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Is Erie Normal

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RESPONSE

Is *Erie* Normal?

*Michael S. Greve**

INTRODUCTION

The *Vanderbilt Law Review*'s kind invitation to comment on Professor Suzanna Sherry's proposal to "normalize" *Erie* provides an opportunity to acknowledge my sizeable debt to Suzanna. Back in the distant age of transistor radios, when the editors of this law review were listening to the Wiggles, she graciously participated in a roundtable discussion hosted by my then-employer, the American Enterprise Institute, on some chapters of a book project of mine that eventually became *The Upside-Down Constitution*.[1] I had at that time a hunch that everything that was wrong with (nominally "originalist") federalism jurisprudence eventually led to *Erie*. Still, I lacked the nerve to pick a fight with my friends and *also* take on the entire Civil Procedure and Federal Courts professions. But the discussion soon drifted towards *Erie* and I burbled that well, I had my questions about that case, too. Heedless of the queue, Suzanna interjected: "Wait: did you just say *Erie* was wrong?" With little to lose, I said something like "every serious argument I can think of compels that conclusion, yes." And Suzanna proclaimed, "Good for you. Because that's what I think."

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1. MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012).

Considering the source—the *Grande Dame* of Federal Courts; a lawyer's lawyer and a fine writer who can make the Rooker-Feldman doctrine look interesting[2]—I marshaled the courage to probe, and my suspicions eventually became firm conviction. You can look it up (and tell me why I'm wrong).[3]

So we are on the same side in the *Erie* debate. "Normalizing *Erie*" is a big step forward in that engagement. On precisely this account, my purpose here is not so much to quarrel with my fellow-combatant as to engage and encourage her audience, or at least those with open ears and minds. The crucial step is to recognize the *Erie* anomaly for what it is and, hence, to begin thinking—seriously and in parallel with Professor Sherry—about what a "normalized" *Erie* might look like.

Persuaded as I am of the orthodoxy of Professor Sherry's seeming heresy, I cannot resist the temptation of offering thoughts about the difficult and crucial next steps in this line of analysis. Formidable forces staunchly defend what may be the "worst decision of all time[.]"[4] As Professor Sherry compellingly demonstrates here, they are woefully mis-aligned. But they are still formidable. Dislodging them will require heavier, constitutional artillery and (for want of a kinder, gentler metaphor) sustained bombardment.

I. THE PROPOSITIONS

"Normalizing *Erie*" advances several propositions, each stated with admirable clarity. Professor Sherry juxtaposes *Erie* and its doctrine with four other legal doctrines where

> the Court confronts a clash between state law and unarticulated federal interests. The dormant commerce clause cases pit state laws against the federal interest in the free flow of interstate commerce. The implied preemption cases implicate a federal interest in the full and effective implementation of federal statutes. Preclusion doctrines address the federal interest in the reach and scope of federal-court judgments. And the enclaves of federal common law encompass a motley assortment of Court-identified federal interests. In each of these situations, the Court solves the problem by using the same strategy of ordinary federalism. The Court presumes that state law operates normally. But if the state law interferes with articulated *or* unarticulated federal interests, the presumption can be overcome and federal law displaces state law.[5]

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2. *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine In Action,* 74 NOTRE DAME L. REV. 1085 (1999).

3. *See* GREVE, *supra* note 1.

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

5. Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1164 (2016).

Erie, Professor Sherry writes, is different and discontinuous with those four doctrines of "ordinary federalism."[6] It says that Congress must first articulate the federal interest; otherwise, the unarticulated federal interest must yield to state law. That is not a mere presumption; it is one of the hardest rules in all of American law. Let's call this the "discontinuity thesis."

The law may or may not work itself pure; but you have to assume that it muddles its way to some sort of coherence. Whence, then, the discontinuity?

> The doctrines of ordinary federalism were developed over many years, and during that time the Court's primary focus was indeed on federalism: the relationship between states and the federal government. Concerns about judicial discretion or judicial overreaching were very much in the background. The *Erie* doctrine, however, reached a pivotal point of development during a period when those concerns were in the foreground, and worries about judicial discretion were at their height. The Court, blinded by these concerns, failed to recognize the *Erie* problem as one of ordinary federalism.[7]

Let's call this the "history thesis."

Professor Sherry's analysis terminates in a description of what a "normalized" *Erie* doctrine, continuous with "ordinary" federalism doctrine, might look like. Professor Sherry proposes a functionalist balancing test. In "run-of-the-mill [diversity] cases, the current *Erie* doctrine works."[8] However, when federal interests plainly predominate, federal courts should fashion federal common law doctrines—revisable by Congress and applicable in each state only to the extent that state law would negatively affect federal interests and citizens of other states.[9] Let's call this the "normalization proposal."

The following Sections discuss the three propositions in turn. In my estimation, the discontinuity thesis—suitably qualified and embellished—is fundamentally right. The history thesis, I think, misses a good deal of *Erie*'s context and its place in the New Deal Constitution. In particular, it cannot adequately explain *Erie*'s perplexing staying power. That, in turn, bears on Professor Sherry's normalization proposal. It is directionally right, but it will require a deeper grounding in the structure and logic of the Constitution.

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6. *Id.* at 1163–64.
7. *Id.* at 1165.
8. *Id.* at 1217.
9. *Id.* at 1225.

II. THE DISCONTINUITY THESIS

A federal system, Professor Sherry writes, will inevitably pose clashes between federal and state interests. Neither the Constitution nor even federal statutes can provide for all such events.[10] Thus, the system has to provide some means of protecting "unarticulated" federal interests. "Ordinary" federalism doctrines ever since *McCulloch v. Maryland*[11] and *Gibbons v. Ogden*[12] have reflected that demand, and continue to do so to this day. *Erie* alone does not.

I agree that the doctrines discussed by Professor Sherry—the dormant Commerce Clause; implied (obstacle) preemption; preclusion doctrine; *Erie* "enclaves"—are in fact closely related to *Erie* and, moreover, discontinuous with the decision and opinion (with an important caveat noted below). The argument would be strengthened, I believe, by including other, partially overlapping legal doctrines of federal common law, all of considerable expanse and import, that fit the same description. I have in mind the judicial inference of substantive rulemaking authority from purely jurisdictional statutory provisions, as with the Federal Arbitration Act and the Labor Relations Act.[13] I would further add the judicial creation of entire regulatory regimes from bare-bones statutes, beginning with the Sherman Act.[14] The judicial creation of private rights of action is yet another example.[15] Adding these bodies of doctrine—all of which implicate federalism concerns—would help to strengthen and refine the argument in several respects.

First, the sheer weight and volume of the "exceptions" pose the obvious question of how much longer we should view and teach *Erie* as "the rule." Insofar as Professor Sherry seeks to tag *Erie* as the outlier, the more the merrier. There is substantive federal common law wherever one looks. Just about the only federal common law we are *not* permitted to have is the "general" common law discarded in *Erie*.

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10. *Id.* at 1167.

11. McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316 (1819).

12. Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1 (1824).

13. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957). Professor Sherry discusses the FAA under a slightly different description. Sherry, *supra* note 5, at 1207–08.

14. One can call these exercises "statutory construction." As Thomas Merrill has noted, however, the line between ordinary statutory creation and the generation of federal common law is rather fluid. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 1–3 (1985). At least one scholar has argued that *Erie*, when viewed as a "delegation" case, renders the judiciary's imposing antitrust edifice highly suspect. Aaron Nielsen, Erie *as Nondelegation*, 72 OHIO ST. L. J. 239, 241–42 (2011).

15. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 667 (1979).

Second, Professor Sherry identifies the *Erie* problem as one of *un*-articulated federal interests. That feature ties *Erie* to the dormant Commerce Clause and to some of *Erie*'s "enclaves," such as the doctrine of *Clearfield Trust Co. v. United States*[16] and the federal contractor defense.[17] The truth of the matter, though, is that over the great run of cases, federal interests are *more or less* articulated by Congress (or, on occasion, the Executive).[18] The federal common law generated in those cases covers the spectrum from near-wholesale judicial invention to something resembling statutory interpretation. That, too, buttresses Professor Sherry's argument. "Let Congress provide," rings the constant refrain among *Erie*'s defenders. It turns out that even if and when Congress does provide, one still needs judge-made doctrines that protect more or less cogently articulated and well-defined federal interests against evasion and erosion.[19]

Third, Professor Sherry characterizes the "normal," "ordinary" federalism inquiry as a "functional" or "balancing" test.[20] That, I believe, is not entirely right, at least not across the board. It is true of implied obstacle preemption, especially in its original formulation (which stacked up broadly divined federal "purposes" against a "presumption against preemption").[21] It is *not* true of other domains, where the "normal" federalism calculus has spawned rule-like doctrines of considerable complexity. Dormant Commerce Clause cases turn on "discrimination."[22] The states' antitrust immunity under the *Parker* doctrine[23] is, well, a doctrine; so is the related "active supervision" test.[24] With respect to private rights of action, the Court has adjusted the federalism "balance" through conventional

16. 318 U.S. 363 (1943) (protecting U.S. financial instruments under federal common law).

17. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

18. Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396 (2003).

19. Naturally, Professor Sherry recognizes the point. Sherry, *supra* note 5, at 1167 ("[E]ven detailed federal statutes may not foresee every possible problem created by state actions.") (footnote omitted); *cf. id.* at 1170 (arguing that implied obstacle preemption is not ordinary statutory interpretation). I suggest, by way of friendly amendment, that the point is not trivial; in fact, it has great force.

20. Sherry, *supra* note 5, at 1219.

21. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947). For another outright balancing test in another "ordinary federalism" venue, see United States v. Kimbell Foods, Inc. 440 U.S. 715, 727 (1979).

22. Professor Sherry describes the modern dormant Commerce Clause as governed by the "balancing" test of *Pike v. Bruce Church Inc.* Sherry, *supra* note 5, at 1192 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). That is not quite right. The balancing test governs only in the absence of (overt) state discrimination. It is a fall-back test (and so far as I can recall, few if any plaintiffs have ever prevailed under it).

23. Parker v. Brown, 317 U.S. 341 (1943).

24. N.C. Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

administrative law doctrines,[25] restrictive textual interpretations,[26] and various immunity doctrines that circumscribe plaintiffs' remedies against state and local actors.[27] One can argue that all those doctrines eventually collapse into a global, functional calculus. But because they matter to litigants and judges, they have weight and consequences.

Fourth (and this is the aforementioned caveat), a consideration of the full range of doctrines suggests that "ordinary" federalism doctrines are not quite as discontinuous with *Erie* as Professor Sherry makes them out to be. For example, the post-New Deal Court's preemption doctrine was in fact a pull-back from earlier, far more nationalist doctrines, and it was driven by the same pro-state, pro-regulatory impulses that motivated *Erie* itself.[28] In this as in other venues, *Erie* has a large doctrinal "overhang."[29] And as Professor Sherry notes, scholars have advanced numerous proposals to normalize those doctrines to *Erie*, not the other way around.[30]

These points have important ramifications for Professor Sherry's argument and especially her normalization proposal; I will come back to them below.

III. THE HISTORY THESIS

Professor Sherry's persuasive account of the discontinuity between *Erie* and ordinary federalism doctrines raises an intriguing question: just *why* has the doctrine proved so stable? Administrative law has yielded readily and frequently to the perceived necessities of the times. So, for that matter, has constitutional law, where the Court has operated as a kind of rolling Constitutional Convention. In striking contrast, the Federal Courts profession continues to party like it's 1939; and *Erie Railroad* remains the heart and soul of the enterprise. It matters not, or so it appears, that the case or doctrine

25. *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 291 (2001) ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.").

26. *E.g.*, Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

27. *E.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

28. Stephen Gardbaum, *The Breadth Versus the Depth of Congress's Commerce Power*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 48, 51–53 (Richard A. Epstein & Michael S. Greve, eds. 2007); Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997); Greve, *supra* note 1 at 209–14, 231–32..

29. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. REV. 1353 (2006).

30. *See, e.g.*, Sherry, *supra* note 5, at 1166 n.8; *id.* at 1207–1215 (discussing, and rejecting, proposals to revise ordinary federalism doctrines to align them with *Erie*).

has given rise to federal common law "exceptions" that chew up half of the Federal Courts curriculum: Henry Friendly has explained that.[31] To the extent that those doctrines or exceptions are discontinuous with *Erie*, they ought to be abandoned or revised accordingly.[32] Failing that, let's simply ignore the incongruities.[33] Nor does it seem to matter that the institutional model embodied in *Erie* bears no resemblance to reality. "Congress must go first," Ernest A. Young has summarized *Erie*'s foundational premise, in his defense of the decision against all comers.[34] That is indeed the premise. It may have made a certain amount of sense—not constitutional sense, but "institutional settlement" sense—in 1938, what with a Congress dominated by one party under the leadership of a popular President. (The entire Federal Courts project screams "FDR.") Nowadays, Congress does not go at all. The rule would have to be that "the administrative state must go first." However, it is very odd, is it not, to defend *Erie* on formalist separation-of-powers grounds—and then to give our large-ish Fourth Branch a free pass?

And still, the *Erie* doctrine continues to reign as unassailable dogma. Professor Sherry's explanation of that perplexity strikes me as not fully persuasive. *Erie Railroad*, she writes, was decided at a strange moment when concern over the federal courts' powers "blinded" the Court to the ordinary federalism calculus. In the decade following *Erie*, the Court expanded the doctrine and made it stick. By the time the next serious *Erie* case reached the Court in 1965,[35] it was all over but the shouting: the doctrine was too well entrenched to be questioned.[36] There is something to this account. In particular, hostility to the federal courts and their law obviously played a significant role in *Erie*. But it is not the whole story, and the omissions have a great deal to do with how one thinks about *Erie* and its "normalization."

Go back to the beginning and *Swift v. Tyson*[37]: in its original formulation, the general federal common law governed commercial relations in diversity cases—that is to say, legal relations between and

31. Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

32. *See supra* note 29; *e.g.*, Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV 273 (1999) (pleading for the abandonment of federal common law in admiralty jurisdiction).

33. On Professor Sherry's account, that is the dominant strategy. *See* Sherry, *supra* note 5, at 1164–65.

34. Ernest A. Young, *A General Defense of* Erie Railroad v. Tompkins, 10 J. L. ECON. & POL'Y 17, 19 (2013).

35. *See* Hanna v. Plumer, 380 U.S. 460 (1965).

36. Sherry, *supra* note 5, at 1186.

37. 41 U.S. 1 (1842).

among merchants. It made all the sense in the world for a number of reasons—among them, the fact that in that context, the general law is precisely not a "brooding omnipresence in the sky"[38] but a "benevolent omnipresence on the ground"[39]—"the usual course of trade and business"[40] among rough equals. The doctrine came under pressure when the "course of trade and business" underwent rapid, dramatic change: business relations became dis-intermediated, and giant, vertically integrated corporations, operating across the continent and dealing directly with consumers, came to dominate the economy. It was that recognition and social reality, not some federalism abstraction, that drove the campaign against diversity jurisdiction for the half-century preceding *Erie*. That same orientation, Edward Purcell has shown in his masterful analysis,[41] drove Justice Brandeis's *Erie* opinion—initially a bit of a halfway solution but eventually highly effective: if we cannot deprive corporations of diversity jurisdiction, let's trap them in state law and, ideally, the state law chosen by the plaintiff.[42] To put the point in federalism terms, and to push to a conclusion Professor Sherry resists:[43] *Erie* did have federalism content, and that content was consistent with the rest of the New Deal Constitution. Sure, the New Deal had nationalist impulses. Its overarching orientation, however, was to expand government at *all* levels and to bring corporations to heel in whatever legal forum might be most conducive to that end. In that crucial respect, *Erie* was not a "fluke of history" but entirely consistent with, *e.g.*, the demise of *Lochner* and, as suggested earlier,[44] the post-New Deal Court's preemption jurisprudence.

The New Dealers, like the original Founders, fully appreciated the need to "liquidate" the meaning of their Constitution; and so they did. At one end, *Erie*'s anti-corporate thrust was soon magnified: *Erie* extends to the choice of law[45] and to cases in equity;[46] the Full Faith

38. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

39. Robert F. Gasaway & Ashley C. Parrish, *In Praise of* Erie*—and Its Eventual Demise*, 10 J L. ECON. & POL'Y, 225, 226, 244 (2013).

40. Swift v. Tyson, 41 U.S. 1, 19 (1842).

41. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

42. Robert R. Gasaway and Ashley C. Parrish have argued compellingly that this feature marks the key difference between the *Swift* and *Erie* regimes. Gasaway & Parrish, *supra* note 39, at 237–39.

43. See Sherry, *supra* note 5, at 1207; *see also* Sherry, *supra* note 4, at 142–44.

44. *Supra* note 28 and accompanying text.

45. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

46. Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 107 (1945).

and Credit Clause imposes no meaningful constraint on the choice of state law;[47] long-arm statutes reach to the ends of the earth;[48] and *really* minimum contacts satisfy due process requirements.[49] Tellingly, none of those extensions encountered any serious debate; *Erie*'s ideological, sociological, jurisprudential and institutional commitments (to federalism and judicial deference) all ran together. The much harder part for the New Deal Founders over the ensuing decades was to resolve conflicts between their institutional commitment to judicial deference and the demands of political constituencies whose interests required a more nationalist stance and a more active judicial role. Their genius was to find a formula, or rather several, to adjust the New Deal bargain to those demands—the protection of federal institutions at first;[50] then labor unions;[51] and eventually and most consequentially, civil rights constituencies.[52] And after the tort and class action reforms of the 1960s, *Erie*'s formula (as well as its doctrinal penumbra in preemption law) came to serve the interests of another powerful constituency: the plaintiffs' bar.

It is too much to say that the post-New Deal Constitution and its *Erie*-plus-federal-common-law formula were purely constituency-driven. Some of *Erie*'s "enclaves," for example—admiralty jurisdiction, federal common law for state compacts, foreign affairs preemption—reflect a perceived need to protect genuinely national interests against centrifugal state interests. In that regard, they are closer to Professor Sherry's account of "ordinary federalism" than to the sharply ideological, legal-realist picture just sketched. That said, an acknowledgment of the political dynamics provides context and coherence of a sort. In juxtaposition, *Erie* and ordinary federalism doctrine look *doctrinally* incoherent and discontinuous. Viewed in the larger context of the New Deal Constitution, their conjunction makes a certain amount of sense and helps to explain the resilience of the *Erie* regime. But for the aforementioned compensating adjustments, the *Erie* doctrine would have come under fire a long time ago.

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47. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

48. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B. U. L. REV. 491 (2004).

49. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

50. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

51. In addition to Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957), see especially the expansive preemption doctrines embraced in e.g., San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959); Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

52. *See, e.g.*, United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); New York Times v. Sullivan, 376 U.S. 254 (1964).

In recent years, *Erie* has gathered additional support from another quarter: originalism, or more precisely its clause-bound and textualist versions. Its advocates cherish *Erie* not so much for its precise holding but rather for its commitment to judicial deference and, above all, against common law argument. Just as *Lochner* is incontrovertibly wrong, so *Erie* must be incontrovertibly right—and for the same reasons of deference and clause-bound originalism. In that deployment, *Erie* casts a very large shadow. Justice Thomas and the late Justice Scalia have cited *Erie*—not in passing but as foundational—in dormant Commerce Clause cases[53]; in cases of obstacle preemption[54]; and in cases where no state or state law is remotely within sight.[55]

It is fair to acknowledge that the conservative-originalist flirtation with *Erie* has been an intermittent affair. Under conservative auspices, the Supreme Court has managed to engineer another set of remedies for *Erie*'s defects, political and social. The contractor defense, admiralty jurisdiction, expansive preemption doctrines, the Rules Enabling Act, and the Federal Arbitration Act have all served as escapes from an *Erie* world where absolutely anything can happen to business defendants.[56] Still, the originalist flirtation with *Erie* matters. It accounts for part of *Erie*'s overhang: perhaps, we would not need those sometimes doubtful doctrines if it weren't for *Erie* itself. Moreover, it exacerbates the difficulties of re-thinking and normalizing *Erie*.

IV. THE NORMALIZATION PROPOSAL

To repeat, I am sympathetic to Professor Sherry's normalization proposal to have courts default from *Erie*'s dogmatic baseline and to fashion federal common law in cases where national interests obviously dominate. But I do have questions and concerns, some of a rather basic sort.

As I am sure Professor Sherry recognizes, the proposal would benefit from some further development. What sorts of cases would qualify? I assume that most would have to do with the interstate

53. *E.g.*, Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 609–39 (1997) (Thomas, J., dissenting).

54. *E.g.*, Wyeth v. Levine, 555 U.S. 555, 582–604 (2009) (Thomas, J., concurring).

55. Sosa v. Alvarez-Machain, 542 U.S. 692, 739–60 (Scalia, J., concurring).

56. *See*, respectively, Boyle v. United Technologies, 487 U.S. 500 (1988); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396 (2003); Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010) (plurality opinion); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).

commerce of the United States—say, product liability.[57] I for one would like to know what the federal common law in those domains would look like: more like antitrust law or the contractual rule of *Carnival Cruise Lines, Inc. v. Shute*,[58] or more like the three-part damages regime of *Motor Vehicle Manufacturers Association v. State Farm*[59] notoriety (a kind of *Roe v. Wade*[60] for the corporate community)? Would or should federal courts borrow state law and if so, whose law—California's exotic law of unconscionability? Restatement law? In defense of the normalization proposal one could say that things cannot possibly get any worse. But they might not get a whole lot better, either.

The question of how much there is to gain matters especially because the *Erie* doctrine's resilience raises the practical question of how exactly one would go about "normalizing" *Erie* and who would step up to the plate. Thanks in no small part to Suzanna Sherry's writings, it has become respectable for scholars to argue that the doctrine is gravely wrong. However, no litigator or judge has that luxury.[61] It is possible in an Administrative Law case for litigators to contest one precedent, liberally extend another, and occasionally to swing for the fences; or for judges to opine that entire doctrines ought to be re-thought: there is no very stable, deeply entrenched body of law to begin with. Not so with *Erie*. I have no idea what the first case might look like.

To "normalize" *Erie* and to make it challenge-able, it seems to me, one would first have to undermine the consensus that sustains it. And that project cannot end with a proposal to normalize *Erie* to adjacent doctrines, helpful though it is. It would have to be a broader and explicitly *constitutional* project. After all, *Erie* itself purported to be a constitutional decision. Its modern-day defenders have sought to root it yet more deeply in the Constitution's structure (the separation of powers as well as federalism).[62] And originalists who remain enamored with *Erie* will dismiss any other form of argument out of hand.

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57. That, intriguingly, is the only example proffered by Professor Sherry. *See* Sherry, *supra* note 5, at 1222.

58. 499 U.S. 585 (1991).

59. Motor Vehicle Mfgs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

60. 410 U.S. 113 (1973).

61. Theoretically, Congress could "normalize" *Erie*—for example, by providing that Section 34 (codified the Rules of Decision Act, 28 U.S.C. 1652 (2012)) means what Justice Story thought it meant. I put that remote prospect aside.

62. *See, e.g.*, Bradford R. Clark, Erie's *Constitutional Source*, 95 CAL. L. REV. 661 (2007); Young, *supra* note 34.

The central problem to my mind is not the narrow *Erie* doctrine itself or even the turbo-charged forum-shopping it has produced. (I'm happy to let my friends in the corporate defense bar worry about that.)[63] The real problem is *Erie*'s overhang. The case has come to stand for a jurisprudence that has made mincemeat of the entire federal structure.[64] To rehabilitate that structure, one must first destroy or at least de-legitimize *Erie*. And that project, to repeat, cannot be made to rest on federal or state "interests," "balancing," and overt functionalism.

I suspect that this—not some dispute over *Erie* itself—marks a point of disagreement between Professor Sherry and myself. While both of us believe that ours is a common law Constitution, we approach it quite differently. This is obviously not the place for that argument. But it may help to illustrate it briefly and to sketch what it implies with respect to "normalizing" *Erie*. To that end, parse this passage:

> In a federal system, there will inevitably be situations in which state and federal interests are at odds. Various provisions of the federal Constitution—including, for example, the Supremacy Clause, the Privileges and Immunities Clause, and a few others—explicitly prohibit the states from acting in ways that interfere with certain federal interests. But a constitution written for the ages is unlikely to account for every clash between state law and federal interests. Indeed, even detailed federal statutes may not foresee every possible problem created by state actions.[65]

That is generally and directionally right—but too loose and, for lack of a better word, too functionalist for my taste. The Supremacy Clause does not in fact prohibit the states from "acting in ways that interfere with certain federal interests."[66] For example, a state refusal to accept a federal Medicaid grant may well interfere with very important federal interests. Yet nothing in the Supremacy Clause or elsewhere in the Constitution authorizes federal agents to do anything about that except to sweeten the deal or to bargain a little harder. The Supremacy Clause is a choice-of-law clause, and its intended and unequivocal point is that "interest" has nothing to do with it:[67] it's your law or ours (and in cases of conflict, it's ours and good night to your "interests," however compelling and heart-felt they may be).

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63. I suspect that they will share my desire to learn more about exactly what the normalization proposal would entail. It would almost certainly entail nationwide class actions in products liability (not a net plus, from their vantage). What else would follow?

64. That, at any rate, is the core of the extended argument in THE UPSIDE-DOWN CONSTITUTION. *See generally* GREVE, *supra* note 1.

65. Sherry, *supra* note 5, at 1167 (footnote omitted).

66. *Id.* at 1167.

67. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 292–96 (2000) (explaining that the point of the Supremacy Clause was to block any judicial balancing of state and federal law).

Professor Sherry then instances the Privileges and Immunities Clause of Article IV—which has nothing to do with adjudicating federal-state relations, powers, or interests. It has to do with federalism's horizontal, state-to-state dimension—as do the constitutional prohibitions, mostly contained in Article I Section 10, that Professor Sherry dismisses with a casual "a few others."[68]

In covering this same ground, I would start with the "for the ages" case to which Professor Sherry alludes: *McCulloch*. The case does say that the Constitution must be made to work and that courts must interpret it in that light. To that extent one can call it "functionalist." But that is not the end. On one side, *McCulloch* says that the Supremacy Clause merely confirms the Constitution's deep structure, which it then explicates. One the other side, the case terminates in a fairly nuanced rule-like doctrine: states may not tax or otherwise encumber the operation of the bank by means that are discriminatory and targeted at its operation as a bank. Thus, federal common law is constitutionally and structurally grounded, and it is doctrine. It is not a perennial balancing act.

How does this shake out in the *Erie* context? The starting point is to see that *Erie* cases concern the federal-state balance only incidentally; in the first place they are horizontal *conflicts* cases.[69] The Constitution speaks to horizontal, state-to-state cases in many of its provisions: the Privileges and Immunities Clause; the Contract Clause; the Import-Export Clause; the Compact Clause; the Full Faith and Credit Clause. Recognizing that not all conflicts between states and their citizens can be provided for ex ante, the Constitution provides for diversity jurisdiction. And unless Congress provides otherwise, courts are to exercise that jurisdiction in the way courts ordinarily adjudicate cases in which more than one state's law can apply—under general law.

Horizontal, state-to-state conflicts loomed very large in the jurisprudence of the nineteenth century. Nowadays, they hardly loom at all. The Constitution's textual clauses have been eviscerated, and some have been rendered virtually unenforceable.[70] The dormant Commerce Clause has been curtailed and severely questioned.[71] Through various constitutional and infra-constitutional doctrines, the

68. Sherry, *supra* note 5, at 1167.

69. Gasaway & Parrish, *supra* note 39, at 226, n.12.

70. *See, e.g.,* Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003) (Full Faith and Credit Clause); U.S. Steel v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (Compact Clause); Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934) (Contract Clause).

71. *See supra* note 51; *see also* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Author., 550 U.S. 330 (2007).

Supreme Court has maximized the potential for horizontal conflicts among state laws and litigants.[72] When the justices encounter a massive, unavoidable horizontal conflict, they throw up their hands and confess cluelessness.[73] All this is overlaid with solemn musings about the "federal-state balance"—a jumble of ad-hoc gut checks in which no constitutional thought can be found.

That's the disease, and no single case or doctrine reflects it as clearly as does the *Erie* doctrine. Normalizing it to doctrines that at least partially recognize the judiciary's indispensable role in safeguarding the Constitution's architecture would be a helpful step. But the true lesson here is deeper. You can believe in the United States Constitution. Or, you can believe that *Erie Railroad* was correctly decided. You cannot believe both these things at the same time.

72. *See supra* notes 45–49.

73. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 499 (2003) ("We decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.").