common law were part of the municipal law of the land. "Municipal" law referred to the law of "any one state or nation, which is governed by the same laws and customs," and thus provided "the rule by which particular districts, communities, or nations are governed." 1 BLACKSTONE, *supra* note 57, at *44. In Britain, the common law both incorporated the law of nations and included local common law as part of the overall law of the land, or the municipal law of Britain. *Id.*

60 *Id.* at *67–68.

61 1 VATTEL, *supra* note 53, bk. I, § 17, at 13.

parts of it entirely. If it departed from rules, principles, or customs that were generally characteristic of the local law of other sovereigns, other sovereigns would have no legal justification for objecting or retaliating. Under the law of nations, each sovereign had exclusive jurisdiction over its own territory, and could regulate within it as it saw fit if no rights of a foreign nation were involved.[62] Local matters were thus subject to local sovereign control. That a group of independent sovereigns generally adopted the same local rule did not transform local law into general law.

Blackstone confirmed the distinction between general law and local law in describing both the law of nations and the common law. He described the law of nations as "general law."[63] This general law of nations was general in the sense that it was a shared body of law governing relations among different sovereigns. It was general because it was applicable to the *whole* civilized world. No one sovereign, he explained, could "dictate or prescribe the rules of this law to the rest."[64] Blackstone contrasted general law with the common law, which was the "law of the land" within a single sovereign, Great Britain.[65] The common law incorporated both the general law and the local rules that governed only within the jurisdiction of Britain, even if other sovereigns, such as the newly independent American states, adopted them as well.[66] Those local rules were subject to the plenary control of Britain[67] and did not apply extraterritorially to bind other sovereigns. For local, or internal, matters, Britain had its own customs and fundamental rights, but it had no legal basis to demand that other free and independent sovereigns adopt the same local rules. Of course, common law jurisdictions had much local law in common because they adopted or inherited it from a common source. But that common origin did not transform local law into general law or mean they lacked the power to change it for themselves.

By the time the Constitution was adopted, the distinction between general law and local law was well established, and the

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62 *Id.* bk. II, § 84, at 147–48.

63 4 BLACKSTONE, *supra* note 57, at *66.

64 *Id.*

65 *Id.* at *67.

66 *Id.*

67 *Id.* at *160–62 (describing parliamentary sovereignty).

Constitution took account of it.[68] The Constitution allocated authority over external and internal matters to different levels of government.[69] As discussed, by delegating some—but not all—of their sovereign authority to a new federal government, the states retained residual sovereignty to govern most local matters. The Constitution thus left most internal matters—governed by local law—to the states, subject only to displacement by duly enacted provisions of "the supreme Law of the Land." In contrast, it gave Congress and the President authority over matters of national importance, such as foreign relations and interstate commerce, and authorized federal courts to hear various categories of cases governed by general law. In this way, the Constitution empowered the federal government to comply with general law, and thus to earn international respect and build commercial relations.

The Constitution empowered the federal judiciary to serve as a primary mechanism for ensuring U.S. compliance with general law. Under the Articles of Confederation, states routinely violated or obstructed general law in cases involving foreign nationals[70]—whether by denying neutral treatment to foreign merchants[71] or disrespecting the immunities of diplomats.[72] This conduct, widely known and lamented, weakened U.S. commercial and foreign relations. At the Convention, delegate Edmund Randolph cited these abuses as a key reason to replace the Articles.[73] For a fledgling republic, neglect of general law risked economic and military consequences that the United States could hardly afford.

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68 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 5–6 (describing this distinction); Bellia & Clark, *General Law in Federal Court*, *supra* note 7, at 664–69 (same).

69 In *Federalist No. 45*, Madison explained that the powers granted to the federal government "will be exercised principally on external objects, as war, peace, [negotiation], and foreign commerce," while the powers "reserved to the several States will extend to . . . the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

70 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 758–60 (2012) [hereinafter Bellia & Clark, *Law of Nations as Constitutional Law*] (describing the states' failure to uphold the law of state-state relations); Clark, *Federal Common Law*, *supra* note 22, at 1348–49 (describing the states' failure to fairly apply the law merchant).

71 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 25 (describing such bias).

72 *See id.* at 49.

73 As Randolph explained, the Confederation was unable to prevent or redress "acts against a foreign power contrary to the laws of nations" and "therefore [could not] prevent a war." 1 FARRAND'S RECORDS, *supra* note 36, at 24–25 (notes of James McHenry from May 29, 1787).

The Founders thus designed the Constitution to enable the federal government to apply and enforce the three principal branches of general law—the law merchant, the law maritime, and the law of state-state relations. They did so in two main ways. First, Article III extended the federal judicial power to cases that traditionally involved application of general law. Second, the Constitution vested the political branches with authority over foreign recognition and retaliation—two key powers under the law of state-state relations. The President and Congress alone could decide when to recognize foreign nations or respond to violations of U.S. rights. Accordingly, courts were bound to recognize the rights of foreign nations under general law but had no authority—without direction from the political branches—to penalize foreign nations for violating U.S. rights under the same law.[74]

Early federal courts did not intrude on residual state sovereignty when applying the general law of nations in appropriate cases. In some contexts, the Constitution required the application of such law to uphold aspects of its design—such as the constitutional equality of the states or the political branches' control over war and foreign relations. In other contexts, application of the general law of nations did not contradict—but rather mirrored—state practice. As the next Section explains, the Constitution did not treat all sources of unwritten law as a monolith. The Founders tailored the instrument to accommodate each branch of the law of nations in ways that balanced national interests and residual state authority. These structural choices enabled the United States to reap the diplomatic and economic benefits of adherence to transnational norms—while preserving the constitutional balance between state and federal authority.

C. Traditional Applications of General Law

The three principal branches of the general law of nations—and their distinction from local common law—were well understood by lawyers at the time of the Founding. Each branch facilitated distinct kinds of sovereign interactions: The law merchant supported commercial exchange, the law maritime governed navigation and shipping, and the law of state-state relations upheld

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[74] Anthony J. Bellia Jr. & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though It Is Not the Supreme Law of the Land*, 106 GEO. L.J. 1915, 1919–23, 1926–27 (2018) [hereinafter Bellia & Clark, *Why Federal Courts Apply the Law of Nations*].

the rights of foreign sovereigns and fostered peaceful coexistence.[75] These bodies of transnational norms—rooted in shared custom, long-standing practice, and mutual interest—enabled sovereigns to coordinate their conduct, manage cross-border disputes, and maintain peaceful relations.

One of the Founders' central goals was to create a government worthy of international recognition. To do so, they had to structure the Constitution to facilitate U.S. compliance with the general law of nations. The Constitution was drafted not only to earn legitimacy abroad, but also to allocate authority between states and the federal government and among the federal branches.[76] Because it vested primary responsibility for foreign affairs in the federal government, the Constitution empowered the United States to act as a unified sovereign in its external relations and to fulfill its obligations under the law of nations.[77]

Consistent with this design, Article III vested the federal judiciary with jurisdiction to apply the three main branches of the general law of nations in appropriate cases. When federal courts applied general law in ways the Constitution authorized or required, the United States enjoyed the benefits of international recognition and peaceful relations without encroaching on the residual sovereign authority of the states.[78]

The broader conception of general common law that emerged in the late nineteenth and early twentieth centuries upended this limited judicial role. Federal courts recast local law as general law and used it to displace state law in the absence of a valid federal enactment. *Erie* rejected this practice and restored the Constitution's restraints on displacement of state law. As discussed in Part III, revivalist theories stretch general law beyond its original parameters and thus invite federal courts to override state law without any warrant in the supreme law of the land. If accepted, such theories would unsettle the very structural compromise the Constitution was designed to preserve. Since *Erie*, the courts have largely applied general law within constitutionally grounded limits. Revivalists have yet to offer a persuasive rationale for why federal courts should apply it more expansively

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75 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 3–4.

76 *See* Bellia & Clark, *Law of Nations as Constitutional Law*, *supra* note 70, at 733–35, 832–33.

77 *See id.*

78 *Id.* at 739–40.

in disregard of residual state authority. Their proposals raise significant constitutional difficulties that the federal courts' early application of the general law of nations did not.

1. General commercial law.

At the Founding, general commercial law—also known as the law merchant—was a body of customary rules that nations followed in order to facilitate and regulate cross-border trade.[79] Blackstone described it as "a particular system of customs" that was "ingrafted into" the common law "for the benefit of trade"[80] and "which all nations agree in and take notice of."[81] As adopted by the common law, it was "part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries."[82] Like the broader law of nations, the law merchant was part of English common law, and common law courts administered it. As Lord Mansfield explained in 1764, "[T]he law of nations, in its full extent was part of the law of England."[83] Blackstone likewise explained that "the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[84] In applying the law merchant, English courts were applying norms recognized across jurisdictions for their mutual benefit.[85]

After independence, the American states largely adopted the English common law—including the law of nations—as part of their own legal systems. "[E]leven of the original thirteen colonies immediately adopted 'receiving statutes' expressly incorporating the common law as state law."[86] New Jersey included a similar provision in its 1776 Constitution.[87] Although Connecticut lacked a written constitution until 1818, its courts treated the common

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79 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 21–25 (describing the law merchant).

80 1 BLACKSTONE, *supra* note 57, at *75.

81 *Id.* at *273.

82 *Id.*

83 Triquet v. Bath (1764) 97 Eng. Rep. 936, 938; 3 Burr. 1478, 1481 (quotation marks omitted) (quoting Buvot v. Barbut (1736) 25 Eng. Rep. 777, 778; Cas. T. Talbot 281, 283).

84 4 BLACKSTONE, *supra* note 57, at *67.

85 *Id.*

86 John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1027 n.307 (2002).

87 Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 799 (1951).

law as part of its unwritten constitution and applied it "so far as it correspond[ed] with [the state's] circumstances and situation."[88] Thus, at the Founding, judges and commentators generally understood the law merchant to be a component of the common law that each state had incorporated to govern and facilitate interstate and international commercial transactions.

Despite adopting this shared body of law, the states frequently misapplied or disregarded it during the Confederation era.[89] State judges and juries often showed bias against foreign citizens and creditors, and some states ignored the rights of foreign ambassadors. In drafting the Constitution, the Founders sought to remedy these shortcomings by equipping the United States to uphold all three branches of the law of nations. Notably, they did not do so by recognizing general law as supreme federal law or by granting federal courts blanket jurisdiction to hear all cases arising under such law. Instead, the Constitution employed more tailored mechanisms—allocating responsibility among Congress, the President, and the federal judiciary—to enable adherence to the law of nations in appropriate cases.

With respect to the law merchant, all of the states initially applied it as part of their common law, and the Constitution employed two principal mechanisms to ensure its effective enforcement. First, it vested Congress with the power to regulate commerce with foreign nations and among the states. The Constitution thus empowered Congress to codify commercial norms as necessary to preempt inconsistent state laws.[90] Second, the Constitution extended federal judicial power to controversies between citizens of different states as well as those between U.S. citizens and foreign nationals.[91] This judicial authority was critical: Under the Articles of Confederation, state courts had often misapplied the law merchant, particularly in disputes involving British creditors after the Treaty of Paris. Diversity jurisdiction did not change the content of the law merchant as the applicable rule of decision; instead, it provided a different forum to ensure its more consistent and impartial application.[92]

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88 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 1 (Windham 1795).

89 *See* Madison, *supra* note 34, at 362.

90 U.S. CONST. art. I, § 8, cl. 3.

91 *Id.* art. III, § 2, cl. 1.

92 *Cf.* Clark, *Federal Common Law*, *supra* note 22, at 1353.

The Judiciary Act of 1789[93] (First Judiciary Act) implemented this jurisdictional framework by authorizing federal courts to hear diversity cases involving amounts in controversy exceeding $500[94]—most of which involved commercial disputes governed by the law merchant.[95] In adjudicating such cases, federal courts applied the same general commercial law as their state counterparts. Although *Swift* is the case most associated with the federal judiciary's embrace of general commercial law, both state and federal courts had long applied such law prior to that decision. In the decades following ratification, federal judicial reliance on the law merchant was routine and raised no constitutional objections.

During this period, state courts applied the law merchant not as local law but as a transnational body of customary rules. As a New York court explained in 1821, "The law merchant relative to bills of exchange and endorsed notes, and commercial paper generally, is not the law of this State only, but of all the States of the Union, and of all the commercial nations of Europe."[96] Courts adjudicating such disputes—often in actions of debt or assumpsit—consulted decisions from multiple jurisdictions and exercised independent judgment to ascertain the content of general commercial law.[97] This approach mirrored the practice of English courts. State courts, like English courts, understood the law merchant as a transnational source of law.

Federal courts understood the law merchant in the same way. In diversity cases, federal court jurisdiction provided a change of forum, not substance. The Process Acts of 1789[98] and 1792[99] required federal courts to adopt the forms of proceeding used by the courts of the state in which they sat,[100] and § 34 of the First Judiciary Act instructed federal courts to apply "the laws of

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93 Ch. 20, 1 Stat. 73 (1789).

94 *Id.* § 11, 1 Stat. at 78–79.

95 *See* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 17 (1948) (noting that the amount-in-controversy requirement meant that "the principal economic groups involved in [federal court] litigation, quantitatively at least, were the shipping industry, the holders of bills and notes, and those who dealt in land").

96 Woodworth v. Bank of Am., 19 Johns. 391, 416 (N.Y. Sup. Ct. 1821) (emphasis omitted).

97 *See, e.g.*, *id.* at 398–403; *see also* Bellia & Clark, *General Law in Federal Court*, *supra* note 7, at 679–87.

98 Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (repealed 1792).

99 Act of May 8, 1792, ch. 36, 1 Stat. 275 (repealed 1872).

100 Act of Sept. 29, 1789, § 2, 1 Stat. at 93; Act of May 8, 1792, § 2, 1 Stat. at 276.

the several states" in common law cases "where they apply."[101] Whether general or local law governed a dispute was therefore a threshold question. If a state had abandoned general commercial law in favor of local rules, federal courts were bound to apply those rules and defer to state court interpretations of them.

Justice Joseph Story confirmed this principle in 1826 in *Halsey v. Fairbanks*.[102] When a state replaced general law with specific local law, he explained, federal courts had to follow their lead—even if the applicable local law departed from prevailing general commercial norms.[103] *Halsey* implicated a local doctrine derived from the 1809 Massachusetts case *Widgery v. Haskell*.[104] According to Justice Story, *Widgery* established, as a "rule of local law," "that in Massachusetts an assignment to a trustee, executed by a debtor bonâ fide for the benefit of creditors, is not valid, unless the creditors are parties to, or assent to the deed."[105] Although Justice Story stated that he was "unconvinced" of the soundness of the rule, he made clear that, insofar as the case stood "upon local law, my duty is to follow it, and it will be performed without hesitation."[106]

Although Justice Story did not specify the source of this duty, both a federal statute and the Constitution required it. First, § 34 of the First Judiciary Act required federal courts to apply local state law in common law actions absent federal law to the contrary. Specifically, in the absence of a controlling provision of "the constitution, treaties, or statutes of the United States," § 34 required federal courts to apply "the laws of the several states . . . in trials at common law . . . in cases where they apply."[107] In *Swift*, Justice Story understood § 34 to apply to both legislative enactments and "long established local customs having the force of laws."[108]

Even absent § 34, however, the Constitution imposes the same duty on federal courts to apply local state law, and to defer to state court understandings of their own local law. As we have explained elsewhere, the states retained all preexisting rights and powers that their people did not transfer to the United States

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101 Judiciary Act of 1789 § 34, 1 Stat. at 92.

102 11 F. Cas. 295 (Story, Circuit Justice, C.C.D. Mass. 1826) (No. 5,964).

103 *Id.* at 297.

104 5 Mass. 144 (1809).

105 *Halsey*, 11 F. Cas. at 300.

106 *Id.*

107 Judiciary Act of 1789 § 34, 1. Stat. at 92.

108 *Swift*, 41 U.S. (16 Pet.) at 18.

government in clear terms or by necessary implication.[109] Thus, as the Supreme Court has recognized from the Founding until today, states retain all residual sovereign authority of which the Constitution has not divested them.[110] This sovereign authority includes the right of each state to determine the content and meaning of its own laws. As Vattel explained, no sovereign had the right to question or judge another sovereign's administration of its own local laws.[111] Just as one sovereign had to respect the judgments of another sovereign's courts,[112] so too did it have to respect another sovereign's understanding of its own laws. Nothing in the Constitution divested states of this right in clear terms or by necessary implication. For this reason, it is not surprising that early federal courts applied local state law and respected state court understandings of it, not only in actions at law, to which § 34 applied, but also in cases in equity, to which § 34 did not apply.

For example, in *Elmendorf v. Taylor*,[113] which began as a bill in equity, the Court declared that "[t]his Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws."[114] Chief Justice John Marshall noted that this was true even though the Kentucky statute at issue would have been open to "a considerable contrariety of opinion" if the Court were construing that law for the first time.[115] Thus, in *Elmendorf*, because "this question ha[d] been settled in Kentucky," the Court was obligated to "suppose it to be rightly settled."[116] The Court rested this conclusion on the universal principle "that the judicial department of every government . . . is the appropriate organ for construing the legislative acts of that government."[117]

Specifically, the Court explained that no sovereign may question how another sovereign understands its own local laws:

> [N]o Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation,

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109 *See generally* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 30.
110 *See* Bellia & Clark, *Constitutional Federalism*, *supra* note 32, at 391–92.
111 1 VATTEL, *supra* note 53, bk. II, § 54, at 138.
112 *Id.* bk. II, § 84, at 148.
113 23 U.S. (10 Wheat.) 152 (1825).
114 *Id.* at 159.
115 *Id.*
116 *Id.* at 160.
117 *Id.* at 159.

> had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this Court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States.[118]

The Court's reasoning recognized that the states retained residual sovereign authority both to adopt and to interpret their own local law in the absence of supreme federal law to the contrary. Accordingly, the Constitution requires federal courts to respect such local decisions.

On the other hand, when a state relied on the general law merchant to resolve a particular matter, federal courts were free to do the same. And like all courts applying the law merchant, federal courts exercised independent judgment in determining its content. For example, in its 1833 opinion in *Nichols v. Fearson*,[119] the Supreme Court addressed a question of "general mercantile interest" by looking to "the weight of authority"[120] across multiple jurisdictions rather than deferring to the approach of any one state.[121] The Court's reasoning reflected the shared understanding that in matters of general commercial law, no single jurisdiction could prescribe the content of such law. Accordingly, neither federal nor state courts were bound by the precedents of the other.

Similarly, in his 1838 opinion in *Williams v. Suffolk Insurance Co.*,[122] Justice Story explained that federal courts could depart

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118 *Elmendorf*, 23 U.S. (10 Wheat.) at 159–60.

119 32 U.S. (7 Pet.) 103 (1833).

120 *Id.* at 108–09.

121 Defendant Samuel Fearson endorsed a promissory note for $101 to plaintiff William Nichols in exchange for $97 in cash. *Id.* at 103. The question was whether this transaction was usurious and the promissory note thus unenforceable. *Id.* at 105. The Court examined decisions from New York, Massachusetts, and Connecticut, and concluded that "[u]pon a subject of such general mercantile interest, we must dispose of the question according to our own best judgment of the law." *Id.* at 108. The Court concluded that "the great weight of authority is certainly in favour of the validity of the contract under review." *Fearson*, 32 U.S. (7 Pet.) at 111.

122 29 F. Cas. 1402 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 17,738).

from state decisions on questions of a "general nature" governed by commercial law.[123] If the issue was not "founded . . . upon local law, but upon the general principles of commercial law,"[124] federal courts were "at liberty to consult their own opinions."[125] This reasoning was uncontroversial at the time. The decision in *Swift* a few years later reflected the same well-established understanding: General commercial law transcended state borders, and so long as state courts considered it applicable, federal courts were free to exercise independent judgment to determine its content.

These early decisions implemented a basic feature of the Constitution: States retained sovereign authority to apply local law or general law as they saw fit unless supreme federal law required otherwise. In the absence of supreme federal law, federal courts were bound to follow the states' choices. Thus, when a state applied general commercial law to resolve a disputed question, the Constitution permitted federal courts to do the same. Federal judicial application of the law merchant did not displace local state law because federal courts were applying the same source of law that the state itself would have applied to the dispute—even if each court exercised independent judgment to determine its content.[126] *Swift* would later become controversial for the broader doctrine it spawned because that doctrine permitted federal courts to disregard local state law. The actual 1842 decision, however, was consistent with the Founders' understanding of residual state sovereignty and thus unremarkable. At that time, both federal and state courts treated the content of the law merchant as a matter of general, not local, law, and the understanding of that law by either set of courts was not binding on the other.

In *Swift*, the question was whether release of a preexisting debt was valuable consideration for a negotiable instrument such that the recipient of the instrument was a bona fide holder.[127] New

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[123] *Id.* at 1405.

[124] *Id.*

[125] *Id.* Similarly, in *Robinson v. Commonwealth Insurance Co.*, 20 F. Cas. 1002 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 11,949), Justice Story, after opining on a question of general commercial law, acknowledged that the Supreme Judicial Court of Massachusetts had laid down a "somewhat different" rule. *Id.* at 1004. "But questions of a commercial and general nature, like this, are not deemed by the courts of the United States to be matters of local law, in which the courts of the United States are positively bound by the decisions of the state courts." *Id.*

[126] *See* Bellia & Clark, *General Law in Federal Court*, *supra* note 7, at 684–85.

[127] Respondent George Tyson bought land from speculators Nathanial Norton and Jairus Keith. As payment, Tyson gave them a bill of exchange promising to pay the amount in question. Norton and Keith subsequently gave Tyson's bill to petitioner John Swift as

York courts had treated the issue as one of general commercial law—rather than one of local law—and had understood the general law to be that release of a preexisting debt was insufficient consideration for that purpose. Writing for the Court, Justice Story acknowledged the New York courts' understanding of general law. But, in accord with long-standing practice, the Court explained that it was not bound to follow this understanding "if it differs from the principles established in the general commercial law."[128] After surveying decisions from multiple jurisdictions, the Court concluded that a preexisting debt did constitute valuable consideration under the general law.[129]

The *Swift* Court emphasized that federal courts—like their state counterparts—had authority to determine the content of general commercial law independently. "[T]he Courts of New York," the Court observed, "do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law."[130] Because New York courts themselves applied general law, federal courts were free to reach their own conclusions as to what that law required. The *Swift* Court's exercise of independent judgment was standard practice at the time: Courts were expected to reason from general principles and established customs in commercial cases, rather than defer to the understanding of any single jurisdiction.

Understood in this light, *Swift* did not depart from judicial practice at the Founding or otherwise intrude upon residual state sovereignty. It merely confirmed that when states treated commercial rules as part of the general law merchant, federal courts possessed the same authority to exercise independent judgment

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payment for a preexisting debt. When Swift demanded payment from Tyson, he refused on the grounds that Norton and Keith had fraudulently obtained the bill in exchange for land that Norton and Keith did not actually own. Swift then sued Tyson in federal court seeking payment under the instrument. *See Swift*, 41 U.S. (16 Pet.) at 14–16.

128 *Id.* at 18.

129 *Id.* at 19. As a matter of authority, the Court found that the clear weight of decisions favored treating a preexisting debt as valuable consideration. As a matter of reason, the Court stressed:

> It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts.

Id. at 20.

130 *Id.* at 18.

in determining the content of such law. That authority was no more constitutionally problematic than a federal court ascertaining the common law of England, the civil law of France, or the feudal laws of Japan when state law required application of such law. The Constitution did not require lockstep conformity between state and federal courts on the precise content of general law because neither court's judgment could bind the other or authoritatively establish the content of general law.

The federal courts' application of general commercial law during this period—including in *Swift*—did not violate residual state sovereignty by displacing state law in violation of the Supremacy Clause. Federal courts were not imposing federal rules or displacing local state law, but rather applying the same transnational commercial standards that state courts applied. Where a state had adopted a contrary local rule, federal courts applied that rule and deferred to state courts' interpretation of its content.[131] The constitutional difficulty emerged only later, when federal courts claimed that the *Swift* doctrine authorized them to apply general common law notwithstanding the existence of local state rules governing the matter in question. That expansion—discussed in Part II—is what gave rise to the constitutional problems recognized in *Erie*.

2. General maritime law.

General maritime law—also known as the "law maritime"—formed another principal branch of the law of nations at the Founding.[132] In late eighteenth-century England, admiralty courts applied this distinct body of law to disputes arising on the high seas or within the ebb and flow of the tide.[133] Courts distinguished between the law of the sea (administered in admiralty)

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[131] This is not to say that it was always easy to discern whether state courts were applying local law to particular questions, especially without widespread reporting of state decisions and access to the precise content of local law, given the variable sources from which it was drawn, including judicial opinions, customs, and usages. But as explained, the principle was clear: If a state adopted local law in lieu of general commercial law, federal courts had a duty to apply it and deferred to state court understandings of it.

[132] *See* 4 BLACKSTONE, *supra* note 57, at *67 (describing the law maritime as a branch of the law of nations).

[133] *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 117–19 (describing the jurisdiction of admiralty courts and the law they applied).

and the law of the land (administered in common law courts).[134] The law maritime encompassed both public matters—such as prize and capture governed by the law of state-state relations—and private maritime disputes, including contracts and torts arising from maritime activity. As Justice Story later explained, admiralty jurisdiction was "divisible into two great branches, one embracing captures, and questions of prize, arising *jure belli*; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations."[135] Different courts handled each branch: Prize courts addressed the former; instance courts the latter.[136]

As applied to private matters, the law maritime functioned much like the law merchant: It comprised a body of transnational commercial norms governing, as Blackstone put it, "all marine causes, relating to freight, average, demurrage, insurance, bottomry, and others of a similar nature."[137] Although admiralty and common law courts sometimes disputed the boundaries of their respective jurisdictions, they agreed that admiralty courts applied a distinct system of general law—one not subject to local variation.[138] Prize cases, which involved the capture of ships and cargo belonging to other nations, were governed by the law of state-state relations and likewise beyond the reach of local law.[139]

The Constitution was crafted with this background in mind. Article III extends federal judicial power "to all Cases of admiralty and maritime Jurisdiction."[140] This jurisdiction encompassed

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134 *See* DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES 35–64 (1970) (describing the distinction).

135 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 864, at 614 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press reprt. 1987) (1833); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 509 (New York, O. Halsted 1827) ("In treating of this law, we refer to its pacific character as the law of commerce and navigation in time of peace. The respective rights of belligerents and neutrals in time of war constitute the code of prize law, and that forms a distinct subject of inquiry.").

136 *See* Rose v. Himely, 8 U.S. (4 Cranch) 241, 282–83 (1808) (Johnson, J., dissenting). As Justice William Johnson put it, "In its ordinary jurisdiction, the admiralty takes cognizance of mere questions of *meum* and *tuum* arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects." *Id.* at 282.

137 4 BLACKSTONE, *supra* note 57, at *67.

138 *See* 3 BLACKSTONE, *supra* note 57, at *68–69 (describing the "maritime courts" as those that "have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law").

139 *See id.* at *69 (explaining prize law under the law of nations).

140 U.S. CONST. art. III, § 2, cl. 1.

both sovereign matters, like prize cases, and private maritime disputes.[141] Alexander Hamilton emphasized the significance of this grant, describing prize causes as the "most important part" of admiralty jurisdiction because erroneous adjudication could provoke diplomatic conflict or war.[142] Under the Articles, state courts had been biased and unreliable in admiralty matters, especially those involving foreign parties.[143] As Hamilton observed in *Federalist No. 80*, even "[t]he most bigotted idolizers of state authority" agreed that maritime causes "so commonly affect the rights of foreigners"[144] that they warranted federal court jurisdiction.

Although the exact boundaries of federal admiralty jurisdiction remained subject to debate, it was well settled that federal courts were authorized—and expected—to apply general maritime law. Congress implemented the Constitution's jurisdictional grant in the First Judiciary Act,[145] and in 1794, the Supreme Court confirmed that "every District Court in the *United States*, possesse[d] all the powers of a court of Admiralty,"[146] as well as those of a common law court. When exercising admiralty jurisdiction, federal judges routinely employed independent judgment to determine and apply the law maritime.

Over time, federal courts expanded the reach of admiralty jurisdiction beyond its traditional confines under English law. In England, admiralty jurisdiction was limited "to contracts and things exclusively made and done upon the high seas, and to be

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141 Blackstone described this branch of the law of nations as applying to disputes involving state-state relations, such as "disputes relating to prizes, to shipwrecks, to hostages, and ransom bills," as well as private commercial disputes and torts—in other words, "in all marine causes, relating to freight, average, demurrage, insurance, bottomry, and others of a similar nature." 4 BLACKSTONE, *supra* note 57, at *67.

142 THE FEDERALIST NO. 80, at 536–38 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

143 In response, Congress recommended that states adopt laws directing their admiralty courts to adhere to the decisions of the three-judge admiralty court of appeals established under the Articles. *See* 16 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 61–62 (Gaillard Hunt ed., 1910).

144 THE FEDERALIST NO. 80, *supra* note 142, at 538.

145 *See* Judiciary Act of 1789 § 9, 1 Stat. at 77. The Act gave federal courts

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; [ ] saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Id.

146 Glass v. Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794) (emphasis in original).

executed upon the high seas."[147] Other claims, even if loosely related to maritime activities, fell within the jurisdiction of the common law courts. In *De Lovio v. Boit*,[148] however, Justice Story rejected this restricted view. He argued that the Constitution's reference to "admiralty and maritime" jurisdiction extended to "all maritime contracts, torts and injuries."[149] His interpretation brought a broader range of disputes within federal admiralty jurisdiction, and sometimes within diversity jurisdiction as well. Regardless of the jurisdiction they were exercising, federal courts consistently exercised independent judgment to identify and apply the governing rules of general maritime law.

As then-Professor William Fletcher explained, "Marine insurance cases in the early nineteenth century provide the clearest example of the federal courts' deciding cases under the general common law."[150] He noted that in such cases, the Supreme Court rarely relied on state court decisions. Instead, it typically examined the issues independently, sometimes consulting English authorities, but only occasionally referencing state law:

> In deciding marine insurance cases, the United States Supreme Court seldom discussed particular state court decisions. In most cases, the Court simply considered the question at large, with occasional reliance on English cases and only infrequent reference to relevant state decisions. In a very few cases, however, the Supreme Court decided questions on which the state courts were in disagreement. An analysis of the Supreme Court's decisions on three such occasions shows that the Court considered itself to be deciding questions of the general law merchant on which it had the right—indeed, the inescapable duty—to follow its own judgment on what that general law was or should be.[151]

During the early decades of the Republic, admiralty cases followed the same constitutional logic as *Swift*: Federal courts were

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147 De Lovio v. Boit, 7 F. Cas. 418, 426 (Story, Circuit Justice, C.C.D. Mass. 1815) (No. 3,776).

148 7 F. Cas. 418 (Story, Circuit Justice, C.C.D. Mass. 1815) (No. 3,776).

149 *Id.* at 442. The Supreme Court adopted Justice Story's view in 1871. *See* Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 35 (1871).

150 Fletcher, *supra* note 14, at 1538.

151 *Id.* at 1540. Of course, federal courts would follow local rather than general law when it applied. *See* The Jerusalem, 13 F. Cas. 559, 563 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 7,293) (stating that when admiralty jurisdiction "rightfully attaches on the subject matter, [the court] will exercise it conformably with the law of nations, or the lex loci contractus, as the case may require").

not displacing local law but applying a shared body of general transnational norms recognized across jurisdictions. The federal courts' use of general maritime law was necessary to exercise the admiralty and maritime jurisdiction conferred by the Constitution and implemented by Congress. Indeed, until the mid-nineteenth century, the tidewater doctrine limited federal admiralty jurisdiction to waters within the ebb and flow of the tide[152]—leaving states free to apply local law within their residual territorial sovereignty. Only later did the Court expand admiralty jurisdiction to the inland waterways[153] and transform general maritime law into federal common law[154]—a doctrinal shift that introduced new questions of constitutional legitimacy.[155] But in the early Republic, federal courts appropriately and routinely applied general maritime law well within the Constitution's structural limits.

3. General law governing state-state relations.

The third principal branch of the law of nations governed the reciprocal rights and duties of sovereign states.[156] This body of general law—focused on state-state relations—established baseline norms of sovereign conduct that served to facilitate peaceful sovereign relations.[157] It recognized rights such as exclusive territorial sovereignty, neutral use of the high seas, the conduct of diplomacy, and freedom from external control by other nations.[158] Correspondingly, nations were obligated to respect the same rights in others.[159] Violations of these obligations—particularly those deemed "perfect rights"—gave the aggrieved nation just cause to retaliate, including by force of arms.[160]

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152 *See infra* text accompanying notes 480–82.

153 *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 453 (1852).

154 *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

155 *See infra* Part IV.F.1.

156 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 44–45 (describing this law).

157 *See id.* (describing this purpose).

158 1 VATTEL, *supra* note 53, bk. I, § 281, at 113–14 (describing the right to neutral use of the high seas); *id.* bk. II, § 49, at 137 (describing the right of security); *id.* bk. II, § 54, at 138 (describing the right of each nation to self-governance and preservation from injury); 2 VATTEL, *supra* note 53, bk. IV, § 57, at 133 (describing the right of embassy).

159 *See* 1 VATTEL, *supra* note 53, bk. II, §§ 45–47, at 136–37 (explaining these important rights and obligations under the law of state-state relations).

160 *Id.* preliminaries, §§ 20, 22, at 6–7.

In Great Britain, both common law and admiralty courts applied this law of state-state relations.[161] Admiralty courts addressed prize and capture under the law of war,[162] while common law courts enforced the rights and immunities of foreign sovereigns and diplomats.[163] In doing so, British courts not only fulfilled their nation's obligations under the law of nations—which was a part of the common law—but also preserved the Crown's exclusive control over foreign affairs. When British courts recognized the rights of foreign sovereigns, they affirmed the Crown's decision to extend recognition through diplomatic relations or treaty.[164] And when they declined to retaliate against other nations' legal rights absent express authorization from the Crown, they respected the Crown's prerogative to decide whether, when, and how Britain would respond to breaches of its rights.[165] This practice ensured that judicial action would not provoke foreign conflicts that the Crown had not authorized.[166]

The U.S. Constitution pursued the same strategy by allocating core foreign affairs powers—recognition, retaliation, war, and treaty making—to the federal political branches. It also vested federal courts with jurisdiction over cases likely to implicate the law of state-state relations. Early federal courts regularly applied this body of law in cases to uphold foreign territorial sovereignty, neutral commerce, diplomatic immunity, treaty rights, and other sovereign rights that, if mishandled, could disrupt international relations.[167] The Founders knew firsthand how state-level misconduct under the Articles—such as violating diplomatic protections or failing to honor treaties—undermined national priorities and invited foreign reproach. The Constitution responded by channeling such disputes into federal court, ensuring that the United States could speak with one voice and meet its obligations on the international stage. Prize cases and suits involving foreign sovereign immunities provide clear examples.

a) Prize cases. In the early decades of the Republic, federal courts regularly applied the general law of state-state relations in

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161 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 8 (describing this practice).

162 *See id*.

163 *See id*.

164 *See* 1 BLACKSTONE, *supra* note 57, at *254, *257 (describing these prerogatives).

165 *See id*. at *257–59 (describing these prerogatives).

166 *Id*.

167 *See supra* note 158 and accompanying text.

prize cases to vindicate foreign sovereign rights and avoid provoking international conflict. The Constitution did not prevent—but actually required—the application of general law in such cases. As discussed, Article III's grant of admiralty and maritime jurisdiction encompassed both private maritime disputes governed by the law maritime and prize cases governed by the law of state-state relations. Under the law of state-state relations, warring sovereigns had the right to capture enemy ships, cargo, and property at sea.[168] To encourage such captures, nations often issued commissions to privateers that authorized them to seize enemy vessels and bring them before prize courts for adjudication and potential condemnation.[169]

Federal admiralty jurisdiction served not only to facilitate these adjudications but also to ensure compliance with the law of nations and thereby minimize the risk of retaliation. Proper resolution of prize cases—especially those involving neutral or foreign vessels—was necessary to maintain peace and uphold neutral rights. "Because 'a nation was responsible for the actions of its [privateers] . . . ,' it was essential to the public peace and the amicable relations of nations that prize courts adhere closely to the law of nations."[170] As Justice Story warned, if a prize court were to deny justice to a foreign sovereign under the law of nations, the offending "nation itself becomes responsible to the parties aggrieved," and the injured foreign power "may vindicate their rights, either by a peaceful appeal to negotiation, or by a resort to arms."[171]

To mitigate such risks, the Constitution extended the federal judicial power to admiralty and maritime cases. This jurisdiction, as implemented by Congress, allowed federal courts—rather than state courts—to adjudicate prize disputes according to their independent interpretation of the law of nations, insulated from local bias or misunderstanding.[172] The First Judiciary Act made this portion of the federal courts' jurisdiction exclusive,[173] eliminating

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168 *See* Clark, *Federal Common Law*, *supra* note 22, at 1334–35.

169 *Id.*

170 *Id.* at 1335 (quoting William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 124 (1993)).

171 STORY, *supra* note 135, § 865, at 615.

172 Even the Articles of Confederation authorized national courts to hear "the trial of piracies and felonies committed on the high seas; and . . . appeals in all cases of capture." ARTICLES OF CONFEDERATION OF 1781, art. IX.

173 Section 9 of the Act gave the federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of

the risk that erroneous state court decisions might embroil the United States in international controversy.

Several Founding Era Supreme Court decisions underscore how seriously the federal courts took their duty to uphold the rights of foreign sovereigns in prize cases. In *United States v. Peters*,[174] decided in 1795, the Court recognized France's exclusive authority to adjudicate the legality of prizes brought into its own ports. Under the law of nations, every sovereign had the exclusive right to govern within its territory—including the authority to determine the legality of captures made by its privateers and brought within its territory for adjudication.[175]

The case arose when James Yard, a Philadelphia merchant, filed an in rem libel suit in federal court against the *Cassius*, a French privateer docked in Philadelphia. Yard claimed that the *Cassius* had unlawfully seized his neutral American vessel, even though a French prize court had already upheld the legality of the capture.[176] The Supreme Court ordered the federal district court to release the *Cassius*, ruling that under the law of nations, U.S. courts were bound to respect France's right to adjudicate prize claims brought before its courts:

> [B]y the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruize against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral ships, in time of war; and the said vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein.[177]

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impost, navigation or trade . . . ; [ ] saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789 § 9, 1 Stat. at 77; *see also* The Moses Taylor, 71 U.S. (4 Wall.) 411, 415 (1867) (interpreting § 9 to give federal courts exclusive jurisdiction over all proceedings in rem, including prize cases).

174 3 U.S. (3 Dall.) 121 (1795).

175 *See* 1 VATTEL, *supra* note 53, bk. II, § 84, at 147–48; 2 VATTEL, *supra* note 53, bk. III, § 229, at 90.

176 *Peters*, 3 U.S. (3 Dall.) at 121–25.

177 *Peters*, 3 U.S. (3 Dall.) at 129–30.

During this era, foreign prize decrees were considered acts of state taken within a nation's territorial jurisdiction, and the law of nations required the courts of other nations to treat them as conclusive. Accordingly, the *Peters* Court condemned the district court's proceedings as "in contempt of the government of the United States, against the laws of nations, [and] the treaties subsisting between the United States and the French Republic."[178]

At the same time, the Constitution gave Congress and the President the authority to override foreign prize decrees if they deemed doing so necessary to protect U.S. interests.[179] But absent such a directive, federal courts were expected to uphold the sovereign rights of foreign nations as defined by the general law of state-state relations.

Relatedly, the Supreme Court established from its earliest days that federal statutes would not be interpreted to infringe the rights of other sovereigns under the general law of nations unless Congress expressed that intent clearly. In *Murray v. Schooner Charming Betsy*,[180] the Court announced that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[181] During the Quasi-War with France, the United States took measures to enforce its right to neutral commerce against French interference. As part of this effort, Congress enacted the Nonintercourse Act of 1800, which prohibited trade between U.S. residents and French territories.[182] Although the statute clearly barred American commerce, it was silent as to the neutral rights of other nations. The Court construed the Act narrowly to avoid interfering with the rights of neutral nations, thereby preserving the Constitution's allocation of foreign affairs authority to the political branches.[183]

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[178] *Id.* at 131 (emphasis omitted). In addition to upholding France's authority, the *Peters* Court refused even to consider whether it should deny France its rights under the law of state-state relations as a consequence of France's alleged violation of U.S. rights under such law. The Constitution, the Court determined, gave the political branches—not the courts—exclusive authority to decide whether, when, and how to hold France accountable. *Id.* at 130–32.

[179] When Congress clearly indicated its intent to violate the rights of a foreign sovereign under the law of nations—even at the risk of war—the Supreme Court followed the statute as (clearly) written. *See generally* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800) (upholding a federal statute enacted during the Quasi-War with France that departed from the law of nations in regulating salvage rights in ships or goods retaken from the enemy).

[180] 6 U.S. (2 Cranch) 64 (1804).

[181] *Id.* at 118.

[182] Act of Feb. 27, 1800, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).

[183] In this sense, the canon was less about the law of nations per se, and more about preserving the constitutional separation of powers. *See* Curtis A. Bradley, *The* Charming

Together, *Peters*, *Charming Betsy*, and related decisions illustrate the role that early federal courts played in applying the general law of state-state relations. These decisions not only vindicated the sovereign rights of foreign nations, but also implemented the Constitution's exclusive allocation of power over war and diplomacy to the political branches.[184] Had such matters remained within the jurisdiction of state courts, misapplications—or outright disregard—of international law could have provoked diplomatic friction or even armed conflict. By authorizing prize jurisdiction in the federal judiciary, the Constitution ensured that the United States could fulfill its obligations under international law and speak with a unified voice in foreign affairs. None of these applications of general law interfered with the residual sovereignty of the states because the Constitution vested exclusive authority to recognize foreign nations and conduct foreign relations in the political branches of the federal government. Thus, the states lacked residual state sovereignty to adopt local law to govern these cases.

b) The rights and immunities of foreign sovereigns. Federal courts applied the general law of state-state relations not only in prize cases, but also in cases involving the rights and immunities of foreign sovereigns, their heads of state, and their diplomatic representatives. Congress has since codified some of these immunities by statute, while others remain rooted in general law. In both contexts, federal courts have properly continued to apply these immunities when necessary to uphold the Constitution's allocation of foreign relations and war powers to the political branches.

The Supreme Court first addressed the immunities of foreign sovereigns in *The Schooner Exchange v. McFaddon*.[185] This decision illustrates how early courts applied the general law of state-state relations to uphold the Constitution's allocation of foreign relations powers to the political branches. The case arose after a group of American owners identified their former vessel docked in the port of Philadelphia.[186] French nationals had allegedly

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Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 524–31 (1998).

184 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 41–71; Bellia & Clark, *Why Federal Courts Apply the Law of Nations*, *supra* note 74, at 1922–26.

185 11 U.S. (7 Cranch) 116 (1812).

186 *Id.* at 117.

seized the ship on the high seas and refitted it as a French warship.[187] The American owners filed a libel action in federal court, asserting that the seizure violated their rights under the law of nations and seeking return of the vessel.

According to the plaintiffs, French nationals had "violently and forcibly taken" the ship from them on the high seas "in violation of the rights of the libellants, and of the law of nations."[188] The central question, as Chief Justice Marshall framed it, was "whether an American citizen can assert, in an American court, a title to an armed national vessel [of another country], found within the waters of the United States."[189] Unlike in *Peters*, the law of nations did not categorically bar adjudication because "no sentence or decree of condemnation had been pronounced against [the ship], by any [French] court of competent jurisdiction."[190]

Nevertheless, Chief Justice Marshall concluded that the French warship was immune from suit in U.S. courts. Drawing upon the law of nations, he recited the core principle that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[191] But this exclusivity, he explained, admitted certain implied exceptions grounded in mutual consent among nations. "All exceptions [ ] to the full and complete power of a nation within its own territories," he stressed, "must be traced up to the consent of the nation itself"[192]—whether express or implied.[193]

To illustrate this principle, Chief Justice Marshall pointed to several settled examples of sovereign immunity. First, he discussed head-of-state immunity, explaining that nations universally refrained from exercising jurisdiction over heads of state while present in their territory. Because this practice was "universally understood,"[194] Chief Justice Marshall treated it as an implied and binding exception to territorial jurisdiction.[195]

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187 *Id.* at 117–19.

188 *Id.* at 117.

189 *Id.* at 135.

190 *The Schooner Exch.*, 11 U.S. (7 Cranch) at 117; *see also id.* at 146–47.

191 *Id.* at 136.

192 *Id.*

193 *Id.*

194 *The Schooner Exch.*, 11 U.S. (7 Cranch) at 137. According to Chief Justice Marshall, "One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory." *Id.*

195 As Chief Justice Marshall explained, when one of these customary exceptions to territorial sovereignty is well established, "[a] nation would justly be considered as violating its faith, . . . [if it] should suddenly and without previous notice, exercise its territorial

Next, Chief Justice Marshall invoked diplomatic immunity. Like head-of-state immunity, this doctrine derived from the uniform practice of "all civilized nations"[196] and thus rested on the implied consent of sovereigns. He emphasized that diplomatic immunity "is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad,"[197] making international relations difficult, if not impossible.

Chief Justice Marshall then offered a third example—immunity for foreign troops lawfully passing through another sovereign's territory. He reasoned that "[t]he [express] grant of a free passage [ ] implies a waver of all jurisdiction over the troops during their passage."[198] Accordingly, "a general declaration that foreign troops may pass through a specified tract of country"[199] was sufficient to divest local courts of jurisdiction over those troops.

Finally, Chief Justice Marshall turned to the issue presented in *The Schooner Exchange*: the immunity of foreign "ships of war entering the ports of a friendly power."[200] He distinguished the dangers posed by land-based military forces from those posed by naval vessels. Because the dangers posed by "the march of an army through an inhabited country . . . do not ensue from admitting a ship of war, without special license, into a friendly port,"[201] nations had developed "[a] different rule [ ] with respect to this species of military force."[202] Specifically, Chief Justice Marshall explained, "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," absent an express prohibition.[203] On this basis, the Court found it "to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[204]

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powers in a manner not consonant to the usages and received obligations of the civilized world." *Id.*

196 *Id.* at 138.

197 *Id.* at 139.

198 *The Schooner Exch.*, 11 U.S. (7 Cranch) at 140.

199 *Id.*

200 *Id.* at 141.

201 *Id.*

202 *Id.*

203 *The Schooner Exch.*, 11 U.S. (7 Cranch) at 141.

204 *Id.* at 145–46. Significantly, Chief Justice Marshall rejected counsel's argument that courts should deny immunity to the vessel on the grounds that France's initial seizure of the vessel violated U.S. rights to neutral use of the high seas under the law of nations. In keeping with the Constitution's assignment of the reprisal and war powers to Congress,

The Schooner Exchange thus grounded foreign sovereign immunities in the established rules and customs of the general law of nations. These default rules were not only customary but also essential to preserving the political branches' exclusive control over recognition, diplomacy, reprisal, and war. By treating such immunities as rules of decision, federal courts avoided usurping powers that the Constitution assigned exclusively to Congress and the President. To deny such immunity would contradict the political branches' decision to recognize France as a nation entitled to sovereign rights under the law of nations and invite retaliation by France for violation of those rights. Thus, judicial enforcement of these immunities was necessary to protect the federal political branches' exclusive authority over foreign affairs.

Federal courts have consistently applied these traditional immunities from the Founding Era to the present. Congress has since codified some of them in statutes such as the Foreign Sovereign Immunities Act[205] (FSIA) or the Diplomatic Relations Act,[206] but others, including head-of-state immunity, remain grounded entirely in general law. As discussed in Part IV, there is no reason to read *Erie* to bar courts from continuing to recognize and apply these uncodified immunities. To the contrary, the Constitution's allocation of foreign relations powers to the political branches—including the recognition power—requires courts to honor these rights unless those branches direct them to do otherwise. Judicial application of these general law immunities is thus not only consistent with *Erie*, but also necessary to implement the Constitution's original design.

Chief Justice Marshall found "great weight" in the argument "that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, [and] that they are for diplomatic, rather than legal, discussion." *Id.* at 146. In other words, the *The Schooner Exchange* Court suggested that the Constitution assigned the political branches—rather than courts—the responsibility for deciding whether France had violated U.S. rights under the law of nations, and whether and how to hold France accountable for any violations. Moreover, the Court imposed a clear statement requirement if the political branches wished to confer jurisdiction over a foreign warship. *Id.* According to the Court, "until [the sovereign] power be exerted *in a manner not to be misunderstood*, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." *Id.* (emphasis added).

[205] Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.).

[206] Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified as amended in scattered sections of 22 and 28 U.S.C.).

D. Congressional Authorization of General Common Law

In addition to applying the three traditional branches of the general law of nations, early federal courts also applied what modern scholars refer to as "general common law" in some contexts. General law revivalists have been quick to observe that early federal courts relied on a broader body of rules governing procedure, equity, tort, contract, remedies, and related matters in exercising their constitutional jurisdiction.[207] This early judicial practice may explain why revivalist scholars lump many different sources of unwritten law, including local common law, into the category of general common law. As used by these scholars, "general common law" includes local rules that multiple jurisdictions have adopted to govern similar internal matters.[208] Unlike the general law of nations—which regulated relations among sovereigns and was not subject to unilateral revision by any one of them—this kind of general common law concerned each sovereign's local domestic affairs.

Because this general common law concerned domestic affairs, its content was subject to control by the local sovereign.[209] If a sovereign did not apply this type of general common law, it would not be opting out of it. Instead, it would simply be applying its own distinct local rule. In contrast, if a sovereign did not apply the general law of nations, it would be opting out of a governing transnational rule. This basic difference between the law of nations and shared local law was fundamental. A sovereign could violate the law of nations by not applying it because such law, as its name implied, bound all nations in their relations with one another. By contrast, a sovereign could not violate the local law common to many jurisdictions by applying a different local rule because such general common law was always subject to each jurisdiction's local control.

Thus, this category of general common law was "general" only in the sense that many sovereigns had chosen to adopt similar rules, typically from the same original source—the common law of England. But general common law, regardless of whether a confluence of custom, fundamental right, or coinciding policy choices, did not constitute a body of transnational rules independent of local sovereign control. If a state adopted the common law of

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[207] *See, e.g.*, Goldsmith & Bradley, *supra* note 13, at 29.

[208] *See supra* text accompanying notes 302.

[209] *See supra* notes 59–60 and accompanying text.

England, aware that other states were doing the same, it did not thereby surrender its authority to define the content of its local common law. Otherwise, the decision by the newly free and independent American states to adopt the common law of England would have rendered them subject to British law—a conclusion incompatible with their hard-fought independence.

Even though this kind of general common law remained subject to local control, revivalists are correct that early federal courts often applied it in cases within their jurisdiction. What revivalists overlook, however, is that Congress authorized—indeed, required—them to do so. Specifically, Congress expressly authorized federal courts to administer common law and equitable forms of proceeding—and all the substantive law they carried with them—in such statutes as the Process Acts, the Conformity Act,[210] and the First Judiciary Act.[211] These statutes covered virtually the entire expanse of what revivalists call general common law. Because federal statutes authorized federal courts to apply these common law and equitable doctrines, the fact that federal courts did so provides no evidence that such courts had independent authority to apply general common law as a freestanding source of law. In short, revivalists' suggestion that federal courts found and applied general common law on their own authority in these circumstances contradicts the historical facts.

As we have explained elsewhere, Congress enacted a series of statutes, including the Process Acts of 1789 and 1792 and the later Conformity Act that authorized federal courts to borrow law from other existing sources.[212] These enactments directed federal courts to employ state forms of proceeding in actions at law, traditional equitable forms in suits in equity, and forms traditionally used by admiralty courts in cases falling within Article III's admiralty and maritime jurisdiction.[213] At the Founding, such "forms of proceeding" were not merely procedural in the modern sense.[214] Forms of proceeding—including legal forms of action—included procedures, remedies, and substantive legal obligations for redressing specific kinds of legal harms. Each form functioned

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[210] Conformity Act of 1872, ch. 255, 17 Stat. 196 (repealed 1934).

[211] Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 641–59 (2015) [hereinafter Bellia & Clark, *Original Source of Cause of Action*].

[212] *See id.* at 646–55 (describing these acts).

[213] *Id.*

[214] *Id.* at 645.

as a self-contained remedial system with its own procedural rules, substantive standards, remedies, and incidental legal requirements.[215] By directing federal courts to adopt these forms, Congress specified not only how federal courts were to proceed, but also which law should resolve a host of matters incident to redressing a particular legal harm. These statutes reflected a deliberate structural compromise: Rather than creating uniform national bodies of substantive law, Congress instructed federal courts to use their state's existing forms and modes of proceeding in actions at law, thereby preserving the states' local control over legal adjudications, even those that proceeded in federal court.[216] And rather than devise a new system for equity and admiralty, Congress instructed federal courts to borrow existing and established practices in those domains as well.

For cases not governed by the Process and Conformity Acts—most notably proceedings in the Supreme Court—§ 14 of the First Judiciary Act authorized federal courts to issue all writs "agreeable to the principles and usages of law."[217] Section 34 further directed federal courts to apply "the laws of the several states" in cases in which they applied.[218] Beyond these general instructions, Congress enacted specific statutes authorizing federal courts to entertain particular forms of action and grant particular writs to enforce specific legal obligations. Through this statutory framework, Congress not only prescribed how federal courts were to proceed, but also specified which bodies of law would supply the governing rules of decision in particular categories of cases. Although federal courts necessarily exercised judgment in applying the substantive incidents historically associated with particular writs, they did so within a congressionally prescribed framework that required adherence to state law where applicable.

In this patchwork of statutes, Congress conferred substantial authority on federal courts to apply what revivalist scholars characterize as "general common law." Many states had adopted similar forms of proceeding, incorporating various remedies and substantive rules common to many jurisdictions, even though those rules remained subject to local revision.[219] That Congress directed

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[215] *Id.* at 631–33.

[216] Bellia & Clark, *Original Source of Cause of Action*, *supra* note 211, at 638–39.

[217] Judiciary Act of 1789 § 14, 1 Stat. at 82.

[218] *Id.* § 34, 1 Stat. at 92.

[219] Bellia & Clark, *Original Source of Cause of Action*, *supra* note 211, at 637.

the judiciary to employ common law and equitable forms of proceeding—including their attendant substantive incidents—does not support the conclusion that federal courts possessed independent authority to displace state law with general common law of their own choosing. To the contrary, federal courts applied those common law and equitable principles because Congress expressly instructed them to do so. Because that authority derived from duly enacted federal statutes—themselves "Laws of the United States" under the Supremacy Clause—this use of general common law did not circumvent the Constitution's lawmaking requirements.

Without acknowledging these statutes, revivalist scholars appear to assume that early federal courts applied general common law of their own accord.[220] On this assumption, they view *Erie*, which foreclosed using general common law to displace state law, as revolutionary. But *Erie* is better characterized as a restoration than a revolution. As the next Part explains, by the time *Erie* was decided, federal courts had expanded the concept of general common law well beyond what either Congress or the Constitution authorized. Although *Erie*'s rationale—upholding the residual sovereignty of the states—was not new, the problem it confronted was of recent vintage: Federal courts were using general common law to displace state law with no warrant in supreme federal law.

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Taken together, Part I identifies four distinct situations in which federal courts appropriately applied general law before *Erie*. First, federal courts applied the general law merchant to commercial disputes when state courts themselves would do so; otherwise, they applied local law. Second, federal courts applied general maritime law in order to exercise the admiralty and maritime jurisdiction that Article III and acts of Congress authorized them to exercise. Third, federal courts applied the traditional law of nations when the Constitution's exclusive allocation of authority to the political branches over foreign relations required its use. Fourth, federal courts administered common law and equitable principles pursuant to congressional acts that expressly authorized them to use forms of proceeding derived from other sources of law, including state law in legal actions. These contexts were not all mutually exclusive. But in each of these contexts, federal

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[220] *See generally, e.g.*, Goldsmith & Bradley, *supra* note 13.

courts applied unwritten law with constitutional or congressional authorization, or in accordance with state law. The constitutional difficulty arose only when courts moved beyond these categories to apply an expanded conception of general common law untethered to the supreme law of the land to disregard governing state law. It was this departure, embodied in the post-*Swift* expansion of general common law, that ultimately gave rise to the constitutional concerns that the Court resolved in *Erie*.

II. *ERIE*'S REJECTION OF GENERAL COMMON LAW

In its landmark decision in *Erie Railroad Co. v. Tompkins*, the Supreme Court famously declared that "[t]here is no federal general common law," and that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[221] At first glance, these sweeping pronouncements appear to contradict the judicial practice at the Founding of applying certain forms of general law in certain contexts. Because early courts routinely applied the general law of nations, some scholars have criticized *Erie* as anachronistic, ahistorical, and inconsistent with originalism.[222]

Upon closer examination, however, this critique misses the mark. Although the *Erie* Court used sweeping rhetoric, the core constitutional holding of *Erie* simply restates and upholds the original constitutional design. Properly understood, *Erie* rejected the federal courts' use of an expansive conception of federal general common law to displace state law without any constitutional or statutory warrant for doing so.[223] The Court rightly condemned this practice as an intrusion upon "rights which in our opinion

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[221] *Erie*, 304 U.S. at 78.

[222] *See* Goldsmith, *supra* note 12, at 732.

[223] As the Supreme Court explained in 1834:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union, and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.

Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834). Congress never attempted to adopt the common law on behalf of the United States, and it arguably lacked enumerated power to do so. "And no clause in the Constitution purports to confer such a power upon the federal courts." *Erie*, 304 U.S. at 78.

are reserved by the Constitution to the several States."[224] The federal courts' expansive application of general common law in disregard of local state law under the *Swift* doctrine appropriated residual state authority without any constitutional or congressional warrant.

Erie's constitutional holding, however, does not preclude federal courts from continuing to apply the traditional general law of nations in appropriate cases, as they did for many decades after the Founding. For example, because the Constitution assigns specific powers over war and foreign relations to the political branches of the federal government, federal courts must sometimes apply rules derived from the law of nations to maintain that allocation of authority. When the Constitution authorizes or requires federal judicial application of such law, courts apply it without contradicting *Erie*.

This Part argues that *Erie* is best understood as a restoration of the Constitution's original design. *Erie*'s constitutional holding is that federal courts may only displace local state law with supreme federal law—law that the Constitution requires political actors to make through specified procedures.[225] *Swift*, as this Part explains, was defensible when decided in 1842 because, as best as the Court could tell, New York applied general commercial law, not local law, to the question at issue. But the subsequent emergence of the *Swift* doctrine—under which federal courts displaced local state law with their own evolving conceptions of general common law—contradicted basic elements of the constitutional design that preserve residual state authority.

By appropriating for themselves the power to create and apply federal general common law—no matter how far removed from a state's local law—courts bypassed the lawmaking procedures that the Constitution required to displace state law under the Supremacy Clause. Each form of supreme federal law—"[t]his Constitution," "Laws . . . made in Pursuance thereof," and "Treaties made . . . under the Authority of the United States"—requires the assent of multiple politically accountable actors.[226] "[F]ederal general common law," however, displaced state law

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[224] *Erie*, 304 U.S. at 80.

[225] For a characteristically thorough and illuminating examination of *Erie*, see Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 950–83 (2013).

[226] U.S. CONST. art. VI, cl. 2.

with no warrant in the Constitution for doing so.[227] *Erie* put a stop to this practice, but its reasoning permits federal courts to continue applying general law when the Constitution, a federal statute, or state law requires or authorizes them to do so.

A. The *Swift*-Era Expansion of General Law

This Part traces how federal courts transformed the original *Swift* decision into the sweeping "*Swift* doctrine" that *Erie* later repudiated. As Part I demonstrated, early federal courts applied the traditional law of nations—including the law merchant, the law maritime, and the law of state-state relations—without running afoul of the constitutional structure. Each source of law interacted differently with the constitutional structure, but the Constitution required or permitted federal courts to apply each in certain circumstances.

During the second half of the nineteenth century, however, federal courts began expanding the concept of general law beyond its traditional limits. They refused to follow state court decisions that localized previously general commercial rules and, more significantly, began treating historically local subjects—such as torts, real property, and damages—as matters of general law. This expanded conception bore little resemblance to the transnational commercial law applied in *Swift*. By the early twentieth century, federal courts were displacing many areas of local state law with judicially fashioned federal general common law. *Erie* correctly rejected this practice as incompatible with structural features of the Constitution designed to preserve the residual authority of the states.

1. Unchecked expansion of general law.

In *Swift*, the Supreme Court used independent judgment to ascertain and apply general commercial law in a federal diversity case.[228] Although the Court disagreed with the New York courts about the precise content of general commercial law, both the state and federal courts agreed that general commercial law applied and that New York had no local law that governed the question.[229] Such general law consisted of transnational commercial

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[227] *Erie*, 304 U.S. at 78.

[228] *Swift*, 41 U.S. (16 Pet.) at 19.

[229] *See id.* at 18–19, 22.

norms, and courts applying it were expected to exercise independent judgment to determine its content. Disagreement over the precise rule did not render the practice constitutionally problematic.

A significant shift began in the Civil War period, when the Court began expanding the category of general law to encompass subjects traditionally governed by local common law, including torts, real property, and remedies.[230] By reclassifying these historically local questions as matters of general law—and then selecting what they deemed the "better" or majority rule—federal judges went beyond applying shared transnational norms; they instead began displacing local state law without any warrant in supreme federal law for doing so. It was this reclassification of local law as general law that generated the "unconstitutional assumption of powers by the Courts of the United States" that the Court rejected in *Erie*.[231]

In describing this transformation of local law into general law, the *Erie* Court emphasized the "broad province" that federal courts had "accorded to the so-called 'general law' as to which federal courts exercised an independent judgment."[232] The federal courts had come to treat matters such as intrastate contracts, tort liability, and property conveyances[233]—subjects local in character when *Swift* was decided—as questions of general law. Under the banner of the "doctrine of *Swift*," federal courts asserted authority to disregard state law in favor of their own conceptions of general common law.[234]

The Supreme Court's decision in *Chicago City v. Robbins*[235] marked an early and consequential step in this expansion. In *Robbins*, the Court displaced state tort law governing negligence and declared that, in common law matters, federal judges were not bound by state decisions.[236] As the Court put it, "[W]here private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals

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230 *See Erie*, 304 U.S. at 74–76 (describing the "mischievous results" of the *Swift* doctrine).

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

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

233 *Id.* at 75–76; *see also Black & White Taxicab*, 276 U.S. at 530–31 (describing how federal courts decided various matters according to general law, including the construction of insurance policies, the construction of deeds, and questions of tort law).

234 *Erie*, 304 U.S. at 74.

235 67 U.S. (2 Black) 418 (1863).

236 *Id.* at 428–29.

the highest respect, does not feel bound by their decisions."[237] That assertion departed from *Swift*'s original premise: that courts would apply general law only to trans-sovereign matters to which state courts applied general law, but certainly not to questions traditionally reserved to, and in fact subject to, local sovereign control. In cases like *Robbins*, courts were no longer identifying and applying transnational norms to which the states subscribed, but instead were displacing local state law with alternative rules of decision.

The Court continued this expansion in *Baltimore & Ohio Railroad Co. v. Baugh*.[238] The question in *Baugh* was whether an employer was liable for injuries caused by the negligence of one employee to another. This question, the Court determined, was:

> not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, . . . but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.[239]

By redefining local master-servant liability as a question of general law, the Court gave federal judges license to substitute their own understanding of common law principles for those adopted by the states. This maneuver transformed diversity jurisdiction from a neutral forum for applying the same governing law into a tool for substituting "better" legal rules for those adopted by the states. By expanding the realm of general law subject to federal judicial control, federal judges did an end run around the Constitution's prescribed procedures for displacing state law.

Justice Stephen Field dissented in *Baugh*, warning that "there stands, as a perpetual protest against [the federal courts' expansion of general law], the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States."[240] He recognized that federal judicial use of general common law in traditionally local fields not only undermined federalism in the abstract, but also violated the Constitution's specific framework governing when and how federal law may displace state law. Justice Field's warning, however, went unheeded.

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[237] *Id.*

[238] 149 U.S. 368 (1893).

[239] *Id.* at 370.

[240] *Id.* at 401 (Field, J., dissenting).

For the next few decades, federal courts continued to expand general common law under the *Swift* doctrine,[241] overriding state common law across a range of local subjects historically subject to exclusive state control.[242]

By 1938, the divergence between state law and federal general common law had created an untenable legal divide. Litigants with access to federal court via diversity jurisdiction routinely took advantage of different substantive rules than state courts applied. The result was precisely the "political and social" defects that *Erie* would later decry[243]: the lack of uniformity in state and federal courts on questions of so-called general law,[244] uncertainty regarding the line between general and local law,[245] and systematic "discrimination result[ing] from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction."[246] Although the "injustice and confusion incident to the [*Swift*] doctrine"[247] had become evident by 1938, it was "the unconstitutionality of the course pursued" that ultimately "compel[led]" the Court to repudiate the doctrine.[248]

2. Localization of general commercial law.

As federal courts were expanding the *Swift* doctrine, a parallel development in the states compounded the constitutional problem. State legislatures and courts increasingly localized what had once been a shared body of general commercial law.[249] This transformation undermined *Swift*'s original premise: that federal

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[241] *See* TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 81–82 (1981); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 51–52 (2000); Harold M. Bowman, *The Unconstitutionality of the Rule of* Swift v. Tyson, 18 B.U. L. REV. 659, 663, 664–66 (1938); Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 AM. BAR ASS'N J. 609, 611–13 (1938).

[242] *See* Bellia, *State Courts and Federal Common Law*, *supra* note 22, at 898–901.

[243] *Erie*, 304 U.S. at 74.

[244] *Id.*

[245] *Id.*

[246] *Id.* at 76.

[247] *Id.* at 77.

[248] *Erie*, 304 U.S. at 77–78.

[249] Clark, *Federal Common Law*, *supra* note 22, at 1290 (noting that after *Swift*, state legislatures and courts increasingly abandoned "reliance on the general law merchant in favor of [ ] localized commercial doctrines"); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 355 (1973) ("[E]ach state from Maine to the Pacific was a petty sovereignty, with its own brand of law."); Lyman D. Brewster, *The Promotion of Uniform Legislation*,

courts would apply general commercial law *only* in the absence of a controlling local rule of decision.

State legislation drove much of this change. By the late nineteenth century, a patchwork of conflicting and idiosyncratic state statutes, rather than general law, had come to govern commercial transactions.[250] During this era, "statutes grew and increased like weeds in all the forty-eight states and territories."[251] Indeed, "every state . . . had one or more statutes attempting to regulate in whole, or in part, the law of commercial paper."[252] Since "[b]ills and notes were the oil for running the American business machine, . . . [c]ourts were clogged with questions of negotiability and transfer."[253] The proliferation of conflicting statutes prompted reformers to draft uniform state laws[254]—most notably the Uniform Negotiable Instruments Act[255]—to reestablish the coordination and predictability that general commercial law had once supplied through transnational custom.[256]

Judicial doctrine reinforced this fragmentation. Over time, state courts ceased treating their commercial law decisions as

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6 YALE L.J. 132, 140 (1897) (arguing for "statutory unity rather than diversity, in matters of common interest"). Many changes in commercial law were due to the enactment of specialized statutes by state legislatures. *See* E. ALLAN FARNSWORTH & JOHN HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 5 (4th ed. 1985) ("By 1890 every state had at least one statute on negotiable instruments.").

250 *See* TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 123 (1979) (describing the need "to bring some uniformity to the tangled local law"); Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIA. L. REV. 351, 367 (1983) (describing "the confusion in the law of bills and notes"); Frederick K. Beutel, *The Development of State Statutes on Negotiable Paper Prior to the Negotiable Instruments Law*, 40 COLUM. L. REV. 836, 849 (1940) (describing the multiplicity of state commercial statutes).

251 Beutel, *supra* note 250, at 849.

252 *Id.*

253 Bane, *supra* note 250, at 367 ("In the *Century Edition of the American Digest*, covering cases up to 1896, the subject of bills and notes took up virtually one entire volume of more than 2,700 pages.").

254 *See* FRIEDMAN, *supra* note 249, at 355 ("By 1900, [the Uniform Negotiable Instruments Law] had been widely enacted.").

255 UNIF. NEGOTIABLE INSTRUMENTS ACT (UNIF. L. COMM'N 1896). *See also* STATE BD. OF COMM'RS FOR PROMOTING UNIFORMITY OF LEGIS. IN THE U.S., SIXTH CONFERENCE 8 (1896). In addition to this act, states widely accepted uniform acts on sales (1906), warehouse receipts (1906), bills of lading (1909), and stock transfers (1909). Bane, *supra* note 250, at 369.

256 By adopting the Uniform Negotiable Instruments Act, which codified many law merchant rules, states incorporated much of general commercial law into their local statutory law. *See* Brewster, *supra* note 249, at 134 ("[G]reat care is taken to preserve the use of words which have had repeated legal constructions and become recognized terms in the Law Merchant.").

contributions to a shared body of transjurisdictional law. Instead, they framed their rulings as interpretations of local common law. By the early twentieth century, even the precise question at issue in *Swift*—whether a promisor who released a preexisting debt gave sufficient consideration for a bill of exchange to qualify as a bona fide holder—was increasingly understood to be a matter of local, not general, law.[257] As this transformation unfolded, *Swift*'s original limitation—that federal courts would apply general commercial law only where states had not supplied a controlling local rule—was ignored or forgotten.

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These dual developments—the federal judiciary's application of an ever-expanding conception of general law to displace local governance, and the states' growing insistence on treating commercial law as a matter of local concern—generated a clear constitutional conflict. By the time *Erie* was decided, federal and state courts were frequently applying different substantive rules to identical questions arising under the same substantive law. As discussed below, federal judicial disregard of residual state authority to adopt governing local law violated the Supremacy Clause's exclusive and conditional framework for displacing state law. For this reason, *Erie* correctly abandoned the *Swift* doctrine. The case is best understood as restoring the original constitutional balance between federal and state authority. Federal courts violate residual state sovereignty when they apply general law in ways that displace state law with no warrant in supreme federal law.[258]

B. An Originalist Defense of *Erie*

As discussed in Part III, critics argue that *Erie* is both ahistorical and inconsistent with originalism. They contend that general law was pervasive at the Founding, that the Founders

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[257] E.G.L., Comment, *What Law Governs the Question of Purchase for Value of Negotiable Instruments*, 27 YALE L.J. 246, 246 (1917). More broadly, by the early twentieth century, the law merchant was regarded as local common law in the individual states. *See* Sykes v. Citizens' Nat'l Bank of Des Moines, 98 P. 206, 207 (Kan. 1908) (explaining that in a large majority of states, "the decisions of the courts of final resort of that state will be followed, regardless of precedents to the contrary in the state where the trial is held, and that this rule applies to the law merchant, as well as to other branches of the common law").

[258] *See* Bellia & Clark, *General Law in Federal Court*, *supra* note 7, at 705–23 (discussing proper and improper uses of general law post-*Erie*).

expected federal courts to apply it, and that federal courts continued to do so until 1938.[259] On this view, *Erie* contradicts more than a century of prior practice and should be narrowed or even overruled. It is an anachronistic oversimplification, however, to argue that *Erie* contradicts originalism merely because general law existed at the Founding. This claim overlooks the limited nature of general law at the Founding and disregards basic features of the Constitution's original structure. As discussed, early federal courts applied different sources of unwritten law pursuant to different federal authorizations and requirements. When federal courts applied general law in ways authorized by the supreme law of the land, they did not interfere with the states' residual sovereignty under the original Constitution. But, beginning in the mid-nineteenth century, federal courts did encroach upon that sovereignty when they applied freestanding general common law to displace state law. Contrary to revivalist accounts, *Erie* did not contradict the Constitution's original design by rejecting this unprecedented use of general law. Rather, *Erie* restored it.

As discussed in Part I, general law was not a monolithic category at the Founding encompassing every conceivable form of general common law. Rather, it consisted largely of the three main branches of the law of nations—the law merchant, the law maritime, and the law of state-state relations. Early federal courts applied each branch in ways consistent with the states' residual sovereignty under the Constitution. More fundamentally, general law was defined in contrast to local law. General law reflected customary rules applied by multiple sovereigns to govern their interactions (or those of their people). Local law, by contrast, was the law of a single sovereign that governed "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."[260] Early federal courts routinely applied traditional branches of general law—such as the law merchant—when state courts did so, but they steadfastly applied local law when state courts used it to govern matters within their territorial jurisdiction. To be sure, under the expanded *Swift* doctrine, federal courts increasingly ignored this dichotomy in the latter half of the nineteenth century. But this development is not evidence of original meaning. Rather, as *Erie* recognized, it was

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[259] *See, e.g.*, Goldsmith & Bradley, *supra* note 13, at 86–92 (arguing that the pre-*Erie* general law regime presents challenges for some strands of originalism).

[260] *Swift*, 41 U.S. at 18.

"an unconstitutional assumption of powers by courts of the United States."[261]

This Section proceeds in three steps. First, it describes how the original Constitution was designed to preserve the residual authority of the states to govern themselves in the absence of supreme federal law. Second, it explains that both *Swift* and *Erie* were constitutionally defensible at the time they were decided. Third, it shows that *Erie*'s core reasoning did not depart from the Constitution's original meaning. It faithfully implemented it.

1. Safeguarding residual state sovereignty.

To understand the permissible and impermissible uses of unwritten law in federal court—and why *Erie* was correct as an original matter—one must appreciate the nature of state sovereignty both before and after ratification. Upon independence, the former British colonies became "Free and Independent States,"[262] possessing the full sovereign authority that accompanied that status under the law of nations, including exclusive territorial sovereignty—the right to govern within their own borders. Under the Articles of Confederation, the states retained this exclusive authority. In adopting the Constitution, the people of the states agreed to relinquish their states' exclusive territorial sovereignty and adopt a system of concurrent sovereignty. They delegated enumerated powers to a new federal government and authorized it to exercise those powers within their borders, but only under strict conditions established by the Constitution.

The people conditioned their assent to this system on two critical constraints designed to preserve residual state authority. The first was substantive: The federal government would possess only limited and enumerated powers, together with those incidental powers necessary and proper to carry them into execution. The second was procedural: Even where the federal government possessed substantive authority to regulate conduct within the states, it could exercise that authority only through the Constitution's exclusive lawmaking procedures. The Supremacy Clause enables only three sources of federal law to displace state law: "This Constitution," "Laws . . . made in Pursuance thereof," and "Treaties

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[261] *Erie*, 304 U.S. at 79 (quotation marks omitted) (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

[262] THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).

made . . . under the Authority of the United States."[263] Not coincidentally, the Constitution prescribes precise procedures for adopting each form of supreme law. Constitutional amendments, federal statutes, and treaties each require the assent of multiple politically accountable actors subject to varying degrees of state influence[264]—including, in every case, the Senate.[265] These procedures safeguard residual state authority by ensuring that federal law cannot displace state law without broad political consensus.

These procedures are exclusive.[266] The Constitution identifies the only forms of law capable of displacing contrary state law and deliberately excludes federal judges from the process of adopting them. The Constitutional Convention rejected proposals, such as a council of revision, that would have inserted judges into the lawmaking process.[267] Instead, it insulated the judiciary from the political process. The role of courts is to interpret and apply governing law, not to create or import it on their own initiative.

It is not possible to understand the appropriate role of general law in federal court without appreciating these features of the constitutional design. The Founding generation did not reject unwritten law as such. Federal courts could apply the traditional law of nations in appropriate cases because doing so was consistent with the Constitution's allocation of powers and often necessary to implement it. General law could inform constitutional terms of art, supply rules governing interstate disputes, and uphold the Constitution's allocation of war and foreign relations powers to the political branches. Nor did early applications of general commercial law threaten residual state authority because the states themselves used this law to resolve disputes. But the

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263 U.S. CONST. art. VI, cl. 2.

264 *See* Wechsler, *supra* note 40, at 558–60 (discussing the composition of political branches and their role in the making of federal law). These safeguards include the states' role in drawing congressional districts, setting voter qualifications in federal elections, and establishing the method of selecting electors for President. *See id.* at 548, 553.

265 *See* Clark, *Separation of Powers*, *supra* note 45, at 1338–39; *see also* Wechsler, *supra* note 40, at 547–48 ("[T]he Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control."). The only exception is the alternative (and as yet unused) Article V procedure that allows state conventions—rather than the House and Senate—to propose constitutional amendments. *See* U.S. CONST. art. V.

266 *See* Clark, *Separation of Powers*, *supra* note 45, at 1328–46.

267 One of the principal objections to a council of revision was that it made "the Expositors of the Laws, the Legislators which ought never to be done." 2 FARRAND'S RECORDS, *supra* note 36, at 75 (notes of James Madison from July 21, 1787) ("Mr. Strong thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established.").

general common law that federal courts applied under the expanded *Swift* doctrine broke from this practice. Under the *Swift* doctrine, federal courts invoked expansive federal general common law to override contrary state law in matters subject to local sovereign control.

For example, the tort rule at issue in *Erie*—the duty of care owed to a trespasser—was not part of any transnational body of law; it was a matter reserved to local governance. In displacing state law in favor of freestanding general common law, the expanded *Swift* regime bypassed the substantive and procedural safeguards through which the Constitution preserves residual state sovereignty. *Erie* did not transform the Constitution's original design. It restored it by recognizing that federal courts may disregard state law only when the Constitution itself, a valid federal statute, or a treaty authorizes them to do so.

2. The originalist case for *Swift* and *Erie*.

Swift was uncontroversial when decided in 1842. Federal courts exercising diversity jurisdiction routinely applied general commercial law, just as state courts did. Diversity jurisdiction was designed in part to provide a neutral forum for commercial disputes. In commercial disputes between diverse parties, both state and federal courts generally understood themselves to be identifying and applying a transjurisdictional body of commercial rules. As Justice Story explained in *Swift*, on "questions of general commercial law," state and federal tribunals performed "like functions"—"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."[268]

The *Swift* doctrine became problematic only as two developments converged. First, states increasingly came to treat commercial law as local rather than shared general law. Second, federal courts expanded the *Swift* doctrine beyond traditional areas of general commercial law into torts, property, and other matters subject to local sovereign control. By the early twentieth century, this regime of federal general common law diverged sharply from state law and raised serious structural concerns that federal courts were displacing state law with laws of their own choosing. By 1938, the Court could no longer avoid the conclusion "that in applying the [*Swift*] doctrine this Court and the lower courts have

[268] *Swift*, 41 U.S. at 19.

invaded rights which in our opinion are reserved by the Constitution to the several States."[269]

Erie itself illustrates the problem. While walking alongside railroad tracks, Harry Tompkins, a citizen of Pennsylvania, was struck by an object protruding from a passing train.[270] He sued the New York railroad in federal court under diversity jurisdiction.[271] The issue was whether Pennsylvania law—treating Tompkins as a trespasser—or a stricter federal judge-made general law of negligence governed the railroad's duty of care.[272] The court below applied general law,[273] and the Supreme Court reversed.[274]

Erie held that federal courts lacked authority to disregard state law in favor of general common law.[275] The Court's constitutional analysis began unequivocally: "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."[276] This passage simply states the negative implication of the Supremacy Clause[277]: If a rule of decision does not derive from the Constitution, valid federal statutes, or treaties, it cannot displace state law. This conclusion follows from the Constitution's basic structure of dual sovereignty. The states delegated some of their sovereign authority to the federal government, subject to substantive and procedural safeguards, and necessarily retained the rest. Thus, the operative question in *Erie* was not whether the Constitution grants lawmaking authority to the states—or even to Congress and the President—but whether it grants authority to federal courts to displace state law with freestanding general common law. As the *Erie* Court explained, "no clause in the Constitution purports to confer . . . power upon the federal courts . . . to declare substantive rules of common law applicable in a State."[278] In the absence

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

270 *Id.* at 69.

271 *Id.*

272 *Id.* at 70.

273 *See* Tompkins v. Erie R.R. Co., 90 F.2d 603, 604 (2d Cir. 1937), *rev'd*, 304 U.S. 64 (1938).

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

275 *Id.* at 78.

276 *Id.*

277 The Court did not mention treaties (perhaps because they rarely displace state law directly), but treaties of course qualify as "the supreme Law of the Land" under the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2.

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

of such power—or a duly enacted source of "the supreme Law of the Land"—"the authority and only authority is the State."[279]

By repudiating the expanded *Swift* doctrine, *Erie* protected both federalism and the separation of powers. Federal courts could no longer apply general common law in place of state law because doing so had "invaded rights which . . . are reserved by the Constitution to the several States."[280] These rights stem from the nature of the Union under the Constitution. Because the states delegated only limited and enumerated lawmaking powers to the federal government—and conditioned their exercise on adherence to precise procedures—the *Erie* Court did not consider federal courts free to displace state law outside these procedures. The Court recognized that, in practice, the federal general common law had become "little less than what the judge advancing the doctrine thinks . . . should be the general law."[281] In other words, as the Court saw it, federal judges were displacing state law on the basis of their own views of sound policy or the majority rule. *Erie* rejected this practice because it operated outside the Constitution's lawmaking procedures and thus intruded upon residual state sovereignty.

Erie's critics often focus on its sweeping jurisprudential declarations—particularly its assertion that general law was a "fallacy" and that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[282] To be sure, the Founding generation did not regard general law as a "fallacy" in the sense that legal realists did when *Erie* was decided. But *Erie*'s obsequiousness toward contemporary jurisprudential fashion does not alter its constitutional holding: Federal courts may not displace state law with unwritten law unless authorized to do so by a form of supreme federal law.[283] Indeed, on the very day that it decided *Erie*, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[284] invoked "a doctrine universally recognized in the law and practice of nations" to

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[279] *Id.* at 79 (quotation marks omitted) (quoting *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting)).

[280] *Id.* at 80.

[281] *Id.* at 78 (quotation marks omitted) (quoting *Baugh*, 149 U.S. at 401 (Field, J., dissenting)).

[282] *Id.* at 79 (quotation marks omitted) (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

[283] *Erie*, 304 U.S. at 78.

[284] 304 U.S. 92 (1938).

resolve an interstate dispute.[285] If *Erie* categorically prohibited federal courts from recognizing general law, it overruled itself the same day. Properly understood, *Erie* did not outlaw general law as such. It repudiated the federal judiciary's practice of using expansive general common law to override contrary state law absent constitutional or statutory authorization. At the same time, it preserved the ability of federal courts to apply traditional general law—including the law of nations—when the Constitution or a valid federal law authorized or required them to do so.[286] The question after *Erie*, therefore, is not whether federal courts may ever apply general law, but when, under *Erie*'s constitutional reasoning, they may properly do so.

3. Why general common law infringes residual state authority.

Some commentators—including Professors Jack Goldsmith and Curtis Bradley—question whether *Erie* is properly grounded in the Constitution. They argue that, if anything, *Erie* rests primarily on the Tenth Amendment rather than on the Supremacy Clause because the general common law applied in diversity cases did not preempt state law in *state court*.[287] Their Tenth Amendment account of *Erie* is only partially correct. The constitutional reasoning of *Erie* rests on *both* the principle of residual state sovereignty reflected in the Tenth Amendment and the constraints on

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[285] *Id.* at 106 (quotation marks omitted) (quoting Poole v. Lessee of Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837)).

[286] *Hinderlider* recast its reliance on traditional principles of general law governing interstate relations as "federal common law," but this recharacterization does not obscure the fact that the rule applied (1) was necessary to preserve the constitutional equality of the states, and (2) did not encroach upon the residual sovereignty of the states. *See id.* (describing how the rule in question upheld the states' right to equal sovereignty under the Constitution).

[287] *See* Goldsmith & Bradley, *supra* note 13, at 78–79 (stating that "the federalism logic of *Erie*" involved "a Tenth Amendment idea, . . . not a Supremacy Clause idea"). They emphasize that in the early nineteenth century, the general law of nations was "not viewed as federal law and [ ] not treated as preemptive." *Id.* at 80. But the cases they cite are distinguishable and do not address the question presented in *Erie*—whether a federal court may displace governing state law in the case before it absent a valid source of supreme federal law. Moreover, because disputes involving the law of state-state relations were ordinarily brought in federal court, there was little need for courts to confront preemption directly. *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), is the rare exception that squarely presented the structural issue. There, a suit against a foreign ambassador in transit was filed in state court and removed to federal court on diversity grounds. The Second Circuit relied on New York law to uphold the ambassador's immunity, but we argue that the Constitution itself required application of general law immunity. *See infra* notes 425–49 and accompanying text.

federal displacement of state law that the Supremacy Clause and associated lawmaking procedures established to protect that sovereignty.

Under well-known principles governing the alienation of sovereign authority, the states—because they possessed greater sovereignty before ratification—necessarily retained all sovereign authority that they did not delegate to the federal government in the Constitution.[288] The Tenth Amendment simply restates this basic proposition—"that all is retained which has not been surrendered"—and, for that reason, is "a truism."[289] But, as discussed, the Constitution preserves residual state authority not only by delegating limited powers to the federal government, but also by establishing several structural safeguards that limit their use.[290] One such safeguard—external to the lawmaking process—is judicial review. Judicial review ensures that the federal government does not exceed the limits of its enumerated powers. Another safeguard—internal to the lawmaking process—consists of procedures that allow only certain actors subject to the political safeguards of federalism (i.e., the House, the Senate, the President, and the states) to adopt federal law.[291] These procedures both require consensus among multiple veto players and subject those players to varying degrees of state influence and control.[292]

The Supremacy Clause implements these safeguards by providing the exclusive constitutional basis for displacing state law in favor of federal law.[293] As Chief Justice Marshall observed, the Clause presupposes judicial review because "in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank."[294] In addition, the Clause incorporates by reference the lawmaking procedures prescribed elsewhere in the Constitution for adopting all three forms of "the supreme Law

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288 *See supra* note 30 and accompanying text.

289 United States v. Darby, 312 U.S. 100, 124 (1941).

290 *See supra* text accompanying notes 263–65 and accompanying text; Clark, *Separation of Powers*, *supra* note 45, at 1339.

291 Wechsler, *supra* note 40, at 543; *see also id.* at 558–60.

292 *See* Clark, *Separation of Powers*, *supra* note 45, at 1345–46.

293 Without the Supremacy Clause, state judges would lack a clear rule of decision for resolving conflicts between state and federal law. Although these judges take an oath to uphold the Constitution, they also take an oath to uphold their respective state constitutions. Thus, an additional mechanism was needed to provide a rule of decision to guide state officers subject to competing oaths. The Supremacy Clause supplied this mechanism.

294 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (emphasis in original).

of the Land" designated by the Clause—the Constitution, laws, and treaties of the United States.[295] These are the only three sources of law capable of overriding contrary state law. Thus, unless one of these sources—adopted according to prescribed procedures—supplants state law, courts have no constitutional authority to disregard state law. The constitutional holding of *Erie* made this very point: "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."[296] Thus, even though general common law under the *Swift* doctrine did not formally bind state courts in future cases, its use by federal courts to resolve disputes in cases like *Erie* improperly displaced the states' residual authority to govern those disputes.

Erie's central insight was therefore not simply that federal power is limited, but that federal courts may not disregard governing state law unless one of the Constitution's recognized forms of supreme federal law displaces it.[297] Diversity jurisdiction merely transferred to the federal government the states' right to adjudicate such cases, not their right to prescribe the governing rules of decision. If only certain forms of federal law may override contrary state law, no other form—including freestanding federal general common law—may do so. The *Swift* doctrine's constitutional defect was not that courts applied unwritten law; it was that they *displaced governing state law* without grounding that displacement in any recognized source of "the supreme Law of the Land."

Although *Erie* reinstated the Constitution's structural limits on judicial displacement of state law, some scholars have urged renewed judicial use of broad general common law. These revivalist proposals contend that *Erie* either misunderstood judicial practice at the Founding or unduly constrained the judiciary's historic role. The next Part examines these claims. Specifically, it assesses whether they can be reconciled with the states' residual sovereignty and the exclusive—and carefully calibrated—framework for adopting supreme federal law that the Constitution established to protect it.

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295 *See* U.S. CONST. art. VI, cl. 2.

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

297 *See id.*

III. CALLS FOR A GENERAL LAW RENAISSANCE

In recent years, a growing number of scholars have called for a "revival" of general common law in federal adjudication.[298] Some contend that the Court wrongly decided *Erie* and should limit or overturn it. Others argue that, with or without *Erie*, courts should exercise greater latitude in applying general law as a rule of decision. Most of these scholars use the phrase "general law" to mean not only the traditional law of nations that governed relations among sovereigns and their citizens, but also unwritten local rules widely adopted by different jurisdictions to govern their own internal affairs—whether as custom, fundamental right, or a policy decision that forms part of a majority rule. This Part evaluates these revivalist proposals. Part III.A introduces the leading scholars in this movement and outlines their key arguments and proposals. Part III.B explains how these proposals tend to conflate distinct historical categories of unwritten law, particularly by expanding the traditional general law of nations into a broader and more elastic conception of general common law. Finally, Part III.C argues that these proposals are in substantial tension with *Erie*, the Supremacy Clause, and the states' residual sovereignty under the Constitution.

A. Revivalist Proposals

Several leading scholars have shown renewed interest in general law.[299] They define general law broadly as a "shared body of unwritten law" that "was not derived from any enactment by a single sovereign but instead 'existed by common practice and consent among a number of sovereigns.'"[300] Importantly, they do not confine this category to the traditional law of nations. Instead, they extend it to a wide array of unwritten doctrines, including

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[298] Professors William Baude, Stephen Sachs, and Jud Campbell observe that "[h]istorical scholarship about general law is in the midst of a renaissance." Baude et al., *supra* note 14, at 1190.

[299] *See, e.g.*, *id.* at 1222 (arguing that the Fourteenth Amendment Privileges or Immunities Clause protects rights found in general law); BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 3–18 (describing the historical application of general law by federal courts). *See also generally, e.g.*, Sachs, Pennoyer *Was Right*, *supra* note 12 (arguing that personal jurisdiction is a matter of general law); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006) [hereinafter Nelson, *Persistence of General Law*] (describing the ways in which federal courts continue to apply general law); Fletcher, *supra* note 14 (describing the historical application of general law by federal courts).

[300] Baude et al., *supra* note 14, at 1190 (quoting Fletcher, *supra* note 14, at 1517).

"the common law," "principles of equity," "admiralty and maritime law," "general parliamentary law," "military law," "and so on."[301] On this view, general law encompasses not only transnational norms governing relations among sovereigns, but also all local "principles or practices [that are] common to many different jurisdictions."[302]

This expansive definition has significant structural implications. Under this definition, all widely shared unwritten doctrines qualify as general law. Professor Stephen Sachs, for example, argues that the Court should "abolish[ ] the [idea] of 'federal common law'" and instead allow federal courts to apply general common law in its place.[303] He and Professor William Baude likewise urge federal courts to recognize freestanding general common law rules of interpretation, contending that "the law of interpretation" is "general law."[304] Under this approach, federal courts could rely on unwritten general rules to recognize remedies, defenses, or even implied rights of action that appear to be widely accepted across jurisdictions, without grounding those rules in enacted federal law.[305]

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301 Sachs, Life After *Erie*, *supra* note 11, at 2.

302 Nelson, *Persistence of General Law*, *supra* note 299, at 505.

303 Sachs, Life After *Erie*, *supra* note 11, at 9–10. Professor Caleb Nelson provides a useful catalog of ways in which federal courts have applied general law after *Erie*. *See* Nelson, *Persistence of General Law*, *supra* note 299, at 507–25. In those limited enclaves in which the Supreme Court has held that federal courts may apply federal common law, federal courts have applied general law to supply freestanding rules of decision. These enclaves include disputes between states, disputes involving rights and obligations of the federal government, certain disputes implicating customary international law, and maritime disputes. *Id.* at 507–18. Before *Erie*, general law often provided rules of decision for disputes within these enclaves. Although the Supreme Court has characterized these rules as "federal common law" after *Erie*, the Court continues to draw upon general law in fashioning those rules. *See id.* at 518 (explaining that "patterns of general jurisprudence form the basis for the rules of decision that judges apply in enclaves of federal common law"); *see also* Clark, *Federal Common Law*, *supra* note 22, at 1292–1311.

304 William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1136–37 (2017); *see also* Sachs, Life After *Erie*, *supra* note 11, at 10–11.

305 In the 1960s, the Court fashioned private rights of action as the Court thought necessary to effectuate congressional purposes. The Court's 1964 decision in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), is a well-known example of this approach. In *Borak*, the Court held that private parties may bring a right of action to remedy violations of § 14(a) of the Securities Exchange Act of 1934, Pub. L. No. 73-291, § 14(a), 48 Stat. 881, 895 (codified as amended at 15 U.S.C. § 78n(a)(1)), a provision that did not itself create a right of action. *Borak*, 377 U.S. at 430–31. In so holding, the Court determined that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433. The Court observed that it "is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Id.* at 434 (quotation marks omitted) (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957)).

Revivalists also urge courts to place greater reliance on general law in constitutional interpretation.[306] To be sure, consulting general law—or general common law—as background context for ascertaining the meaning of the Constitution at the time of adoption is uncontroversial. For instance, when the Constitution employs terms of art—such as "Piracies," "Letters of Marque and Reprisal," or "Citizen"—courts must look to the general law in force at the Founding to recover their original meaning.[307] In this sense, general law does not supplement or revise the Constitution; it illuminates the semantic meaning of the text when ratified. Likewise, we have explained elsewhere that background principles of the general law of nations provide critical context for understanding the Constitution's allocation of powers to the federal government and its reservation of powers to the states.[308] All of these uses of general law constitute faithful interpretation of the instrument.

But some scholars would go further. Rather than using general law at the time of ratification as context to understand the text and structure of the Constitution, they would use an evolving body of general law to update the meaning of the Constitution. Professors Baude and Robert Leider, for example, contend that the Second Amendment "was not creating or defining [the] terms [it used] for the first time, but rather using the legal terminology and legal infrastructure of the day" and that courts should therefore adopt "a general-law approach to evaluate laws restricting who may possess a firearm."[309] Similarly, Professors Baude, Sachs, and Jud Campbell argue that under "the general-law approach, the 'privileges or immunities of Citizens of the United States' were grounded in general law that operated throughout the United States."[310] Moreover, because "general law is shaped

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[306] As Professors Baude and Robert Leider explain, "[S]ometimes, perhaps often, the Constitution's reference to a legal right must be understood by learning the historical customary law that defined and governed the right before its codification." William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1469 (2024). For many rights, "the Constitution was not creating or defining these terms for the first time, but rather using the legal terminology and legal infrastructure of the day." *Id.* In such cases, "the scope of these preexisting rights was sometimes defined by unwritten law that was neither state common law nor federal common law" but instead "general law." *Id.* at 1470.

[307] U.S. CONST. art. I, § 8, cl. 10, 11; *id.* § 2, cl. 2.

[308] *See generally* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32; BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21.

[309] Baude & Leider, *supra* note 306, at 1469, 1512.

[310] Baude et al., *supra* note 14, at 1207.

by legally recognized custom and practice," they contend that "its contours can change as those practices change."[311] On this account, the "pertinent question for a judge might then be what the general law requires today, not what the content of that law was at a particular moment in the past, whether in 1791 or in 1868."[312] In making this claim, they use general law to refer not only to the traditional transjurisdictional general law, but also to widely adopted principles of unwritten local law.

Although it is not entirely clear how far revivalists would go, many appear open to the view that judges may update constitutional provisions by reference to contemporary general law as it evolves. Professors Danielle D'Onfro and Daniel Epps are the most explicit about this position. They argue that "courts should interpret the Fourth Amendment by turning to *general law*"[313]—rules that "reflect principles or practices common to many different jurisdictions"[314]—and they "would ask courts to resolve Fourth Amendment questions not by looking to the common law of 1791, but instead by using the tools of the common law to determine the general law of the country *today*."[315]

Scholars promoting this general law renaissance are often sharply critical of *Erie*. Because early federal courts applied certain limited forms of general law, these scholars characterize *Erie*'s condemnation of broader forms of general law as anachronistic, ahistorical, and inconsistent with originalism.[316] Sachs, for example, describes *Erie* as a wrong turn that "rejected sources of law with centuries of history and undoubted validity in our system, on the strength of abstract philosophical arguments that are unambiguously false."[317] He concludes that "the rejection of *Erie* is the beginning of wisdom,"[318] and that "[w]hen we ask 'when

311 *Id.* at 1248.

312 *Id.*

313 D'Onfro & Epps, *supra* note 17, at 914 (emphasis in original).

314 *Id.* (quotations marks omitted) (quoting Nelson, *Persistence of General Law*, *supra* note 299, at 505).

315 *Id.* (emphasis in original). In a recent article, Professors Joshua Macey, Ketan Ramakrishnan, and Brian Richardson argue that calls for "a modern general law constitutionalism would . . . mire the federal judiciary in a moralized and largely discretionary form of common law–like decision-making that is vulnerable to the characteristic pitfalls of more familiar forms of common law constitutionalism without sharing in their characteristic attractions." Joshua C. Macey, Ketan Ramakrishnan & Brian M. Richardson, *Against General Law Constitutionalism*, 93 U. CHI. L. REV. 621, 621 (2026).

316 *See* Goldsmith, *supra* note 12, at 732.

317 Sachs, Life After *Erie*, *supra* note 11, at 7.

318 Sachs, Pennoyer *Was Right*, *supra* note 12, at 1255.

should we start to overrule *Erie*?' the only answer is that 'Now is an acceptable time.'"[319]

These critiques rightly identify problems with *Erie*'s jurisprudential rhetoric. But they fail to distinguish *Erie*'s rhetoric from its core constitutional holding. They also fail to distinguish between the traditional law of nations—historically applied in ways consistent with the Constitution's allocation of authority—and the later, far broader conception of general common law that *Erie* rejected. As Part IV demonstrates, these distinctions are essential to a proper understanding of *Erie* and to preserving the Constitution's structural safeguards of residual state sovereignty.

B. Structural Difficulties with Expansive General Law

Proposals for the expanded use of general common law encounter serious structural difficulties. First, they collapse historically distinct categories of unwritten law into a single undifferentiated concept. Recent revivalist accounts tend to treat the law merchant, the law maritime, the law of state-state relations, equity, shared local common law, interpretive conventions, and other sources of unwritten law as manifestations of the same legal phenomenon.[320] But to conflate all of these sources of unwritten law into a monolith of general law is a category error. The Constitution was structured to interact differently with different forms of unwritten law.

Second, the historical record on which revivalists rely is not as clear cut as they suggest. When early federal courts applied unwritten law, they often did so because the Constitution ousted state authority over certain matters, because Congress authorized the use of general law, or because state law called for the application of that law. As discussed, scholars overlook the fact that early Congresses gave federal courts express authority to administer legal and equitable forms of proceeding—and thus to apply the law that was part and parcel of them. The suggestion that federal courts were free to discern and apply such law without congressional authorization is a fallacy, no matter how often scholars repeat it.

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[319] Sachs, Life After *Erie*, *supra* note 11, at 17; *cf.* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1348 (2023) ("I am not sure that the old ways of legal culture are entirely destroyed. And even if they were, might it not be our obligation to try to help bring them back?").

[320] *See, e.g.*, Sachs, Life After *Erie*, *supra* note 11, at 2 (listing several such categories as examples of the same phenomenon).

Beyond these conceptual and historical difficulties, revivalists face a more fundamental obstacle: the constitutional basis of *Erie* itself. *Erie* reasoned that absent a valid form of supreme federal law, courts had no authority to displace state law with general law. This constitutional principle stems from the residual state sovereignty that the Constitution preserves not only by limiting federal power, but also by conditioning federal supremacy on adherence to federal lawmaking procedures. To succeed, any revivalist account must establish not only its historical pedigree but also its conformity to this constitutional principle.

1. Conflating general common law with the law of nations.

Many revivalist proposals rely on expansive definitions of general law that collapse historically distinct categories. Most notably, they conflate the transjurisdictional law of nations with a more expansive conception of general common law that includes local law common to many jurisdictions. The law of nations provided general (in the sense of uniformly applicable) rules to guide interactions and resolve disputes among sovereigns (and their citizens). The general common law that revivalist scholars advocate, by contrast, encompasses general (in the sense of characteristic) unwritten local rules that different jurisdictions have in common. This Section traces the historical and conceptual distinctions between these two categories and explains the constitutional problems that arise from conflating them.

Revivalists define general law as any "shared body of unwritten law" that "was not derived from any enactment by a single sovereign but instead 'existed by common practice and consent among a number of sovereigns.'"[321] Read broadly, this definition could encompass much local common law that aligns across some set of jurisdictions.[322] Yet this definition elides critical distinctions. The law of nations was general in a specific sense: It was a shared body of transjurisdictional customary rules that sovereigns followed to govern their interactions and those of their citizens, and no individual sovereign had authority to fix its meaning. By contrast, what revivalists call "general common law" is "general" in the distinct sense that it is merely characteristic of the local law that multiple jurisdictions have adopted to govern similar matters but that each sovereign remains free to tailor to

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[321] Baude et al., *supra* note 14, at 1190 (quoting Fletcher, *supra* note 14, at 1517).

[322] *Id.*

its own needs. General law in this enlarged sense would encompass local common law characteristic of multiple systems—and potentially any legal norm that some set of jurisdictions widely shared.[323]

General law thus can be used in at least two distinct senses. One sense in which law may be "general" is that it applies uniformly across jurisdictions and is not subject to unilateral revision by any single sovereign—as with the three branches of the law of nations at the Founding. In this sense, the law of nations was synonymous with general law: It was a shared body of transjurisdictional rules that governed "matters of concern to more than one sovereign, and no [ ] sovereign had the ability to fix its meaning."[324] It applied to all nations that wished to be part of the "civilized world," and noncompliance was treated as opting out of the system rather than changing its content.[325] Opting out of the general law of nations was a choice of law decision, not a decision to change the content of that law. And under the law of nations itself, the decision to opt out had legal consequences for the sovereign making that choice. Specifically, opting out might justify retaliation by other nations for that decision.[326] Because no nation had unilateral authority to define the content of the general law of nations, that law was "general" in the dictionary sense of "applicable . . . to the *whole* rather than to a limited part."[327] This is the sense in which commentators, the Founders, and early federal courts understood the law of nations to be general law.

There is, however, a second, broader sense in which law can be "general." It can be general in the sense that it is characteristic of the law that multiple jurisdictions have adopted to govern matters within their local control. Revivalist scholars include law that is general in this second sense in their sweeping definitions of general law. They refer to "general law" as "principles or practices common to many different jurisdictions."[328] Under this broader conception, general law is "general" only in the sense of reflecting

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[323] *See id.* (noting that "general law" included "the common law" (quotation marks omitted) (quoting Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 749 (1838))); Sachs, Life After *Erie*, *supra* note 11, at 5 (noting that "general law" included the "common law *for* America," as inherited from England (emphasis in original)).

[324] Bellia & Clark, *General Law in Federal Court*, *supra* note 7, at 658.

[325] *Id.* at 664.

[326] *See supra* note 53 and accompanying text.

[327] *General*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (emphasis added).

[328] Nelson, *Persistence of General Law*, *supra* note 299, at 505.

a majority approach—much like a Restatement rule. But this notion of general common law (characteristic of local practice) is different in kind from the law of nations notion of general law (applicable to the whole). Whether general (characteristic) common law derives from a common legal source, such as the diaspora of the common law of England, fundamental right, or coinciding policy choices, the content of such law remains subject to the local control of each jurisdiction. If a jurisdiction does not follow the prevalent approach to a matter of local law, that jurisdiction is not making a choice of law decision that affects other sovereigns. It is simply providing a different rule to govern a local matter, and doing so has no legal consequences for its relations with other nations.[329] Because each nation had territorial sovereignty to govern local matters as it saw fit, coinciding local law was not general in the same way that the general law of nations governed interstate and international relations. It was general in the distinct dictionary sense of being "characteristic of the majority," not of "applicable to every one."[330] By design, the Constitution interacted differently with the general law of nations than with unwritten law that was generally characteristic of the local law of multiple sovereigns.

This conflation of general and local law is not the only problem with revivalists' expansive definition of general law. Even if one accepts their broad account, they fail to identify which jurisdictions count in determining the existence and content of general common law. For the traditional law of nations, the relevant community was the family of nations, none of which could alter its content unilaterally. For shared local common law, the relevant set of jurisdictions might be the American states, the American states plus federal practice, former British colonies that inherited the common law, western democracies, or perhaps the entire world. Some revivalists, like D'Onfro and Epps, suggest looking to "principles or practices common to many different jurisdictions"[331] to determine the content of general common law, but they provide no clear denominator. As Professor Maureen Brady points out, "this vision of the 'general law'—one that includes majority

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[329] *See supra* text accompanying note 62.

[330] *General*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

[331] D'Onfro & Epps, *supra* note 17, at 914 (quotation marks omitted) (quoting Nelson, *Persistence of General Law*, *supra* note 299, at 505).

and minority rules, all federal, state, and local statutory law, as well as social norms—is more radical than the authors let on."[332]

Even apart from the difficulty of determining which jurisdictions count, the content of general law is not always self-evident. What if, among the jurisdictions that count, there is substantial disagreement about the content of the law, or the majority rule is otherwise vague or in transition? What if it is unclear how a widely adopted rule applies to the particular circumstances of a case? What if the application of a general law standard is dependent on its interactions with local laws, customs, or usages? These questions do not involve mere details for courts to work out in application. Instead, they involve the same indeterminacies that made the constitutional defect addressed in *Erie* so problematic.

At the Founding, the distinction between the law of nations and local unwritten law, including shared common law, was critical. The law of nations consisted of customary rules governing relations among sovereigns and their citizens—rules that nations followed to manage sovereign relations and facilitate cross-border commerce. By contrast, general common law, as conceived by modern revivalists, includes local law rules that many jurisdictions share in common but that remain rooted in each sovereign's own independent authority. That sovereigns shared the same legal approach to matters subject to local rules did not mean that the shared approach displaced an outlier state rule. After independence, the American states retained exclusive power over matters of local law—real property, trusts and estates, torts, crimes, and other local matters—subject only to displacement by the "supreme Law of the Land" as defined by the Supremacy Clause.[333]

The historical boundary between the general law of nations and local common law was critical because it helped divide federal and state judicial power. The Constitution required federal courts to respect local law unless it conflicted with a valid form of supreme federal law. The general law of nations was different. The Constitution was designed to facilitate the application of all three branches of the law of nations in appropriate cases, and it vested federal courts with jurisdiction to hear them. But it did not authorize federal courts to disregard local law in favor of the kind of general common law that revivalist scholars advocate today.

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[332] Brady, *supra* note 17, at 1018.

[333] *See supra* Part I.A.

Thus, the all-or-nothing choice revivalists present—between embracing all that they lump together as general common law and rejecting all of it wholesale—is a false one. Some uses of general law are essential to upholding the Constitution's design and structure; others are unconstitutional intrusions on state sovereignty or lawmaking authority assigned to the political branches. History reveals a basic distinction between the traditional law of nations and broader versions of general common law that did not exist as an undifferentiated category at the Founding.

The Supreme Court's rejection of general common law in *Erie*—and its continued reliance on the traditional law of nations—is grounded in the Constitution's structure. The Constitution was designed to facilitate specific application of the law of nations, but it gave federal courts no freestanding warrant to use general common law to displace state law. To the contrary, federal judicial application of general common law—like the general tort rule applied by the court of appeals in *Erie*—would usurp residual state sovereignty and the political and procedural safeguards embedded in the Constitution's lawmaking procedures. For this reason, calls for greater use of general common law are incompatible with the constitutional constraints recognized in *Erie*. Properly understood, *Erie* prohibited federal courts from applying freestanding general common law to displace state law, but its reasoning permits them to apply the law of nations when necessary to implement "the Federal Constitution or [ ] Acts of Congress."[334]

Revivalist scholars have made little attempt to demonstrate that their proposed uses of general law are consistent with *Erie*, the states' residual sovereignty, and the Supremacy Clause's built-in safeguards. At a minimum, they invite judges to displace state law in ways that *Erie* condemned.

2. Congressional authorization of general law.

Revivalists contend that broad federal judicial reliance on general common law is appropriate because early federal courts routinely applied it as freestanding rules of decision. But the evidence they invoke does not support this proposition: When early federal courts applied generally shared rules of local common law, they typically did so pursuant to congressional authorization.

As discussed in Part I.D, § 14 of the First Judiciary Act empowered federal courts to issue "all [ ] writs not specially provided

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[334] *Erie*, 304 U.S. at 78.

for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[335] Likewise, the Process Acts of 1789 and 1792 directed federal courts to use state forms of action in actions at law, and traditional forms of proceeding in equity and admiralty cases.[336] These statutes authorized federal courts to apply unwritten forms of law—including what today would be characterized as remedial and substantive doctrines—within the forms of proceeding that Congress prescribed for them.[337]

Chief Justice Marshall's 1807 opinion in *United States v. Burr*,[338] a criminal case upon which revivalists rely, illustrates the point. At the time of *Burr*, legal process was a matter of local law, especially in criminal cases, which were quintessentially local in nature.[339] The question in *Burr* was whether the court was bound to follow state processes under § 34 of the First Judiciary Act (which required federal courts to apply "the laws of the several states" as rules of decision "except where the constitution, treaties or statutes of the United States shall otherwise require or provide"), or whether it could instead apply the criminal process that common law jurisdictions generally followed.[340] The court determined that it could apply the common law more generally—but *only* because an act of Congress authorized it to do so. In other words, what revivalists take to be an example of freestanding federal judicial use of general common law was in fact authorized by Congress.

"The case," Chief Justice Marshall explained, was "provided for by an act of congress," specifically § 14 of the First Judiciary Act.[341] Section 14, he determined, gave the "court power to devise the process for bringing any person before it who has committed

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[335] Judiciary Act of 1789 § 14, 1 Stat. at 81–82.

[336] *See* Bellia & Clark, *Original Source of Cause of Action*, *supra* note 211, at 646–55.

[337] There were other statutory authorizations as well. Section 34 of the First Judiciary Act required federal courts to apply state law as rules of decision in actions at law, including local common law. Judiciary Act of 1789 § 34, 1 Stat. at 92. And § 17 further authorized them "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." *Id.* § 17, 1 Stat. at 83.

[338] 25 F. Cas. 187 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694).

[339] *See* Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 959–65 (2006) (explaining that procedure and penal actions were local in nature).

[340] *Burr*, 25 F. Cas. at 188 (quotation marks omitted) (quoting Judiciary Act of 1789 § 34, 1 Stat. at 92).

[341] *Id.*

an offence of which it has cognisance, and not to refer it to the state law for that process."[342] The statutory "limitation on this power," he continued, is "that the process shall be agreeable to the principles and usages of law."[343] Thus, Chief Justice Marshall applied as a rule of decision "those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state."[344] Why did the court apply principles and usages "generally recognized" by the states? Because Congress had instructed it to do so. In short, *Burr* is not an example of inherent federal judicial power to apply general common law, but of federal courts exercising authority expressly conferred by the Judiciary Act. Because that Act was "the supreme Law of the Land" under the Supremacy Clause, federal courts were bound to apply it.

Livingston v. Jefferson[345] is another case on which revivalists rely for their broad understanding of general common law. In *Livingston*, the circuit court rejected the idea that it could apply a freestanding general law of trespass and instead held that Virginia common law controlled. The issue in *Livingston* was whether the court, sitting in Virginia, could "take cognizance of a trespass" committed on lands outside the state of Virginia.[346] Under the Process Acts of 1789 and 1792, Congress required a federal court to apply the same forms of proceeding as the courts of the state in which it sat.[347] At the time, federal courts rarely felt the need to recite the Process Acts for the same reason that federal courts today do not announce that the Federal Rules of Civil Procedure govern civil actions. It was well established—and simply assumed—that in actions at law, federal courts were to apply the forms of proceeding of the state. Accordingly, the circuit court could entertain the trespass action only if Virginia courts would have done so under state law.

Chief Justice Marshall and District Judge John Tyler, sitting on the circuit court, held that the federal court could not hear the action because the common law of Virginia considered an action for trespass to be local, meaning that it could be heard only in the

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342 *Id.*

343 *Id.*

344 *Id.*

345 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411).

346 *Id.* at 663 (opinion of Marshall, Circuit Justice).

347 *See* Bellia & Clark, *Original Source of Cause of Action*, *supra* note 211, at 646–55.

state where the land was located.[348] Chief Justice Marshall explained that under the common law of England, which "ha[d] been adopted by the legislature of Virginia," courts could not entertain such trespass actions because such actions were "local."[349] Judge Tyler went further, expressly rejecting counsel's appeal to general law to displace local Virginia law as "something like the last resort of kings, when everything else fails."[350] In Judge Tyler's view, "[T]his undefined law as to the case before us, ceases to be anything more than empty sound."[351] In other words, he rejected the notion that freestanding general law could authorize the court to disregard local law.

In sum, the historical record does not support the claim that federal courts once wielded free-ranging power to apply general common law as a freestanding source of authority in lieu of state law. Instead, the historical record establishes only that federal courts may apply general law when supreme federal law authorizes or requires them to do so, or when the relevant state would itself look to general law.

C. Incompatibility with *Erie* and the Residual State Authority

Even if revivalists could overcome the difficulties that the historical record presents for their theory, their proposals would confront a more fundamental obstacle: the Constitution itself. The revivalist position encounters serious constitutional impediments. As Part II explains, the states transferred only a portion of their sovereign authority to the federal government and necessarily retained substantial residual sovereignty. They also conditioned that transfer on substantive and procedural safeguards that limit when and how federal actors may displace state law. The Supremacy Clause embodies that compromise by restricting

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348 *Livingston*, 15 F. Cas. at 664–65 (opinion of Marshall, Circuit Justice).

349 *Id.* at 665. As an aside, he observed that he "should have thought [the common law rule] in force" even if the legislature of Virginia had not adopted the common law because legislative adoption was not the only way a state could adopt the common law. *Id.* Some states signified adoption simply by continued judicial application of such law. *See supra* text accompanying notes 86–88 (discussing state adoption of common law).

350 *Livingston*, 15 F. Cas. at 663 (opinion of Tyler, J.).

351 *Id.* A third case upon which scholars rely as evidence of federal judicial power to apply general consensus common law is the 1838 case of *Massachusetts v. Rhode Island*, 37 U.S. (12 Pet.) 755 (1838). This case involved a boundary dispute between two states. *Id.* at 759. As we explain in Parts I and IV, federal courts have applied, and may continue to apply, the general law of nations to such disputes in order to uphold the territorial integrity and constitutional equality of the states. General common law has no application.

supreme federal law to specified forms of law adopted by specified actors, pursuant to delegated authority, using constitutionally prescribed procedures—procedures that exclude federal courts from federal lawmaking. The constitutional holding of *Erie* therefore preserves residual state authority by rejecting federal judicial power to displace state law unless a valid source of "the supreme Law of the Land" authorizes them to do so. If the Constitution's designated federal actors do not adopt federal law through these procedures, then state law governs by default. Federal courts may not rely on freestanding general common law in its place. Revivalist proposals would invite federal courts to exercise precisely the kind of freewheeling judicial power exercised under the *Swift* doctrine. The reason *Erie* rejected this power is that it is inconsistent with the Constitution's exclusive framework for dividing and exercising sovereign authority within the federal Union.

With these constitutional limits in mind, it becomes clear why proposals to expand the use of general common law conflict with *Erie* and the original constitutional structure. Advocates such as Sachs urge the Court to "abolish[ ] the [idea] of 'federal common law'" and simply allow federal courts to substitute general common law in its place,[352] contending that "the rejection of *Erie* is the beginning of wisdom."[353] By pressing for *Erie*'s abandonment, these scholars necessarily signal disagreement not only with its rhetoric but also with its core constitutional holding.

Revivalist proposals envision two distinct uses of freestanding general common law. The first is interpretive: to employ an evolving conception of general law as a means of updating constitutional provisions.[354] D'Onfro and Epps are candid about this project. They argue that "courts should interpret the Fourth Amendment by turning to general law" and that courts "[should] resolve Fourth Amendment questions not by looking to the common law of 1791, but instead by using the tools of the common law to determine the general law of the country today."[355] Baude, Sachs, and Campbell likewise contend that the "privileges or immunities of citizens of the United States" were grounded in "a shared body of law which American jurisdictions, both state and

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[352] Sachs, Life After *Erie*, *supra* note 11, at 9.

[353] *Id.* at 14; *see also* Sachs, Pennoyer *Was Right*, *supra* note 12, at 1255.

[354] *See supra* notes 309–15 and accompanying text.

[355] D'Onfro & Epps, *supra* note 17, at 914 (emphasis omitted).

federal, could properly employ."[356] They suggest that because the "contours [of general law] can change as [legally recognized customs and] practices change," the "pertinent question for a judge might then be what the general law requires today, not what the content of that law was at a particular moment in the past."[357] Absent from these proposals is any attempt to explain how such dynamic uses of general law can be reconciled with *Erie* and the Constitution's exclusive framework for displacing state law.

When deployed as a dynamic source for updating constitutional meaning, freestanding general law presents serious constitutional problems. The Founding generation understood that sovereign authority could be altered only through a legal instrument's ordinary meaning at the time of adoption.[358] Of course, the Constitution may employ an open-textured standard—such as "unreasonable searches and seizures" or "cruel and unusual punishments."[359] And such a standard could manifest an evolving meaning. If scholars can establish, for example, that courts should understand the Privileges or Immunities Clause of the Fourteenth Amendment in light of developing consensus standards,[360] then they might be able to reconcile their theory with *Erie*. In that case, the Constitution itself would authorize judicial resort to an evolving consensus standard.

But if they mean that general common law is an independent source of law that may alter the Constitution's meaning and displace state law on its own, then the Constitution, as explained in *Erie*, disallows that practice. To be sure, general law provides useful context for interpreting and upholding the Constitution's allocation of powers and its protection of individual rights. But revivalists' proposed reliance on general law goes beyond ordinary interpretation. Revivalists are pushing a general common law that would generate evolving meaning for the Constitution from emerging consensus. Because this approach would elevate general common law over the Constitution itself, it stands in tension with the constitutional constraints recognized in *Erie*.

The second proposed use of general common law is remedial and statutory: to fill perceived gaps in federal enactments. Sachs,

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356 Baude et al., *supra* note 14, at 1192, 1195 (quoting U.S. CONST. amend. XIV).

357 *Id.* at 1248.

358 *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 30, at 579–87.

359 U.S. CONST. amends. IV, VIII.

360 *See supra* text accompanying note 310.

for instance, has urged federal courts to replace federal common law with general common law[361] capable of supplying remedies, defenses, and interpretive rules—even absent evidence of congressional intent. Baude and Sachs similarly contend that the law of interpretation is general law and that courts may apply it directly to shape the meaning of constitutional and statutory provisions.[362] The implication is that federal courts may identify and enforce evolving unwritten general principles of construction, remedies, and defenses, independent of legislative adoption. Properly understood, however, this move likewise substitutes evolving general norms for enacted law—a move that contradicts the Constitution's preservation of residual state sovereignty through prescribed lawmaking procedures.

Revivalists have not attempted to reconcile such expansions of judicial authority with the constitutional limits on federal lawmaking that underlie *Erie*. As explained, the Supremacy Clause specifies only three sources capable of displacing state law: "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."[363] As Part IV explains, the Constitution's allocation of war and foreign relations powers sometimes authorizes or requires judicial application of traditional principles of the law of nations. Courts apply these principles not as freestanding general law, but in order to uphold the Constitution's allocation of powers.

Similarly, Congress may—and frequently does—incorporate background general law into federal statutes. When it does so, those principles become binding as part of the supreme law of the land. As Professor Caleb Nelson shows, courts often read statutes against established background principles—understanding "the statute to incorporate (and thereby federalize) various background principles of general jurisprudence, including principles about the proper measure of damages, the availability of 'assumption of the risk' as a defense to liability, and the survival of personal injury claims after the injured party's death."[364] In such cases, courts are not applying freestanding general law; they are

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361 Sachs, Life After *Erie*, *supra* note 11, at 9–11.

362 *See* Baude & Sachs, *supra* note 304, at 1104–18; *see also* Sachs, Life After *Erie*, *supra* note 11, at 10–11.

363 U.S. CONST. art. VI, cl. 2.

364 Nelson, *Persistence of General Law*, *supra* note 299, at 520.

implementing enacted federal law in light of background principles that inform its meaning. To go beyond this established practice of interpretation and use general law to craft new remedies or change interpretive rules themselves would displace applicable state law outside the constitutionally required lawmaking processes.

Critics may question our reliance on the Supremacy Clause on the ground that *Swift*-era general law lacked formal preemptive effect in state courts and thus posed no real threat to state authority.[365] Because state courts remained free to apply their own law in subsequent cases, critics might contend that federal judicial application of general common law did not implicate the Supremacy Clause. This critique, however, overlooks the federal courts' use of general law to displace state law in the cases before them. As discussed, the Constitution preserved residual state sovereignty by prescribing precise procedures for the adoption of all forms of federal law capable of displacing state law.[366] The constitutional defect in the expanded *Swift* doctrine was not that it formally bound state courts in subsequent cases; it was that federal courts were displacing governing state law in the case before them without any warrant in any recognized source of "the supreme Law of the Land." Even if a *Swift*-era ruling bound only the immediate litigants, it still displaced governing state law absent a controlling provision of the Constitution, a federal statute, or a treaty. As *Erie* recognized, federal judicial displacement of state law, absent supreme federal law to the contrary, intruded upon the states' residual authority to govern themselves. *Erie* upheld residual state authority by prohibiting federal courts from overriding state law on the basis of freestanding general common law untethered to the Constitution's enumerated sources of supreme federal law.

Perhaps sensing this tension with residual state sovereignty under the Constitution, some revivalists disclaim any intention to displace state law.[367] They contend that general common law would apply only in areas in which the states themselves have retained it. But this position raises more questions than it answers. First, state courts have largely abandoned general law.

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[365] *See* Sachs, Life After *Erie*, *supra* note 11, at 2 ("General law wasn't '*supreme* Law of the Land' under Article VI, overriding state law to the contrary." (emphasis in original)).

[366] *See supra* Part I.A.

[367] *See, e.g.*, Sachs, Life After *Erie*, *supra* note 11, at 7 (suggesting that perhaps "not much" would change in a post-*Erie* world (quotation marks omitted)).

Second, if federal courts invoke general law principles to interpret a federal statute or fill perceived statutory gaps, are state courts bound to follow those principles? If not, federal law will be applied inconsistently across jurisdictions. If so, unwritten general common law would bind state courts in much the same manner as federal common law. Both horns of this dilemma implicate *Erie*.

Moreover, some specific applications of general common law that revivalists propose would displace state law. To permit evolving conceptions of general law to control the meaning of constitutional provisions would effectively displace state law without any warrant in supreme federal law for doing so—except in the rare instance in which a constitutional provision itself called for reliance on evolving consensus as part of its original meaning. To permit federal courts to discern and administer freestanding general common law rights of action or remedies or contract principles for settlement agreements of federal and state claims—when no federal statute authorizes them to do so—could result in the displacement of otherwise governing state law. And to invoke evolving general law rules of interpretation to determine constitutional or statutory meaning likewise could displace state law outside the supreme law of the land. It is simply not possible for federal courts to apply freestanding general common law without displacing state law in some measure. Unless revivalists can demonstrate that their proposals avoid all displacement of state law, disclaimers alone cannot avoid the constitutional defect condemned in *Erie*.

Finally, if revivalists insist that general law untethered to the Constitution or a federal statute cannot displace state law, why not? What is the source of authority for that limitation? We know of none other than *Erie* and the basic constitutional limits it recognized on federal displacement of local state law. Thus, if the Court were to overturn *Erie*—as some revivalists urge—it is not clear why freestanding general law could not displace state law.

In sum, federal judicial application of general common law as freestanding rules of decision—whether to update constitutional meaning, supply interpretive rules, or supplement statutory schemes—threatens the residual authority of the states and conflicts with the lawmaking procedures that the Constitution prescribes. By design, those structural safeguards limit federal power in order to preserve the states' capacity for self-government. It is no answer to say that general common law is not itself "the

supreme Law of the Land." The federal general common law rejected in *Erie* was not supreme law either, yet it was used to displace state law in diversity cases.[368] That displacement alone was sufficient to render the practice unconstitutional. Properly understood, *Erie* adopted a principle faithful to the Constitution's original design: Federal courts may apply general law when the Constitution, Congress, or state law authorizes them to do so, but not as an independent source of judicial authority. That command places revivalist proposals on a collision course with the Constitution's original design.

IV. GENERAL LAW AFTER *ERIE*

Erie repudiated the federal courts' authority to displace state law with freestanding "federal general common law."[369] But it did not forbid courts from applying traditional general law in all circumstances. As best understood, *Erie* held that federal courts may displace state law only when it conflicts with rules derived from the Constitution, federal statutes, or treaties. That principle simply restates the effect of the Supremacy Clause, which designates these three sources as "the supreme Law of the Land."[370]

Contrary to the assumptions of some revivalists, the reasoning of *Erie* did not categorically bar federal courts from applying *all* general law. It condemned a particular abuse: the late-stage *Swift* doctrine, under which federal judges disregarded state law in favor of general law that was, as the Court put it, "often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject."[371] Nothing in the Constitution authorized federal courts to override state law on this basis. As *Erie* stated, "the law to be applied in any case is the law of the State"[372] unless the matter is "governed by the Federal Constitution or by Acts of Congress"[373]—a formulation that echoes the Supremacy Clause itself.

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368 *See* U.S. CONST. art. VI, cl. 2; *Erie*, 304 U.S. at 78.

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

370 U.S. CONST. art. VI, cl. 2.

371 *Erie*, 304 U.S. at 78 (quotation marks omitted) (quoting *Baugh*, 149 U.S. at 401 (Field, J., dissenting)).

372 *Id.*

373 *Id.*

Read in this way, *Erie* leaves room for federal courts to apply traditional general law when it implements a constitutionally recognized source of supreme law. Although *Erie* prohibits courts from substituting freestanding general common law for state law, it permits courts to rely on general law when necessary to implement the Constitution, federal statutes, or even state law itself.

This Part identifies five constitutionally legitimate uses of general law after *Erie*. Courts may apply general law (1) to uphold the constitutional equality and territorial integrity of the states and (2) to uphold the Constitution's allocation of war and foreign relations powers to the political branches. In addition, they may apply general law, including broader notions of general common law, (3) as background interpretive context for understanding constitutional and statutory terms of art, or the Constitution's allocation of powers between the federal government and the states; (4) when Congress has authorized them to do so in duly enacted statutes (which are themselves supreme); and (5) to mirror state law when state law treats general law as controlling.

A. Upholding the Constitutional Equality of the States

The Supreme Court has long recognized that the states enjoy territorial integrity and constitutional equality.[374] These foundational principles not only shape federalism but also guide judicial resolution of disputes between states. In such cases, federal courts often invoke background rules drawn from the general law of nations. This practice does not offend *Erie* or the Supremacy Clause. Rather, it implements a structural feature of the Constitution itself—the equal sovereignty of the states.

A paradigmatic example is *Hinderlider*, decided the same day as *Erie*. *Hinderlider* involved a dispute over the allocation of water in an interstate stream, a dispute that implicated the constitutional equality of the states.[375] To resolve it, the Court applied principles derived from the law of nations—rebranded as "federal common law"[376]—that historically governed relations among coequal sovereigns. These principles recognized the "perfect equality and absolute independence of sovereigns."[377] At first glance, this reliance on such general rules might appear to conflict with

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[374] *See* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1102–32 (2016) (arguing that a principle of equal sovereignty is part of the Constitution).

[375] *See Hinderlider*, 304 U.S. at 95–97.

[376] *Id.* at 110.

[377] *The Schooner Exch.*, 11 U.S. (7 Cranch) at 137.

Erie's rejection of federal general common law. But the rules applied in *Hinderlider* were not free-floating general common law. They were long-standing norms drawn from the law of nations that gave effect to a constitutional mandate: the sovereign equality of the states.[378]

This distinction is crucial. Federal general common law, in the sense *Erie* repudiated, refers to rules "whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command."[379] By contrast, the rules applied in disputes between states derive from the constitutional structure itself. The Constitution presupposes that the states entered the Union as coequal sovereigns with defined territorial boundaries. Because "Free and Independent States" enjoyed absolute equality under the law of nations, the Constitution presupposes the sovereign equality of the states absent clear constitutional abrogation.[380] This presumption is reflected not only in the text—such as the requirement of state consent before forming new states within an existing state's territory[381]—but also in structural features like the states' equal suffrage in the Senate.[382]

From the Declaration of Independence forward, American states claimed the status of "Free and Independent States,"[383] entitled under the law of nations to the "perfect equality and absolute independence of sovereigns."[384] The Constitution carried that baseline forward. Unless the Constitution clearly provides otherwise—whether expressly or by unavoidable implication[385]—the

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[378] *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 935–40.

[379] PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988). Or, as Professor Martha Field put it, federal common law "refer[s] to any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional." Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (emphasis in original).

[380] *See* Colby, *supra* note 374, at 1139.

[381] U.S. CONST. art. IV, § 3, cl. 1.

[382] *Id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."). Indeed, the Constitution even exempts the states' equal suffrage in the Senate from amendment under Article V. *See id.* art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

[383] THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).

[384] *The Schooner Exch.*, 11 U.S. (7 Cranch) at 137.

[385] *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 881–84.

states retain their sovereign equality. Unlike the states' equal suffrage in the Senate,[386] provisions such as proportional representation in the House[387] or the design of the Electoral College[388] represent specific, textually grounded departures from this baseline, not rejections of it.

Thus, when the Court resolves disputes among states, it does not legislate new rules. It applies background principles—many drawn from the general law of nations—that give effect to the Constitution's recognition of equal sovereignty. *Hinderlider* illustrates this approach. The Court refused to apply either state's domestic law to determine water rights,[389] determining instead that the Constitution required an "equitable apportionment"[390] based on "the equal level or plane on which all the states stand, in point of power and right, under our constitutional system."[391] Although these rules originated in the law of nations, they operate here as constitutional implements—tools for enforcing the Constitution's recognition of state equality—rather than as freestanding preemptive sources of law.

Boundary disputes provide another example. In *New Jersey v. Delaware*,[392] the Court determined the boundary between two states by applying the thalweg doctrine—a principle of international law that locates river boundaries in "the track taken by boats in their course down the stream, which is that of the strongest current."[393] The Court invoked this doctrine not as an act of judicial innovation, but to ensure that each state retained its equal right to use the river that defined its border. The doctrine provided a neutral, historically grounded framework for respecting each state's territorial integrity and sovereign equality under the Constitution.

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386 *See supra* note 382 and accompanying text.

387 *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.").

388 *Id.* art. II, § 1, cl. 2 (assigning electors to each state "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"). If no candidate receives a majority of the electoral votes, then the Constitution defaults to state equality by specifying that the House of Representatives shall choose the President, but "the votes shall be taken by states, the representation from each state having one vote." *Id.* amend. XII.

389 *Hinderlider*, 304 U.S. at 110 (explaining that "neither the statutes nor the decisions of either State can be conclusive" upon these questions).

390 *Id.* at 109.

391 Wyoming v. Colorado, 259 U.S. 419, 465 (1922).

392 291 U.S. 361 (1934).

393 *Id.* at 379.

Although *Hinderlider* labeled the principles it applied as "federal common law,"[394] the rules applied in this context are best understood as constitutional implements rather than exercises of judicial lawmaking.[395] Judicial use of those rules does not conflict with *Erie* because it does not displace state law absent a constitutionally recognized source of supreme federal law. On the contrary, the operative source of supremacy is the Constitution itself. Principles drawn from the law of nations function as background default rules that implement the Constitution's recognition of the states' equal sovereignty, rather than as independent grounds for overriding state law. So understood, reliance on general law in interstate disputes, even when relabeled federal common law, does not circumvent constitutional safeguards. Rather, it faithfully executes the equal power, dignity, and territorial sovereignty that states enjoy under the Constitution, and thus is a proper application of supreme federal law.

B. The Allocation of War and Foreign Relations Powers

Just as the Constitution's guarantee of state equality permits federal courts to apply traditional principles of general law in interstate disputes, so too does the Constitution's allocation of war and foreign relations powers authorize judicial reliance on traditional principles of the law of nations when necessary to preserve those powers.[396] Neither *Erie* nor the Supremacy Clause forbids this practice. To the contrary, federal courts have long applied the

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394 *Hinderlider*, 304 U.S. at 110 (quotation marks omitted).

395 Although the Court rebranded these rules of the general law of nations as federal common law in *Hinderlider*, scholars have made more of this relabeling than it is worth in this context. Before *Erie*, courts applied the general law of nations to uphold the territorial integrity and sovereign equality of the states. To the extent that the Constitution required this integrity and equality, state courts were bound to uphold them as well. It is of course true that before *Erie*, state courts could exercise independent judgment to determine the content of general law, but if the Supreme Court held that the constitutional equality of the states required equitable apportionment under general law, then state courts were bound by that constitutional holding regardless of whether the Court labeled the equitable apportionment principle "general law" or "federal common law." The problem arises when the Court displaces state law with federal common law governing local matters within the undisputed territory of the states.

396 The Constitution assigns certain powers exclusively to the political branches of the federal government. These include the power to recognize foreign nations, *see* U.S. CONST. art. II, § 2, cl. 2 (providing that the President has power to send ambassadors with the consent of the Senate); *id.* § 3 (providing that the President has power to receive ambassadors); the authority to declare and conduct war, *id.* art. I, § 8, cl. 11; and the power to authorize captures and reprisals, *id.*

general law of nations in order to uphold the constitutional assignment of foreign relations authority to the political branches and to prevent states and courts from usurping that authority.

The Constitution assigns primary and exclusive responsibility for the nation's foreign affairs to the federal political branches. The President and Congress possess the power to recognize foreign nations, declare and conduct war, authorize captures and reprisals, and make treaties.[397] From the outset, federal courts understood that they had an obligation to apply background principles of the law of nations in a way that respected this allocation. Doing so was necessary to preserve peace, avoid provoking foreign conflict, and ensure that courts did not violate the rights of foreign sovereigns without authorization from the political branches. Because violating such rights could give other nations just cause for retaliation or even war, the Constitution reserved such decisions to the political branches alone.[398]

From their lived experiences and familiarity with publicists such as Vattel,[399] the Founders were steeped in principles of the law of nations—particularly those governing territorial sovereignty, diplomatic relations, neutral rights, and liberty of commerce and navigation.[400] These principles were not discretionary, but were rules governing interactions among sovereigns. At the time of the Founding, a court's failure to observe these principles could constitute a just cause for retaliation, including even war.[401] Because the Constitution vested the decision to recognize foreign states, to make war, and to authorize reprisals exclusively in the political branches, it required courts to uphold the rights of foreign sovereigns under the law of nations. If they failed to do so, they would countermand this allocation of powers. Adherence to such law prevented federal courts from taking actions that could compromise U.S. foreign policy or undermine the political branches' exclusive authority.

The Supreme Court has long tied the application of the general law of nations to the Constitution's allocation of powers to

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397 *Id.*, art. I, § 8, cl. 11; U.S. CONST. art. II, § 2, cls. 1, 2; *id.* § 3.

398 *See* Bellia & Clark, *Law of Nations as Constitutional Law*, *supra* note 70, at 837.

399 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 3 ("These founders were familiar with at least [one] prominent authorit[y] on the law of nations: Emmerich de Vattel[ ].").

400 *See id.* at 7–8 (describing perfect rights).

401 1 VATTEL, *supra* note 53, bk. I, § 17, at 5 ("The perfect right is that to which is joined the right of constraining those who refuse to fulfill the obligation resulting from it." (emphasis omitted)).

the political branches. The Court's 1815 decision in *The Nereide*[402] provides a famous and foundational example. In that case, Chief Justice Marshall confronted the question whether an American privateer could lawfully seize neutral property (owned by a Spanish subject) found on an enemy (British) ship. All nations enjoyed the sovereign right to neutral use of the high seas under the law of nations. The privateer urged the Court to ignore this right—and excuse his capture of neutral Spanish property—on the grounds that "Spain . . . would subject American property, under similar circumstances, to confiscation."[403] Chief Justice Marshall categorically rejected this argument. To disregard Spain's neutral rights would have amounted to retaliation against a recognized foreign sovereign—an act the Constitution entrusted to the political branches rather than the judiciary. As he put it: "If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for that purpose."[404] But, "Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."[405] This case understood the law of nations to supply baseline default rules that informed—and helped implement—the Constitution's allocation of foreign relations powers to the political branches. In other words, the Court enforced Spain's neutral rights both to uphold the Constitution's allocation of war and foreign affairs powers to Congress and the President, and to avoid usurping the political branches' exclusive authority to decide whether, when, and how to retaliate against Spain for any violation of U.S. rights.

This use of general law as an exercise in judicial restraint has endured to the present day. Later Supreme Court decisions have either explicitly linked reliance on such law to the Constitution's allocation of foreign relations powers[406] or simply applied such law in a way that was consistent with the political branches' exclusive

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402 13 U.S. (9 Cranch) 388 (1815).

403 *Id.* at 422.

404 *Id.* at 423.

405 *Id.* Of course, there is a distinction between "the law of the land," a phrase used in England to refer to a unified body of domestic law, and "the supreme Law of the Land," a uniquely American construct to mediate conflicts between state and federal law. *See* Bellia & Clark, *Why Federal Courts Apply the Law of Nations*, *supra* note 74, at 1927.

406 *See, e.g.*, United States v. Pink, 315 U.S. 203, 233 (1942) (concluding that New York's refusal to apply the act of state doctrine—an implementation of a recognized foreign nation's right to territorial sovereignty under the law of nations—was not a "power . . . accorded a State in our constitutional system").

authority to conduct foreign relations.[407] These applications of the law of nations are not exercises in judicial lawmaking that interfere with residual state sovereignty. They are acts of constitutional implementation. The courts apply the general law of nations to uphold the Constitution's structure by respecting the exclusive authority of the political branches over foreign affairs.[408]

This structural understanding also answers a potential jurisdictional objection regarding Article III. Goldsmith and Bradley argue that early federal judicial application of general law must have been untethered from the supreme law of the land because cases governed by general law were not understood to be cases "arising under"[409] federal law for purposes of Article III.[410] In their view, the Founding generation's apparent assumption that such cases fell outside federal question jurisdiction shows that general law was treated as a freestanding source of law rather than as law applied pursuant to the Constitution, treaties, or other forms of supreme federal law. On this account, disputes implicating the law of nations categorically fell outside federal question jurisdiction.

That claim rests on three mistaken premises. First, it assumes that cases in which courts applied general law *never* also involved the Constitution or federal statutes as operative sources of law. But some cases involved both types of law. As explained, certain constitutional provisions—and the allocation of powers they established—require courts to give effect to rights recognized under the law of nations. When courts upheld the rights of recognized foreign sovereigns, they were not applying freestanding general law untethered from supreme federal law; they were applying general law because doing so was necessary to uphold the Constitution's exclusive allocation of foreign relations and war powers to the federal political branches. In such cases, the Constitution itself would supply a rule of decision if there was a dispute about whether and how the Constitution required the application of the general law of nations.

Second, the argument misconceives the historical scope of Article III "arising under" jurisdiction. Early decisions such as *Osborn v. Bank of the United States*[411] and *Cohens v. Virginia*[412]

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407 *See* Bellia & Clark, *Law of Nations as Constitutional Law*, *supra* note 70, at 799–805.

408 *See id.* at 732.

409 U.S. CONST. art. III, § 2, cl. 1.

410 *See* Goldsmith & Bradley, *supra* note 13, at 35–36.

411 22 U.S. (9 Wheat.) 738 (1824).

412 19 U.S. (6 Wheat.) 264 (1821).

recognized that a case arises under federal law not only when the right that underlies a cause of action derives from a federal source,[413] but also when the court must resolve a federal issue in the course of litigation.[414] If a state court denied a foreign sovereign a right that the Constitution requires courts to uphold, the resulting controversy would present a federal question reviewable by the Supreme Court. The fact that general law supplied the substantive rule to resolve the dispute would not categorically place the case outside federal question jurisdiction. Rather, the question whether the Constitution requires courts to apply a rule of general law would be a sufficient predicate for the Supreme Court to exercise federal question jurisdiction on appeal. We have explained elsewhere why the authorities invoked by Goldsmith and Bradley do not support a contrary conclusion.[415]

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[413] *Osborn*, 22 U.S. (9 Wheat.) at 823 (explaining that a cause of action itself arises under federal law if a right or title that the plaintiff had to prove to obtain relief under a particular form of proceeding derived from a federal source—in other words, if federal law "forms an ingredient of the original cause"); *see also* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 332–34 (2007) [hereinafter Bellia, *"Arising Under" Jurisdiction*]. This understanding explains why Congress could require federal courts to apply state forms of proceeding in actions at law under the Process Acts without transforming every case into one arising under federal law. What determined whether the cause of action was one arising under federal law was whether the right or title upon which it was predicated derived from a federal source.

[414] *See* Bellia, *"Arising Under" Jurisdiction*, *supra* note 413, at 337–38 (explaining this aspect of *Cohens*). In such a case, Congress could authorize removal to federal court or Supreme Court review of the federal question that the state court decided. It is clear from this basic principle that there is no merit to the argument that cases involving general law categorically could not fall within the Supreme Court's appellate jurisdiction to hear federal questions decided in state court. If a dispute arose in state court as to whether the Constitution required the court to uphold the right of a foreign nation under the law of nations, or what the scope of the right was that the Constitution required courts to respect, the case would arise under federal law for purposes of Article III, and the Supreme Court could review that federal question in exercising its appellate jurisdiction over state courts.

[415] *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 176–81. None of the cases cited by Goldsmith and Bradley involved a denial of a recognized foreign sovereign's rights under the law of nations in a manner implicating the Constitution's allocation of recognition, war, or foreign relations powers to the political branches. For example, they cited *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1876), for the categorical proposition that the Supreme Court lacks appellate jurisdiction to review state court decisions applying general law. *See* Goldsmith & Bradley, *supra* note 13, at 35–36, 36 n.31. In that case, a Virginia plaintiff sought recovery on a life insurance policy following the Civil War, and the insurer invoked general principles of the law of war to mitigate its contractual obligations. The state court rejected that defense. The Supreme Court dismissed the appeal for lack of a federal question, but the case did not involve any claim that the Constitution required application of the law of nations to vindicate the rights of a recognized foreign sovereign. At the time, the Court's appellate jurisdiction under § 25 of the Judiciary Act extended only to cases in which a state court had

Third, the argument treats the categories of "cases" and "controversies" in Article III as mutually exclusive silos.[416] They are not. Some cases—depending on the elements of a particular plaintiff's cause of action or the issues that actually arise during litigation—may fall under multiple jurisdictional heads. For example, some diversity cases might involve an underlying right under federal law that forms part of the plaintiff's cause of action, or might generate a disputed federal question in the course of litigation. No one denies that a diversity case in state court (not reviewable by the Supreme Court on the basis of diversity) would be reviewable under the Court's "arising under" jurisdiction if a federal issue arose by way of defense. That a case would fall within both diversity and federal question jurisdiction, either as an original matter (if federal law was part of plaintiff's cause of action) or on appeal from a state court to the Supreme Court (if a federal question arose during litigation), is unremarkable.

The same holds true for those categories of Article III jurisdiction designed to enable federal courts to apply the general law of nations. Article III authorizes Congress to give federal courts jurisdiction over cases affecting ambassadors or of admiralty and maritime jurisdiction, for example, regardless of whether they also were cases "arising under" federal law. But nothing in Article III precludes such cases from also arising under federal law if the plaintiff's cause of action rests on a federal right, or if the defendant claims that the Constitution requires application of a rule or immunity derived from the general law of nations.[417] Thus, the absence of federal question jurisdiction in some cases

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ruled against a title, right, or privilege specially set up or claimed under the Constitution, a treaty, or a statute of the United States. *See* Judiciary Act of 1789 § 25, 1. Stat. at 85–86. Because neither party asserted such a federal claim—and the state court did not reject one—the Court lacked jurisdiction. *Hendren*, 92 U.S. at 287. Likewise, in *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836), the Court dismissed the case for lack of jurisdiction because "the judgment [below] had no reference to any constitutional question whatsoever; but proceeded upon general principles of law, applicable to cases of garnishment." *Id.* at 399. Nothing in that decision suggests that the Court lacked jurisdiction where a state court denied rights that the Constitution requires courts to respect in order to preserve the political branches' constitutional authority over foreign relations.

416 U.S. CONST. art. III, § 2, cl. 1.

417 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 175 (explaining that if the ambassador in *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), had been sued and denied immunity in state court, the Supreme Court could have exercised federal question jurisdiction to review the decision on the grounds that the Constitution's allocation of foreign relations powers required immunity under the law of nations).

involving general law does not foreclose federal question jurisdiction in other cases in which the Constitution itself requires courts to apply principles drawn from general law and a state court fails to do so.

And, as discussed, the Constitution's allocation of foreign affairs authority to the political branches sometimes requires courts to apply long-standing doctrines rooted in the law of nations. For instance, long before diplomatic immunity was codified, U.S. courts upheld it not as a matter of judicial discretion but because they risked provoking international conflict if they disregarded it.[418] The same logic applies to head-of-state immunity, which remains uncodified. Suits against foreign leaders in U.S. courts may contradict the President's recognition of a foreign sovereign or interfere with the nation's diplomatic relations. By enforcing such immunities, courts preserve the political branches' constitutionally assigned control over war and foreign affairs.

These doctrines do not conflict with *Erie*'s constitutional reasoning. To the contrary, they are "matters governed by the Federal Constitution," which justify departures from otherwise applicable state law.[419] *Erie* prohibits federal judges from creating freestanding general common law in ways that displace state law unless authorized by a valid source of supreme federal law. But when the Constitution itself requires courts to observe rules necessary to implement the political branches' foreign relations authority, courts may apply those rules without infringing upon the residual authority of states. In such cases, the Constitution itself—not the law of nations standing alone—supplies the operative source of supremacy. Courts apply principles derived from the law of nations in this situation only as a necessary means of upholding exclusive constitutional allocations of authority.[420] Thus, as the following examples show, the continued judicial application of traditional law of nations principles in this context is fully consistent with *Erie*.

1. Diplomatic immunity.

As discussed in Part I, Chief Justice Marshall described diplomatic immunity in *The Schooner Exchange* as grounded in the

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[418] *See infra* Part IV.B.1.

[419] *Erie*, 304 U.S. at 78.

[420] For this reason, Goldsmith and Bradley are mistaken in categorically rejecting our claim that "some form of constitutional or statutory authorization justified application of the early forms of general law." Goldsmith & Bradley, *supra* note 13, at 79.

common practice of all civilized nations.[421] At the Founding, the absolute equality and independence of sovereign states required nations to uphold certain rights and immunities of other sovereigns. Vattel described the rights to establish embassies and to send and receive public ministers as essential to the exercise of all other sovereign rights. "[N]ations," he wrote, "should treat with each for the good of their affairs, for avoiding reciprocal damages, and for adjusting and terminating their differences."[422] Public ministers were "necessary instruments in affairs which sovereigns have among themselves, and to that correspondence which they have a right of carrying on."[423] Accordingly, Vattel deemed the rights, privileges, and immunities of public ministers as inviolable because "[the] respect due to sovereigns should reflect on their representatives, and chiefly on their ambassadors, as representing his master's person in the first degree."[424] Because diplomatic intercourse was a necessary—and often exclusive—means of communication among sovereigns, the immunities of public ministers were understood as core incidents of sovereignty under the law of nations.

Federal courts applied diplomatic immunity as a matter of general law from the Founding until Congress codified the doctrine in 1978.[425] In the immediate aftermath of *Erie*, however, some questioned whether federal courts could continue to apply this general law immunity. The issue arose in *Bergman v. De Sieyes*,[426] a diversity case removed from state court. Alfred Bergman, a New York citizen, sued Jacques De Sieyes, a citizen and accredited minister of France, by serving him as he was passing through New York en route to his diplomatic post in Bolivia.[427] De Sieyes asserted diplomatic immunity under the general law of nations.[428]

The question before the Second Circuit was whether *Erie* required a federal court, sitting in diversity, to apply New York law to determine immunity. In an opinion by Judge Learned Hand, the court held that because De Sieyes had been served with a

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421 *See The Schooner Exch.*, 11 U.S. (7 Cranch) at 132.

422 2 VATTEL, *supra* note 53, bk. IV, § 55, at 132.

423 *Id.* § 57, at 133.

424 *Id.* § 80, at 142.

425 *See generally* Diplomatic Relations Act of 1978, 92 Stat. 808.

426 170 F.2d 360 (2d Cir. 1948).

427 *Id.* at 360–61.

428 *Id.* at 361.

state court subpoena, "the law of New York determines its validity."[429] On this view, "[A]lthough the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us."[430] In other words, Judge Hand regarded diplomatic immunity as state common law, even though its source lay in the traditional law of nations. After surveying New York precedent and secondary sources, the court dismissed the suit because it "believe[d] that the courts of New York would today hold that a diplomat in transitu would be entitled to the same immunity as a diplomat in situ."[431] As Professor Louis Henkin observed, "So great a judge as Learned Hand apparently assumed that international law was part of state common law for this purpose and that a federal court in diversity cases had to apply international law as determined by the courts of the state in which it sat."[432]

We respectfully disagree with Judge Hand's conclusion. *Erie* did not address the rights and immunities of foreign sovereigns under the law of nations, nor did it involve matters implicating the Constitution's allocation of foreign relations powers. The Court's holding—that federal courts must apply state law "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress"[433]—left states free to govern domestic matters such as commercial transactions and torts. But the immunity of foreign diplomats is different. It implicates the Constitution's exclusive assignment of foreign affairs powers to the political branches, including the power to recognize foreign nations and establish diplomatic relations. Unless qualified by the political branches, formal recognition of a foreign nation necessarily implies recognition of the sovereign rights and immunities that status carries under the law of nations.[434]

In *Bergman*, the political branches had previously recognized France. That recognition meant that the political branches had determined and signified that France, in the eyes of the United States, was a sovereign that enjoyed the traditional incidents of that status under the law of nations—including immunity for

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[429] *Id.*

[430] *Id.*

[431] *Bergman*, 170 F.2d at 363.

[432] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1558 (1984).

[433] *Erie*, 304 U.S. at 78.

[434] *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 53–57.

diplomats in transit, such as De Sieyes.[435] If a state court—or a federal court sitting in diversity—could override such immunity, it would directly contradict the federal government's decision to recognize a foreign sovereign.[436] Such a conflict between state law and the exercise of constitutional power by the political branches would present a federal question sufficient to support the Supreme Court's exercise of appellate jurisdiction.

From this perspective, *Erie* does not bar application of the general law of diplomatic immunity—it compels it.[437] Because the Constitution allocates the foreign affairs powers to the political branches, the Supremacy Clause requires courts to give effect to the legal consequences that flow from recognition and other exercises of those powers. When the President recognizes a foreign nation and its representatives, that act carries with it the sovereign immunities traditionally associated with recognized status under the law of nations.[438] In cases like *Bergman*, diplomatic immunity is therefore not a matter of local common law left to the states or to judicial discretion; it is a constitutional incident of the recognition power. Courts must give it effect under the Supremacy Clause, even in diversity cases and even in the face of state law "to the Contrary."[439]

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[435] *Bergman*, 170 F.2d at 362.

[436] Judge Hand may have sensed this tension because he left open the possibility that a state's departure from the general law of immunity could give rise to a federal question: "Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here." *Id.* at 361. The only federal question available in this case is the Constitution's exclusive allocation of recognition and foreign affairs powers to the political branches of the federal government.

[437] A quarter century after *Erie*, the Supreme Court held that *Erie* did not bar the application of the act of state doctrine, another rule with roots in the general law of nations. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) ("It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie*."). According to the Court, the doctrine has "'constitutional' underpinnings." *Id.* at 423 (quotation marks omitted). Specifically, the doctrine "arises out of the basic relationships between branches of government in a system of separation of powers," *id.*, and "its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs," *id.* at 427–28. For further analysis of *Sabbatino*, see BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 202–05.

[438] The Supreme Court has recently emphasized the President's exclusive constitutional power to recognize foreign sovereigns and their territorial boundaries. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 14 (2015).

[439] U.S. CONST. art. VI, cl. 2.

2. Head-of-state immunity.

The Constitution's allocation of foreign relations powers to the political branches also explains the judiciary's continued application of head-of-state immunity after *Erie*. Although this doctrine remains uncodified in U.S. law, it is among the oldest and most firmly established rules of the general law of nations.[440] It rests on the principle that the head of a recognized sovereign embodies the dignity and independence of the state. The Supreme Court acknowledged this principle early in the Republic,[441] and nations have continued to uphold it as a matter of international practice. Because the doctrine derives from the general law of nations, head-of-state immunity presents the same potential *Erie* question as other uncodified rules governing relations among sovereigns. The reason that federal courts may apply this doctrine of general law notwithstanding *Erie* is that it implements the Constitution's structural allocation of recognition, war, reprisal, and capture powers to the political branches. For this reason, the doctrine is fully consistent with both *Erie* and the Supremacy Clause.[442]

Prior to *Erie*, federal and state courts routinely applied the general law of nations to determine the existence and scope of head-of-state immunity.[443] In 1976, Congress codified certain aspects of foreign sovereign immunity in the FSIA, and many courts initially interpreted the statute to extend immunity to high-ranking foreign officials.[444] But in *Samantar v. Yousuf*,[445] the Supreme Court held that the FSIA's reference to a "foreign state" does not "include an official acting on behalf of the foreign state,"[446]

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440 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 197–98.

441 *See The Schooner Exch.*, 11 U.S. (7 Cranch) at 137 (noting that "the whole civilized world" recognizes "the exemption of the person of the sovereign from arrest or detention within a foreign territory").

442 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 90.

443 *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 924 (2011).

444 *See In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).

445 560 U.S. 305 (2010).

446 *Id.* at 319.

thus leaving head-of-state immunity uncodified. *Samantar* involved claims against the former Prime Minister of Somalia for allegedly authorizing torture and extrajudicial killings while in office.[447] Although the Court held the FSIA inapplicable, it acknowledged that the defendant "may be entitled to immunity under the common law,"[448] thereby reaffirming the doctrine of head-of-state immunity recognized by Chief Justice Marshall in *The Schooner Exchange*.[449]

While *Samantar* did not identify the source of this immunity, the statute's silence may require the Court to clarify this matter in the future. As we have argued elsewhere, the recognition of a foreign state or government by the political branches obliges the United States—including its courts—to respect the rights of that sovereign under the law of nations.[450] Denying immunity to the head of a recognized foreign state would contradict that recognition, risk diplomatic rupture, and usurp the political branches' exclusive authority to determine whether, when, and how to hold foreign leaders accountable for misconduct.[451] Because the Constitution assigns recognition, war, and reprisals exclusively to the federal political branches, courts—state and federal alike—must respect head-of-state immunity unless and until those branches affirmatively abrogate it. For this reason, the denial of such immunity by a state court would present a federal question reviewable by the Supreme Court on appeal.

Because head-of-state immunity is properly grounded in the recognition power, it falls within *Erie*'s exception for matters governed by the Constitution. *Erie* rejected judicial use of "federal general common law"[452] to displace state law when it was untethered to any source of supreme federal law. But, properly understood, head-of-state immunity is grounded in the Constitution. It flows directly from the Constitution's structural allocation of powers over recognition and foreign affairs. Under the Supremacy Clause, that allocation displaces contrary state law and binds the

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447 *Id.* at 310.

448 *Id.* at 325.

449 *See supra* notes 185–97 and accompanying text.

450 *See* Bellia & Clark, *Law of Nations as Constitutional Law*, *supra* note 70, at 735.

451 In the absence of recognition, courts have greater latitude to reject claims of head-of-state immunity. *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (denying head-of-state immunity to General Manuel Noriega because the President had never recognized Noriega as the legitimate head of Panama and had manifested an intent to deny such immunity by capturing and prosecuting him).

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

judiciary. Rather than violating *Erie*, the continued application of head-of-state immunity aligns with *Erie*'s command that departures from state law rest on "the Federal Constitution or [ ] Acts of Congress."[453]

C. Interpretive Uses of General Law

Since the Founding, federal courts have drawn on the general law of nations and widely shared common law traditions as background context for interpreting both constitutional and statutory provisions. This practice presents no constitutional difficulty. When courts use general law in this manner, general law does not operate as an independent source of authority capable of displacing state law. Rather, it functions as an interpretive aid that helps courts ascertain the meaning of enacted federal law. The ultimate rule of decision still derives from a recognized source of supreme federal law: the Constitution or an act of Congress. Courts look to general law not to override state law but to implement a source of supreme federal law—the Constitution, a federal statute, or a treaty.

Several constitutional provisions incorporate terms of art whose meaning was informed by the general law of nations, including "War," "Treaties," "Ambassadors," "Piracies," and "Letters of Marque and Reprisal."[454] Early judicial decisions employed this interpretive approach. In *Brown v. United States*,[455] for example, the Supreme Court relied on the law of nations to determine whether a declaration of war automatically authorized the confiscation of enemy property within U.S. territory.[456] In *Foster v. Neilson*,[457] Chief Justice Marshall defined a treaty as a "contract between two nations,"[458] invoking principles from the law of nations to elucidate the meaning of the term "treaty." Courts have likewise relied on English common law traditions to interpret constitutional phrases such as the right to "trial by jury."[459] And if, as Campbell and others have argued, the Privileges or Immunities Clause of

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[453] *Id.*

[454] U.S. CONST. art. I, § 8, cls. 10, 11; *id.* art. II, § 2, cl. 2.

[455] 12 U.S. (8 Cranch) 110 (1814).

[456] *Id.* at 112.

[457] 27 U.S. (2 Pet.) 253 (1829).

[458] *Id.* at 314.

[459] *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 350 (1898) (interpreting "trial by jury" in the Sixth Amendment against the background of the common law).

the Fourteenth Amendment incorporates widely recognized common law rights, then courts properly may consult those traditions in determining the Clause's meaning.[460] As we have recently argued, such reliance on general law and shared common law understandings accords with the interpretative expectations of the Founding generation.[461]

Federal statutes may likewise incorporate or presuppose background principles drawn from general law or common law traditions. Sometimes Congress incorporates such principles expressly, as in the early statute criminalizing "the crime of piracy," as "defined by the law of nations."[462] In *United States v. Smith*,[463] Justice Story upheld this usage, explaining that "Congress may . . . define [a crime] by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term."[464] At other times, Congress legislates against settled background legal principles without expressly codifying them—for example, by enacting a criminal prohibition that implicitly relies on a common law mens rea requirement,[465] or by using a legal term of art such as "trustee."

In all of these contexts, general law functions not as freestanding law superior to state law, but as background context that informs the proper meaning of enacted federal law. *Erie* does not prohibit this practice; it presupposes it. Using general law to interpret duly enacted federal law is not only permissible after *Erie* but is often a necessary part of faithfully interpreting constitutional and statutory provisions.

D. Congressionally Authorized Uses of General Law

Since the Founding, Congress has authorized federal courts to apply general law in specific statutes. As explained, § 14 of the First Judiciary Act authorized federal courts to issue writs "agreeable to the principles and usages of law"[466]—a phrase that

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460 *See supra* text accompanying notes 356–57 and accompanying text.

461 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federalism Canons as Ordinary Interpretation*, 120 NW. U. L. REV. 991, 1000–09 (2026); Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 527–35 (2022).

462 Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14.

463 18 U.S. (5 Wheat.) 153 (1820).

464 *Id.* at 159.

465 *See generally, e.g.*, Morissette v. United States, 342 U.S. 246 (1952).

466 Judiciary Act of 1789 § 14, 1 Stat. at 82.

invokes general background principles of the common law.[467] Likewise, the Process Act of 1792 directed federal courts to use the forms of proceedings of courts of equity and admiralty, forms that included much general common law. To apply such statutes, federal courts necessarily had to determine the content of the general law Congress authorized them to apply, such as the relevant "principles and usages of law." In some instances, Congress explicitly authorizes courts to apply general law, as in § 14 and the Process Acts. In other instances, Congress implicitly authorizes them to apply it, as when Congress creates a cause of action without specifying all of its incidents. In such cases, the most reasonable understanding of the statute is that Congress presupposed that courts would use general background legal principles to fill the gaps.[468] In either circumstance, federal courts apply general law because Congress has authorized them to do so.

E. When Federal Courts Mirror State Practice

Finally, *Erie* does not prohibit federal courts sitting in diversity from mirroring state courts' use of general law. As discussed in Part I, early federal courts applied general law when state courts themselves treated it as the rule of decision. *Swift* provides the clearest example.[469] There, the Supreme Court applied general commercial law because New York courts applied the same law in comparable disputes. Had New York adopted a different rule—by statute or through settled local custom—the federal courts would have been bound to follow it. *Swift* thus applied general law only because New York treated commercial law as part of a shared transjurisdictional body of law rather than as local law.[470]

Today, however, federal courts have little occasion to employ this mirroring approach. With limited possible exceptions, modern states no longer treat any form of general law as controlling

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[467] *See* Bellia & Clark, *Original Source of Cause of Action*, *supra* note 211, at 643–45 (describing this effect of the Act).

[468] As Nelson has explained, when Congress creates a cause of action without specifying all of its incidents, such as remedies, defenses, vicarious liability, and the like, the Court has "understood the statute to incorporate (and thereby federalize) various background principles of general jurisprudence, including principles about the proper measure of damages, the availability of 'assumption of the risk' as a defense to liability, and survival of personal injury claims after the injured party's death." Nelson, *Persistence of General Law*, *supra* note 299, at 520. These decisions "reflect[ ] an interpretation" of the statute itself rather than the application of a freestanding general law rule of decision. *Id.*

[469] *Swift*, 41 U.S. (16 Pet.) at 15.

[470] *See supra* Part I.C.1.

in their courts.[471] As Part II explained, after the states localized general law, including general commercial law, the original *Swift* paradigm became obsolete. Once states replaced shared general law with local law, federal courts were constitutionally required to follow that law in diversity cases absent a contrary source of supreme federal law. Unless state courts adopt general law as the governing rule of decision, federal courts lack any constitutional warrant to apply it on their own initiative.

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Taken together, these five categories confirm that *Erie* did not expel all forms of general law from federal courts. Rather, it confined the use of general law to contexts in which the Constitution, federal statutes, or state law provide an independent and constitutionally grounded basis for applying it. Federal courts may apply principles derived from the law of nations to uphold the constitutional equality and territorial integrity of the states, and to implement the Constitution's allocation of war and foreign relations powers to the political branches. They may also apply general law when Congress has authorized its use in duly enacted statutes, when state law itself treats general law as controlling, or when general law supplies interpretive context necessary to determine the meaning of constitutional or statutory provisions. In each of these settings, general law functions not as a freestanding source of supreme law, but as an appropriate means of upholding both state and supreme federal law.

F. Questionable Uses of General Law After *Erie*

While the five uses of general law discussed above are defensible within the Constitution's framework, some modern applications sit uneasily with the structural principles *Erie* embraced. For example, the Supreme Court's ongoing use of general law in

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[471] *See* Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1126–28 (2011) (explaining that Georgia's continued reliance on aspects of general law is unusual). Although Georgia is often cited as an example of a state that still follows general law, a forthcoming note argues that Georgia's unusual conflicts rule—under which Georgia courts sometimes presume a sister state's common law is the same as Georgia's—does not mean Georgia understands its own common law as general law. To the contrary, the Georgia Supreme Court's repeated acceptance of *Erie* and its practice of answering certified questions by reference to Georgia law suggest that it regards its own common law decisions as state law rather than general law. *See* William Frankel, Note, *Is* Erie *Our Law?*, 79 STAN. L. REV. (forthcoming 2027) (available on SSRN).

private maritime disputes—rebranded as federal common law—sometimes displaces local state law without a firm basis in the Constitution or federal statutes.[472] At the Founding, the federal courts' use of general maritime law raised few, if any, constitutional concerns for two reasons. First, state common law at the time incorporated the law of nations, including the law maritime. Second, the law maritime governed only matters that occurred on the high seas or within the ebb and flow of the tide—matters largely outside the territorial jurisdiction of the states. The Supreme Court's abandonment of the tidewater limitation and its reconceptualization of maritime law as federal common law are in tension with *Erie*'s core premise that federal courts must apply governing state law unless supreme federal law directs otherwise.

Other federal common law doctrines that lack clear grounding in the Constitution, federal statutes, or treaties raise similar structural concerns. This Section examines a few examples that are difficult to reconcile fully with *Erie*'s structural command. These problematic examples are limited in scope, however, because the Supreme Court has confined federal common law to narrow enclaves closely tied to uniquely federal interests. In practice, the Court has anchored most federal common law in constitutional or statutory authority, thereby satisfying *Erie*'s prerequisites.

1. Federal maritime law.

As discussed, the law maritime—also known as general maritime law—was one of the three principal branches of the law of nations familiar to the Founders. In England, common law courts applied the common law (or law of the land) and admiralty courts applied the law maritime (or law of the sea).[473] Generally, common law courts exercised jurisdiction over controversies arising within counties while admiralty courts claimed jurisdiction over "contracts, pleas, and querels made upon the sea, or any part thereof which is not within any county."[474] Although their respective jurisdictions were theoretically mutually exclusive, the two court

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[472] *See, e.g.*, Great Lakes Ins. SE v. Raiders Retreat Realty Co., 144 S. Ct. 637, 641 (2024).

[473] For an overview of the development of admiralty and maritime jurisdiction in England and America, see BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 117–31.

[474] EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 134 (London, E. & R. Brooke 1797) (1644).

systems contested the precise division of authority from the fourteenth through the eighteenth centuries.[475]

In America, the line of demarcation proved less rigid. During the late colonial period, the Crown appointed vice-admiralty courts with jurisdiction that exceeded that of English admiralty courts, thereby curtailing the jurisdiction of the common law courts (sitting with local juries).[476] After achieving independence, the states created their own admiralty courts but did not strictly enforce the limits on their jurisdiction that existed in England. The Constitution extended federal judicial power "to all Cases of admiralty and maritime Jurisdiction."[477] Early federal courts questioned whether they were "bound to follow the [admiralty] practice in England" as opposed to the more liberal American view.[478] Justice Story, sitting as a circuit justice, regarded himself as "at liberty to re-examine the [English] doctrines and to construe the jurisdiction of the admiralty upon enlarged and liberal principles."[479]

One area in which early federal courts adhered to English limits was the tidewater doctrine, which limited admiralty jurisdiction to matters "substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide."[480] As Justice Story wrote for the Court in 1825, "This is the prescribed limit which it was not at liberty to transcend."[481] The tidewater doctrine prevailed until 1851, when the Court extended admiralty and maritime jurisdiction to all "public navigable water[s], including lakes and rivers in which there is no tide."[482] This expansion marked a significant shift in the geographic scope of admiralty jurisdiction and laid the groundwork for the early twentieth-century transformation of maritime law into federal common law—a transformation difficult to reconcile with *Erie*'s constitutional rationale.

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475 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 117–20.

476 *See* DAVID R. OWEN & MICHAEL C. TOLLEY, COURTS OF ADMIRALTY IN COLONIAL AMERICA 4–5, 139 (1995).

477 U.S. CONST. art. III, § 2, cl. 1.

478 Jennings v. Carson, 13 F. Cas. 540, 542 (D. Pa. 1792) (No. 7,281).

479 *Boit*, 7 F. Cas. at 441.

480 The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825).

481 *Id.*

482 The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457 (1852).

During the early decades of the Republic, federal courts exercising admiralty and maritime jurisdiction routinely applied general maritime law to resolve private disputes. This practice did not interfere with the states' residual sovereign authority for two reasons. First, the states had received the common law of England, which incorporated the law maritime. State courts with jurisdiction therefore would have applied the same maritime principles that federal courts applied. Second, the tidewater doctrine meant that maritime cases decided in federal court arose almost exclusively outside the territorial jurisdiction of the states.[483] Thus, during this period, federal maritime adjudication was in keeping with the states' residual sovereignty.

Once the Supreme Court abandoned the tidewater restriction and extended maritime jurisdiction to the inland waterways, the federal courts' application of general maritime law became increasingly difficult to reconcile with the states' residual sovereignty. Cases arising on such waters fell within the territorial jurisdiction of the states, and state courts would have applied state law to decide them had the tidewater doctrine remained in force. Some states responded to the Court's rejection of the tidewater restriction by enacting statutes to govern certain maritime transactions within their borders. Under the parallel expansive version of the *Swift* doctrine for maritime cases, federal courts used general common law to displace unwritten local law, but deferred to state statutes. This practice persisted until 1917, when the Court significantly expanded the displacement of state law.

In *Southern Pacific Co. v. Jensen*,[484] the Supreme Court treated general maritime law as supreme federal law capable of displacing contrary state law, including duly enacted statutes. Christen Jensen, an employee of Southern Pacific, died in an accident while unloading cargo from a ship docked in New York.[485] His widow successfully obtained damages under New York's workmen's compensation statute in state court.[486] On appeal, the Supreme Court reversed, holding that general maritime law preempted the state statute by virtue of the Constitution's grant of admiralty and maritime jurisdiction.[487] Justice James McReynolds's opinion for the

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[483] A state's sovereign authority generally runs with its territory. *See* United States v. Bevans, 16 U.S. (3 Wheat.) 336, 387 (1818).

[484] 244 U.S. 205 (1917).

[485] *Id.* at 207–08.

[486] *Id.* at 209.

[487] *Id.* at 216–18.

Court declared that state law is preempted to the extent that it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[488]

Several Justices dissented. Justice Mahlon Pitney characterized the decision as "novel and far-reaching,"[489] warning that it would "deprive the several States of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate intrastate commerce so far as it is carried upon navigable waters."[490] Justice Oliver Wendell Holmes also famously dissented. In his view, "[i]f admiralty adopts common-law rules without an act of Congress," it "must take the rights of the parties from a different authority," and the "only authority available is the common law or statutes of a State."[491] Echoing the *Swift*-era dissents that the *Erie* Court later embraced, he stressed that the "common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."[492] For this reason, the common law "always is the law of some State."[493]

Jensen marked the first time that the Supreme Court declared general law to have the force of supreme federal law—even without any clear federal constitutional or statutory authorization. The Court decided *Jensen* two decades before *Erie*, at the height of the era of *Lochner v. New York*,[494] when the Court was willing to constitutionalize unwritten principles in order to override state legislative reforms. The Court's subsequent repudiation of both *Lochner* and *Swift* in the late 1930s would seem to call *Jensen* into question as well.[495] As Justice John Paul Stevens observed in 1994, "*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation . . . without any firm grounding in constitutional

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488 *Id.* at 216.

489 *Jensen*, 244 U.S. at 225 (Pitney, J., dissenting).

490 *Id.* at 253.

491 *Id.* at 221 (Holmes, J., dissenting).

492 *Id.* at 222.

493 *Id.*

494 198 U.S. 45 (1905).

495 *See* Clark, *Separation of Powers*, *supra* note 45, at 1454–55; Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 302–06 (1999) (discussing *Jensen*'s future).

text or principle."[496] Nonetheless, the Court has continued to treat maritime law as a narrow enclave of federal common law, largely declining to expand it in the absence of congressional command. Maritime law thus survives as a confined exception to *Erie*'s prohibition on using general law to displace state law absent constitutional or statutory authorization.[497]

2. Modern federal common law.

Maritime law is not the only domain in which the Supreme Court has recognized unwritten federal rules with preemptive force. In *Hinderlider*, decided the same day as *Erie*, the Supreme Court began using the phrase "federal common law" to describe a category of unwritten law treated as having the force of supreme federal law in both state and federal courts.[498] In *Hinderlider* itself, however, the change in terminology did not alter the underlying analysis. The Court relied on principles drawn from the law of nations to implement the constitutional equality of the states. Likewise, although the Court had already largely federalized admiralty and maritime law in *Jensen*, it did not begin describing such law as federal common law until its decision in *Hinderlider*. The phrase, however, obscured an important distinction: Some doctrines labeled "federal common law" were not freestanding judicial creations; they were rules that the Constitution itself authorized or required federal courts to apply.

Modern federal common law doctrines do not form a unitary category. As the following summary shows, some implement constitutional structure, some derive from statutory authorization, and only a small subset are rules that courts genuinely fashion according to their own standards. In the early case of

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[496] Am. Dredging Co. v. Miller, 510 U.S. 443, 459 (1994) (Stevens, J., concurring in part and concurring in the judgment). He also insisted that "*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* would be in a case under the Due Process Clause." *Id.* at 458 (citation omitted).

[497] In *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), for example, the Court rejected the argument that federal maritime law preempted a state statute barring the use of forum non conveniens in maritime cases brought in state court. *Id.* at 447. According to the Court, "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *Id.* at 455. This emphasis on harmonization underscores that, although it declined Justice Stevens's invitation to reconsider *Jensen*, the Court prefers unwritten maritime law to operate within—not apart from—enacted supreme federal law.

[498] *Hinderlider*, 304 U.S. at 110 (quotation marks omitted).

Clearfield Trust Co. v. United States,[499] the Court used federal common law to preempt state law governing the United States' right to reimbursement from Clearfield Trust (as express guarantor of prior endorsements) for the amount of a government check that had been fraudulently cashed. Pennsylvania law would have barred recovery because the United States had unreasonably delayed giving notice of the forgery. Nonetheless, the Court held that the "rule of *Erie R. Co. v. Tompkins* does not apply to this action," and that "federal rather than local law" governs "[t]he rights and duties of the United States on commercial paper which it issues."[500] In other words, the Court treated the rights and obligations of the United States as deriving from a uniquely federal source sufficient to justify a federal rule of decision. The Court borrowed its rule of decision from the law merchant, but it did not tether that rule to state law (indeed, it rejected the application of state law), nor did it identify a source of supreme federal law that required it. Under *Erie*, the Court was justified in applying a rule derived from the law merchant as a rule of decision so long as a source of supreme federal law authorized or required its use.

Several decades later, in *Banco Nacional de Cuba v. Sabbatino*,[501] the Court adopted the "act of state doctrine in its traditional formulation"[502] as an "enclave[ ] of federal judge-made law."[503] As described by the Court, the doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[504] According to *Sabbatino*, "[T]he Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*."[505] Unlike the general tort law repudiated in *Erie*, the doctrine has "'constitutional' underpinnings" and "arises out of the basic relationships between branches of government in a system of separation of powers."[506] As we have explained elsewhere, "the act of state doctrine upholds the political branches' exercise of the recognition power" because territorial sovereignty is a traditional attribute of

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499 318 U.S. 363 (1943).

500 *Id.* at 366 (citation omitted).

501 376 U.S. 398 (1964).

502 *Id.* at 401.

503 *Id.* at 426.

504 *Id.* at 401.

505 *Id.* at 425.

506 *Sabbatino*, 376 U.S. at 423. As the Court later put it, the doctrine is "a consequence of domestic separation of powers." W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990).

recognized foreign states.[507] In 2015, the Court tied *Sabbatino*'s use of the doctrine to the United States' recognition of Cuba. As the Court put it, "Because the Executive had recognized the Cuban Government, the [*Sabbatino*] Court held that it should be treated as sovereign and could benefit from the 'act of state' doctrine."[508] Properly understood, the act of state doctrine is not freestanding common law, but derives from traditional law of nations principles that courts apply in order to preserve the political branches' exclusive constitutional authority over recognition and foreign relations.

Although the Court continues to use the phrase "federal common law," it has largely confined its development to a limited set of traditional enclaves. For example, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[509] the Court summarized its approach to federal common law, stressing that the instances of such law are "few and restricted."[510] "[A]bsent some congressional authorization to formulate substantive rules of decision,"[511] federal common law is appropriate only when "a federal rule of decision is 'necessary to protect uniquely federal interests.'"[512] Even so, the Court increasingly confined such interests to historically established categories closely tied to constitutional structure and federal sovereignty. According to this standard, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[513] Even within these narrow enclaves, the Court has exercised marked restraint when asked to recognize new federal common law rules[514]

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507 *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE CONSTITUTION, *supra* note 21, at 254.

508 *Zivotofsky*, 576 U.S. at 19.

509 451 U.S. 630 (1981).

510 *Id.* at 640 (quotation marks omitted) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

511 *Id.* at 641.

512 *Id.* at 640 (quoting *Sabbatino*, 376 U.S. at 426).

513 *Id.* at 641.

514 For example, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court unanimously rejected "judicial creation of a federal rule of decision" to determine whether "knowledge of the conduct of [a federally insured savings and loan's (S&L's)] controlling officers must be imputed to the S&L, and hence to [the FDIC], which, as receiver, stood in the shoes of the S&L," and whether the FDIC "was estopped from pursuing its tort claims against [the S&L's law firm] because of the imputed knowledge." *Id.* at 89, 82. The Court relied in part on the Constitution's separation of powers. Deciding "[w]hat sort of tort liability to impose on lawyers and accountants . . . who provide services to federally insured

and has continued to emphasize *Texas Industries*' narrow formulation.[515]

Moreover, many doctrines now labeled "federal common law" are better understood not as freestanding judicial lawmaking, but rather as long-standing background legal doctrines that the Constitution's structure authorizes or requires courts to apply.[516] These include doctrines implementing the constitutional equality of the states, respecting the traditional rights of recognized foreign sovereigns, and preserving the political branches' authority over foreign relations in admiralty and related contexts.[517] That so many surviving enclaves of federal common law can be tied to the Constitution's design—and that the Court has repeatedly declined to recognize broad new categories of such law—confirms that the constitutional constraints identified in *Erie* continue to limit federal judicial lawmaking. Modern federal common law survives not as a revival of *Swift*'s expansive general common law, but as a narrow collection of doctrines largely grounded in supreme federal law and justified by the Constitution's allocation of authority.

CONCLUSION

In adopting the Constitution, the people of "Free and Independent States" made a conditional transfer of significant sovereign authority to a new federal government. They established a system of federal supremacy—but only on carefully prescribed terms. The Supremacy Clause limits displacement of state law to three sources of supreme federal law—the Constitution, laws

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financial institutions" involves the function of "weigh[ing] and apprais[ing]" a host of considerations that "is more appropriate[ ] for those who write the laws, rather than for those who interpret them." *Id.* at 89 (quotation marks omitted) (quoting Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 98 n.41 (1981)).

[515] *See* Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1509 (2022) (unanimously rejecting a proposed federal common law choice of law rule for state law claims under the FSIA, and reiterating that "[j]udicial creation of federal common law to displace state-created rules must be 'necessary to protect uniquely federal interests'" (quoting *Texas Indus.*, 451 U.S. at 640)).

[516] Clark, *Federal Common Law*, *supra* note 22, at 1251.

[517] Even the government contractor defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is capable of being understood as constitutional preemption rather than federal common law. *See* Bradford R. Clark, Boyle *as Constitutional Preemption*, 92 NOTRE DAME L. REV. 2129, 2134 (2017); *cf. Osborn*, 22 U.S. (9 Wheat.) at 867 (suggesting that the Constitution preempts state laws preventing, taxing, or fining contractors "for supplying a military post with provisions").

made in pursuance thereof, and treaties. And only specified political actors, using specified procedures, may adopt each of these specified sources. The Constitution thus preserves the residual authority of the states not by granting them such authority, but by prescribing precise procedures governing the displacement of state law. Unless and until displaced by "the supreme Law of the Land," state law governs by default.

Erie Railroad Co. v. Tompkins did not invent this constitutional structure. Its constitutional holding, considered apart from its broader jurisprudential rhetoric, restored this structure following a period of doctrinal drift. The constitutional reasoning of *Erie* did not prohibit federal courts from ever applying general law. Rather, it repudiated the federal courts' expanded use of general common law during the *Swift* era to displace state law with no basis in supreme federal law for doing so. That practice circumvented the Constitution's allocation of lawmaking authority and the procedural safeguards upon which the Constitution conditions the federal government's ability to displace state law.

From the beginning, federal courts applied the traditional law of nations in limited and constitutionally grounded ways. They applied it to uphold the constitutional equality and territorial integrity of the states, and to implement the Constitution's allocation of war and foreign relations powers to the political branches. They also applied it (and broader notions of general common law) as background context for interpreting constitutional and statutory provisions, when Congress authorized its use in duly enacted statutes, and when state law itself treated general law as controlling. In these settings, general law did not function as an independent source of supreme law; instead, federal courts applied it because the Constitution or an act of Congress authorized or required them to do so, or because doing so mirrored, rather than displaced, state law.

In recent years, several scholars have proposed a broad revival of general common law beyond these limits—and some even favor overturning *Erie* in order to achieve that goal. These proposals conflate the traditional general law of nations with broader conceptions of general common law and contradict the constitutional structure. Under the Constitution, the federal government may override residual state authority only when specified actors use specified procedures to adopt specified forms of law. That arrangement was the price of transforming free and independent

states into a Union with overlapping federal and state sovereignty. Federal courts therefore may not use general law to displace state law unless the Constitution, a valid federal statute or treaty, or state law itself authorizes or requires its use. Revivalist theories would circumvent those limits by permitting federal courts to apply unwritten law without regard to the Constitution's carefully prescribed lawmaking procedures. The Constitution was designed to prevent precisely this form of judicial innovation. *Erie* did not invent this design. It restored it.