Expanding the Federal Common Law?: From Nomos & Physis and Beyond

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Expanding the Federal Common Law?:
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No just government ever did, nor probably ever can, exist, without an unwritten or common law. By the common law, is meant those maxims, principles, and forms of judicial proceeding, which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws; and, by such incorporation, form a part of the municipal code of each state or nation, which has emerged from the loose and erratic habits of savage life, to civilization, order, and a government of law.²

Searching for order in a world full of flux, lawyers and jurists grope for ideas, intellectual constructs, which allow for change while providing the illusion of continuity.³ Justice Oliver Wendell Holmes told us that the lawyers' job is that of prediction,⁴ but the task of prediction requires continuity between the past and the present, and between the present and the future. The nature of progress, however, raises important and interesting

¹ Associate Professor, University of Wyoming College of Law. I am grateful to Stephen Feldman, Mark Squillace, [___] for their helpful comments and insights.
² Ohio v. Lafferty, Tappan's Reports 113 (Ohio 1817).
³ “[I]n the evolution of habitat, custom and tradition in the field of politics there is a more or less constant interplay between the forces of continuity and change.” BURLEIGH C. RODICK, AMERICAN CONSTITUTIONAL CUSTOM: A FORGOTTEN FACTOR IN THE FOUNDING 132 (1953).
⁴ Oliver Wendell Holmes, The Path of Law, 10 HARV. L. REV. 457, 461 (1897).
questions concerning the relationship between continuity and change.\(^5\) Specifically, to what degree do legal actors develop, modify, or adopt ideas that accommodate such facially irreconcilable concepts as change and continuity? How do members in the legal profession speak of "legal certainty" if progress requires that the law exist in a state of flux?

These questions lie subtly beneath escalating efforts to test whether a federal common law should apply to complex interstate environmental harms. After all, the common law operates against the background of our existing regulatory state. And when our existing environmental programs appear ill equipped to tackle complex environmental threats, the common law serves as a potentially viable solution for advocates concerned with protecting threatened resources. “The common law,” as Roger Percival explains, “now serves primarily as a backstop to be invoked when regulation fails, but common law concepts retain a powerful influence on judges distrustful of regulatory agencies.”\(^6\) Absent the common law, the only alternative is to secure a political solution through legislation. But in our present age of increased partisanship and attendant legislative gridlock at the national and occasionally state level, political solutions appear problematic. Not surprisingly, therefore, scholars and advocates increasingly focus attention on the flexibility of the common law to adapt and respond to modern threats. Jason Czarnezki and Mark Thomsen, for instance, argue for a “rebirth of the environmental common law.”\(^7\) Others suggest that, with the advent of scientifically proven methods for tracing pollutants, the common law offers increasing promise to address regulatory gaps in our modern environmental programs.\(^8\)

The viability of pursuing federal common law claims is one aspect of this growing conversation. During the early 1990s, when the Federal Courts Section of the Association of American Law Schools addressed the question of federal common law, the issue arguably appeared somewhat academic.\(^9\) But today, as we struggle to find solutions to modern, complex environmental threats that transcend political boundaries, the need for some nationally uniform standard seems apparent.\(^10\) Federal common law claims naturally become attractive options against a background of congressional inaction. Some scholars advocate that federal courts, like state courts, ought to have

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expansive power to “create” law—fashion a federal common law. And then there are those who argue otherwise. This debate is evident—and increasingly relevant—in the effort to secure a federal common law of public nuisance for greenhouse gas (GHG) emissions. While, at least for now, the Supreme Court in *AEP v. Connecticut* held that such claims, if they exist, would otherwise be displaced by the Environmental Protection Agency’s (EPA) implementation of the Clean Air Act (CAA), it repeated a now frequent refrain that some limited federal common law claims are possible. In another prominent case, the Seventh Circuit decidedly left open the possibility that states might be able to use federal common law to sue the United States for allowing an invasive species into the Great Lakes region.

Employing the common law to address emerging environmental threats assuredly might be a means for achieving legitimate ends, ends that we must achieve if we are to attain some level of sustainability, whether in connection with invasive species or rising greenhouse gas emissions. If, however, law “does the bidding of those whose hands are on the controls,” and consequently “reflect[s] the goals and policies of those whose call the tune,” then whether law as announced by judges is an appropriate means to address modern environmental threats is worth exploring. But whether such means are themselves appropriate is missing from the current dialogue.

Instead, two fundamental premises support the “rebirth of the common law.” The initial premise is that the legislative and executive branches are not adequately addressing modern environmental threats. True enough; however, legislative action, at least at the national level, historically occurs only when a sufficient consensus coalesces around the need for immediate action to respond to discrete, readily observable problems. And in advance of that occurring, it is a normative judgment about whether the legal system must respond to those threats. The second largely ignored premise is that courts are capable, constitutionally, institutionally, and professionally of employing a common, or customary law—a “law” somehow tied to the past and yet capable of expanding to address new problems. While it may be utilitarian to urge an expanded common law, we ought to ensure first that the means—that is, the common law and particularly a federal common law—is an appropriate or efficacious tool for social change.

After all, the common law assumes that past, or customary practice, provides some defensible, respectable, and reasonably predictive guide for defining current or future rights and responsibilities between parties. Yet, paying homage to custom necessarily embodies some normative judgment. For most of our history, that normative

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14 See infra notes ___ to ___ and accompanying text.
judgment was an acceptance of—and allegiance to—the notion of shared values: custom reflected universal truths. That made sense in a pre-modern world, where jurists assumed human nature was universal. Few today accept this. “A major feature of the outlook against which the classical social theorists rebelled was the notion that there is a universal human nature, common to all men, regardless of their place in history.”\textsuperscript{16} And to the extent any particular custom arguably reflects a shared community value or vision, the custom can be as arbitrary as it might be rational. We see this on the international level, where customary law can conflict with modern sensibilities.\textsuperscript{17} A good example of how custom can emerge with little appreciation for its modern relevance goes something like this: in ancient times, houses of worship were built with small doors, possibly as a consequence of the smaller height of many of the congregants. But even with smaller doors, congregants still had to bow when entering the holy sanctuary. While the average height of congregants increased over the centuries, the doors on these religious buildings were enlarged; the congregants, however, still bowed. Why? They believed it was tradition: A custom to be followed because it had been done that way for centuries.

This article, therefore, attempts to prompt a searching dialogue about the jurisprudential basis for promoting an expanded federal common law. Is there a custom? What is the basis for it? And if so, is there a principled rationale for applying it to new circumstances? This dialogue is both timely and necessary; the assumption about a general federal common law for interstate pollution unfortunately divorces the past from the present without any robust discussion. That assumption is evident in the cases discussed in Part I, and infects the present exploration into the use of an expanded federal common law. Parts II and III illustrate that the assumption buries history, that continuity with the past. In particular, Part II briefly explores the evolution of the jurisprudential basis for the common law, and how the common law and custom became inextricably tied to eighteenth and nineteenth century enlightenment principles, and how those ideas shaped the growth of and demise of a general federal common law. Part III, then, examines how and why the interstate pollution cases reflect the Court’s struggle with the scope of its constitutionally assigned original jurisdiction to decide disputes between states on the basis of law and equity, not on the basis of any federal common law theory. This critical appreciation for history does not necessarily suggest that the present effort to expand the federal common law is inappropriate, only that it requires considering apart from the past whether it is jurisprudentially appropriate to do so. Part IV, therefore, offers suggestions for that consideration, and Part V concludes that perhaps the time is ripe for accepting the challenge to balance the desire for change with the need for continuity.

I. Growing Interest in the Federal Common Law

\textsuperscript{16} ROBERTO MANGABERIA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 5 (1976).

\textsuperscript{17} See Magaya v. Magaya, Supreme Court, 16 Feb. 1999 (gender equality conflicting with African customary law); Ephraim v. Patory (2001) AHRLR 236 (TxHC 1990) (conflict between general equality and customary law). In Ephraim, Justice Mwalusanya opined, “however much this court may sympathise [sic] with these very natural sentiments [against gender discrimination] it is cases of this nature bound by the Customary law applicable to these matters. It has frequently been said that it is not for courts to overrule customary law. Any variations in such law as takes place must be variations initiated by the altering customs of the community where they originate.”
As we confront multi-jurisdictional environmental threats not addressed adequately by existing environmental programs, the pressure mounts for exploring common law remedies—particularly with a gridlocked political system.\textsuperscript{18} Two recent cases, in particular, illustrate attempts to persuade the federal judiciary that not only is there a federal common law of public nuisance, but that it ought to be expanded. In \textit{AEP v. Connecticut} and \textit{Michigan v. Corps}, the courts accepted a general federal common law of public nuisance for interstate pollution, and in both cases the parties pressed the judiciary to expand that law to suit new circumstances. And in each instance, the court left open the possibility of expanding the doctrine. Unfortunately, as explained in Parts II through IV, it did so without any apparent appreciation for how or why the Court entertained lawsuits that today we cite as evidence of a federal common law of public nuisance.

\textbf{A. Addressing Rising Greenhouse Gases}

In recent years, the viability of having federal courts apply federal common law has emerged as a possible venue for forcing large scale GHG emitters to reduce their emissions. When congressional interest in responding to the threat of climate change began to wane, scholarly commentary encouraging the use of a federal public nuisance claim intensified.\textsuperscript{19} And during the past few years, three principal GHG common law cases surfaced.\textsuperscript{20} \textit{Comer v. Murphy Oil}, for instance, focused primarily on state common law. It involved the devastation following hurricane Katrina, with Mississippi homeowners alleging that but for the rising GHG emissions the degree and intensity of the storms off the Coast would not have occurred.\textsuperscript{21} Next, residents of the village of Kivalina, Alaska, alleged that rising GHG emissions contributed to rising sea levels,

\textsuperscript{18} Louise Weinberg, for instance, commented several years ago:

\begin{quote}
If Congress is in gridlock, must that disable the Supreme Court from rationalizing mass disaster litigation? The inaction of Congress in the face of so much proposed legislation says very little about national policy, save that powerful minorities are likely to be aligned on each side. Unlike legislatures, courts can attempt to strike policy balances on a case-by-case basis, feeling their way toward lines of responsive authority.\end{quote}


forcing residents of the small village to relocate. And finally, in *AEP v. Connecticut,* the State of Connecticut and others alleged that some of the largest electric utility GHG emitters were liable under a federal common law public nuisance theory for the emissions.

The Supreme Court’s decision in *AEP v. Connecticut* has since eclipsed the other cases. In *AEP,* the plaintiffs invoked the common law against some of the country’s largest GHG emitters. Collectively, the defendants, four private utilities and the Tennessee Valley Authority (TVA), allegedly emit approximately 650 million tons of GHGs, accounting for roughly 25% of emissions from the domestic energy sector. “Plaintiffs sought [injunctive] relief under the federal common law of public nuisance or, in the alternative if federal claims were not available, under the state common law of public nuisance.” The Second Circuit held that the complaint stated a valid federal common law nuisance claim. In requesting certiorari, the companies argued that “[t]he threat of such litigation and the indeterminate exposure to monetary and injunctive relief that it entails will substantially impede and alter the future investment decisions and employment levels of all affected industries, and ultimately every sector of the economy.”

The Court decided the case on narrow grounds, holding that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.” In doing so, however, the Court observed that its past cases allowed federal common law suits for a public nuisance, citing *Missouri v. Illinois,* *New Jersey v. City of New York,* *Georgia v. Tennessee Cooper Co.,* and two lawsuits between Illinois and Milwaukee. And while adding that the common law adapts to new circumstances and science, the Court observed that it has “not yet decided whether private citizens . . . may invoke the federal common law of nuisance to abate out-of-state pollution.”

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22 Native Village of Kivalina v. ExxonMobile, 663 F. Supp.2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir.).
24 131 S. Ct. at 2534.
26 582 F.3d 309, 350-51 (2nd Cir. 2009).
28 131 S. Ct. at 2537.
29 190 U.S. 208 (1901).
30 283 U.S. 473 (1931).
31 240 U.S. 650 (1916).
33 131 S. Ct. at 2535-36.
34 Id. at 2536. The Court expressed hesitancy about creating “controlling law,” although it quoted approvingly Justice Jackson’s comment that courts can fashion federal common law. Id. at 2536-37. But Jackson’s comments in *D’Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Co.,* 315 U.S. 447 (1942), involved a lawsuit brought by a federal corporation under a specific federal statute that lacked any direction on what law to apply. And the *D’Oench* Court relied upon *Deitrick v. Greaney,* 309 U.S. 190 (1940), involving national banks and a federal question, where that Court indicated that the federal statute left it to
B. Protecting Against Invasive Species

Michigan’s reliance on federal common law is a similar effort to test how far federal common law might adapt to new circumstances. Seeking to prevent an alleged influx of Asian carp into Lake Michigan, the five Great Lakes region states of Michigan, Ohio, Pennsylvania, Wisconsin and Minnesota (collectively “the States”), as trustees of the water and aquatic resources and as parens patriae on behalf of their citizens, brought suit against the United States over the operation of the Chicago Area Waterway System (“CAWS”). The States’ complaint charged that the U.S. Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago violated the Administrative Procedure Act (APA) and is creating a federal common law public nuisance, by allowing non-native (invasive) species of carp (the bighead and silver) to enter the Great Lakes through the CAWS. Federal and state resource agencies agree that invasive species pose a threat to the region. In 2007, Congress even directed that the Corps prepare a feasibility analysis of options for addressing invasive species in the Great Lakes and Mississippi River Basin region. Concerned that the Corps was not adequately responding to the threat of invasive carp species, the States, since 2009, “repeatedly urged the Defendants to promptly take additional, comprehensive action to minimize the risk that Asian carp will migrate through the CAWS into Lake Michigan.”

Initially, in December 2009, the State of Michigan attempted to compel a Corps response by seeking to reopen and amend a decree in the Supreme Court’s Original Nos. 1, 2 and 3 proceedings, or in the alternative file a new original jurisdiction action. In

"judicial determination . . . to be derived from it and the federal policy which it has adopted.” Id. at 201. See infra notes ___ and accompanying text.

35 The 78 miles of canals in the CAWS resolved Chicago’s long-standing problem with contaminated water supplies, by, inter alia, altering the hydrology of the region and allowing water to flow from Lake Michigan into the Mississippi River Basin. The Chicago Sanitary and Ship Canal, completed in 1900, connected Lake Michigan with the Mississippi drainage basin, and is now operated and maintained by the Corps pursuant to congressional directives. See Pub. L. 97-88, § 107, 95 Stat. 1135 (Dec. 4, 1981); Pub. L. 98-63, Tit. I, Ch. IV, 97 Stat. 301 (July 30, 1983). The CAWS, as a consequence, created several opportunities for fish and other biota to move into Lake Michigan. See Complaint, P. 25 Michigan v. U.S. Army Corps. ___ (7th Cir. 2011), available at ____ (“the diversion project, the CAWS and associated infrastructure as created, maintained, and operated by the District and the Corps provide a conduit for the movement of fish and other biota between the Illinois River and the Great Lakes at multiple locations on the shore of Lake Michigan”).


38 Complaint, P. 59, Michigan v. U.S. Army Corps., ___ (7th Cir. 2011), available at ____.

1967, the Supreme Court issued a decree in *Wisconsin v. Illinois*,\(^{40}\) establishing limits on the amount of water that Illinois can divert from Lake Michigan. The United States opposed Michigan’s efforts, arguing that the only appropriate forum would be an APA-type case in federal district court, assuming the presence of a final agency action.\(^{41}\) Soon thereafter, the Asian Carp Regional Coordinating Committee, which includes the federal agencies, issued framework reports; the coordinating committee rejected the Michigan’s suggestion of temporarily closing locks and sluice gates and deferring until 2012 any decision on a long-term solution.\(^{42}\) On June 3, 2010, the Corps then released its “Interim III, Modified Structural Operations, Chicago Area Waterways Risk Reduction Study and Integrated Environmental Assessment.” This Interim III report concluded that insufficient evidence exists that Asian carp are infesting the system and pose any imminent threat.\(^{43}\)

The States then filed their Administrative Procedure Act (APA) and federal common law complaint in federal district court.\(^{44}\) The United States principally argued that no reviewable final agency action existed, and that the only “tort” based remedy would be under the Federal Torts Claims Act ("FTCA"), not under a federal common law theory, and that the FTCA did not allow the issuance of equitable relief—here, the requested mandatory preliminary injunction.\(^{45}\) The States presented the court with volumes of information, testimony and argument, and the district court judge decided that the States had failed to overcome the high burden necessary to warrant issuing either a preliminary or permanent mandatory injunction. The court assumed that a final agency


\(^{41}\) Brief for the United States in Opposition, 13. The United States explained that, while actions among states and the United States are subject to concurrent original jurisdiction in the Court, 28 U.S.C. § 1251(b)(2), the Court exercises jurisdiction in such cases sparingly; the Government further argued that reopener provisions in existing decrees cannot expand the scope of the issues that were originally before the Court, and that the appropriate approach is to seek leave of the Court to initiate a new original jurisdiction action. Here, such an original jurisdiction action lacked any opposing state, according to the United States, because Illinois is not the defendant along with the Corps, but rather it is the Water District. *Id.* at 21-23.

\(^{42}\) Some temporary closures did occur, such as the closure of a 2.5-mile segment to allow the application of rotenone poisoning, with a subsequent public statement that no invasive carp species were among the fish killed.

\(^{43}\) The Corps reaffirmed its Interim III report on June 8, 2010, when responding to a letter from the States. This and other public statements led the States to conclude that the Corps was proposing “no change in operation” of the system regarding lock operations. Complaint, P. 80

\(^{44}\) U.S. District Court Judge Robert Dow, Jr., noted that the States filed the case “on the heels of [Michigan’s] unsuccessful bid to persuade the Supreme Court . . . to address the subject matter of this dispute.” *Michigan v. U.S. Army Corps of Engineers*, __ F. Supp.2d __, 2010 WL 5018559, n.1 (N.D. Ill. Dec. 2 2010).

\(^{45}\) The Government argued that the FTCA is the only waiver of sovereignty applicable to the State’s complaint, and the FTCA limits relief to monetary damages. The States countered that the APA (5 U.S.C. § 702) waived sovereign immunity.
action existed, and concluded that little suggested that the agency had acted “wrong,” “much less arbitrary and capricious[ly].” And, although the court agreed with the States that the APA waives sovereign immunity even for non-APA cases, including the State’s common law claim. Judge Dow concluded that the States failed to present sufficient evidence that the United States had created a public nuisance—an “unreasonable interference with a common public right.” But Judge Dow signaled that, with sufficient evidence, he did not believe that any federal statute had displaced the common law claim.

The Seventh Circuit expressed reservations about the district court’s assessment of the facts, and as such was “less sanguine about the prospects of keeping the carp at bay,” but nonetheless concluded that the requested injunction was premature. The court accepted that states may sue under federal common law for the abatement of interstate pollution, echoing the long-standing rationale that “[i]t is our federal system that creates the need for a federal common law to govern interstate disputes over nuisances.” And interstate pollution includes, according to the court, a wide range of areas and effects, including environmental and economic impacts from invasive species. The principal question, therefore, is whether such suits are actionable against the United States. The court assumed they were, noting what it believed were good arguments for both sides, and then proceeded to address whether the United States had waived its sovereign immunity, or regardless, if federal statutory law had displaced any federal common law claim. The court first agreed with the lower court that the APA waives sovereign immunity for non-monetary claims, even those claims not brought under the judicial review provisions of the APA. It then rejected any suggestion that the FTCA somehow shields tort-based non-monetary relief cases against the United States.

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50 Id. at *3 (employing Tennessee Copper).
51 The States, and subsequently the court, invoked the RESTATEMENT (SECOND) OF TORTS § 821B(1) and Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979), overruled on other grounds, as the basis for the underlying federal common law public nuisance tort. See Brief for Plaintiffs-Appellants, at 25-26, 2011 WL 3836457.
53 In addition to the cases relied upon by the lower court, see supra note __, the Seventh Circuit relied upon Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011). State of Michigan: F.3d at __, 2011 WL 3836457, at *8. But the relevant portion from Veterans for Common Sense involved a constitutional issue, with the plaintiff veteran group arguing that the Veteran Affairs Administration violated veterans’ due process rights by not providing adequate and swift enough mental health care guaranteed by statute. The United States, there, did not even argue sovereign immunity for the constitutional claim, and the Ninth Circuit capitalized on the opportunity to assert that the APA’s waiver of

Rough Draft: Do Not Cite Without Author’s Permission 9
II. **Foundations of the Federal Common Law: From Swift to Erie**

What seems striking about the Court’s language in *AEP v. Connecticut*, and understandable and yet quite extraordinary about the issues left unresolved in *Michigan v. Corps*, is that the law surrounding a federal common law for interstate pollution has evolved with minimal analysis or discussion, and, more importantly, it has become severed from its roots. This seems odd for two reasons. First, the history surrounding the federal common law is quite torturous. During the early Republic, the possibility of a federal common law became entangled in discussions about the general role and efficacy of the common law. Whether or how a federal common law could exist necessarily depended upon how jurists conceived of the common law in the first place. And as the country grew older, so too our conception of law matured to a degree that a federal common law made little sense. Second, the cases today we associate with the rise, decline and lingering vestiges of a federal common law are anything but that. Instead, as explained in Part III, those cases demonstrate the Court’s struggle with the scope of its original jurisdiction, and the application of equity principles—not common law doctrines.

To begin with, the common law morally, religiously, scientifically, and jurisprudentially, made sense to many of the leading jurists during the period surrounding the revolutionary war, up to at least the mid to late nineteenth century. The common law as it emerged in this country enjoyed a symbiotic relationship with the dominant natural law theory of the time. Sir Isaac Newton’s scientific discoveries in physics portrayed a mechanistic universe: Through observation we could glean fixed principles. We could observe human behavior—customary human practices, and through reason deduce from

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sovereign immunity did not necessarily only apply to reviewable final agency actions under the APA. 644 F.3d at 865.

54 ___ F.3d at ___, 2011 WL 3836457, at *9.

55 Natural law “was conceived of as a collection of principles that, while universally subscribed to, had not been codified, and for this reason it was regularly contrasted with ‘positive’ . . . law.” G.E. White, The Marshall Court & Cultural Change, 1815-1835 676-77 (1991).

56 See J. Bronowski & Bruce Mazlish, *The Western Intellectual Tradition: From Leonardo to Hegel* 200 (1960) (“a Newtonian world which moved in mathematical regularity, like a ‘great Clockwork’”). Cynthia Russett explains Newton’s influence:

Mechanism reigned in philosophy and politics, economics and ethics. Newtonian physics was the first great instance of science as a paradigm, *i.e.*, when not only the method but the very substance of science spills over into the humanities. On a cosmic scale, Newton’s achievement promoted a conception of the universe as a great machine operating in accordance with certain specified laws. At a lower level, it suggested that men and societies could similarly be interpreted as acting under fixed laws.

these practices rules governing human relationships that, to many at the time, reflected some divine providence or plan.\textsuperscript{57} The northeast Unitarians, in particular, embraced a theology that, following John Locke, allowed them to discern through reason and revelation a divine plan, and support utilitarian legal or moral rules that merged with facilitating the tendencies of human behavior—custom.\textsuperscript{58}

Of course, while notions of fundamental, higher, and natural law pervaded legal, political, and philosophical discourse during the pre and post-revolutionary period,\textsuperscript{59} legal positivism was emerging simultaneously with the embedded hostility toward the common law—an English institutional remnant.\textsuperscript{60} And so, alongside common law advocates were

\textsuperscript{57} Even to the American Philosophical Society, science served a utilitarian purpose of revealing some divine plan upon which human society could better adjust its rules. See Henry F. May, The Enlightenment in America 217 (1976) (“it was assumed that any discovery of the workings of nature, even any particular fact, from a new plant to mastodon bones or Indian customs, was bound to prove useful to man—that was how all nature had been framed.”). In Martin v. Hunter’s Lessee, U.S. 327 (1816), for instance, Justice Story wrote that the Constitution “was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of providence.”


\textsuperscript{59} See Miller, supra note __, at 239-265 [Life Mind]. See also Charles G. Haines, The Revival of Natural Law Concepts (1930); Edward S. Corwin, The “Higher Law” Background of American Constitutional Law (1928); Gordon S. Wood, The Creation of the American Republic 1776-1877 259-305 (1969); Benjamin F. Wright, Jr., American Interpretations of Natural Law: A Study in the History of Political Thought (1931); Roscoe Pound, The Place of Judge Story in the Making of American Law, 48 AM. L. REV. 676, 681-82 (1914); A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 260 (1968); Miller, supra note __, at 208-9, 241 [Life Mind]. See generally Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978) (unwritten constitution formed the status quo in the period surrounding the revolution). For a discussion about how natural law theory became bundled in the framers’ approach toward law and the constitution, see Morton White, Philosophy, The Federalist, and the Constitution (1987). Samuel Pufendorf, cited by many during this period, provided a natural law foundation for law, at least as it then related to international law and the law of nations. James Hoffman’s textbook for law students at the time observed that “[t]he pages of Pufendorf, and of Wolf, or at least those of Rutherforth and of Burlamaqui, are presumed to be familiar to the student, before he takes up the works which treat of the law of nations.” David Hoffman, A Course of Legal Study Addressed to Students and the Profession Generally: Vol. 2 451 (1836). Hoffman also instructed students about Vattel, although warning about his “novel and untenable positions (id. at 453), as well as others such as Selden, Grotius, and Bynkershoek. Id. at 467.


Stewart Jay aptly opines “the profession had to contend, in the post Revolutionary years, with a deep hostility among people to the whole conception of the Common Law, which patriots now identified with British tyranny and with Tory endeavors . . . .” Perry Miller, The Legal Mind in America: From Independence to the Civil War 17 (1962). Gordon Wood too observes how codification responded to the hostility toward judges exercising too much discretion, although recognizing the softening of this hostility over time. Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789-1815 402-03, 406 (2009); see also id. at 430-31 (describing tension between codification and common law). For a review of early codification efforts, see Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform, 1820-1850 (1981) (noting that not necessarily a movement and focused on addressing legal development); George M. Hezel, The Influence of Bentham’s Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States, 22 BUFF. L. REV. 253 (1972) (discussing three primary antebellum lawyers’ views).
those who favored codification. Even Justice Joseph Story, one of the leading jurists in the Nineteenth Century, “could marshal all the arguments against the untility of a code, but then ask the still-persistent question: ‘Because we cannot form a perfect system, does it follow that we are to do nothing?’” And Story promoted incorporating civil law concepts into American jurisprudence. Another pre-Civil War scholar, Theodore Sedgwick, echoed Justice Story, when he explained how both the common law and limited codification coalesced to address the needs of a changing society: the slow process of custom establishes general rules over time, while codification responds immediately and uniformly to present demands.

Indeed, both Justice Joseph Story and the eminent Chancellor James Kent promoted the republic’s common law heritage. Both jurists clung tenaciously to a static system, often favoring vested forms of older common law property rights over dynamic, entrepreneurial forms of property. Chancellor Kent, for instance, believed that jurists do not make law, but rather follow the law—that is, the common law. And when describing the prohibition against marriage among lineal descendants, Chancellor Kent

61 See Miller, supra note __, at 239-265 [Life Mind]
62 See also Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America Vol. 16 (13th Ed. Melville E. Bigelow 1886) (“It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.”).
64 See Miller, supra note __, at 296-306 [Legal Mind]. Sedgwick apparently distinguished Swift v. Tyson, when he further suggested that “that there can be no common law of the Union,” and such law could exist “only by legislative adoption.” Id. at 302.
65 The colonies “received” the English common law, and often explicitly did so in legislation and typically with caveats. See generally Paul S. Reinsch, English Common Law in the Early American Colonies (1899, Da Capo Reprint 1970); Ford W. Hall, The Common Law: An Account of its Reception in the United States, 4 VAND. L. REV. 791 (1951); William Stoebeck, Reception of English Common Law in the American Colonies, 10 WM. & MARY L. REV. 393 (1968). James Hoffman, a prominent figure in post-Revolutionary America, also promoted the common law, believing that, through methodological rigor, law as a science legitimated legal principles. Miller, supra note __, at 83-4 [Legal Mind]. See also Miller, supra note __, at 159, 182-83 [Life Mind].
66 Both jurists, for instance, expressed fear that property rights had been undermined by Chief Justice Taney’s decision in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). Miller, supra note __, at 220-21 [Life Mind]. In Charles River Bridge, the Court over Justice Story’s objection favored dynamic over static property rights. See generally Stanley I. Kutler, Privilege and Creative Destruction: The Charles River Bridge Case (1971). See also White, supra note __, at 595. Chancellor Kent’s rigid devotion to vested property rights led him to oppose universal suffrage. See Miller, supra note __, at 231 [Life Mind]. Kent undoubtedly was influenced by Adam Smith and, while tethered to tradition, promoted rules favoring commercial expansion. See Joseph Dorfman, Chancellor Kent and the Developing American Economy, 61 COLUM. L. REV. 1290 (1961).
67 Miller, supra note __, at 234-6 [Life Mind]. Kent, a diest, infused his captivation of the common law with a universal religious sanction (id. at 194), and was an intellectually formidable leader during his era. See May, supra note __, at 233-34.
expressed how natural law provided a reasoned approach for deducing *ex ante* legal principles:

That such a marriage is criminal and void by the law of nature, is a point universally conceded. And, by the Law of Nature, I understand those fit and just rules of conduct which the Creator has prescribed to Man, as a dependent and social being; and which are to be ascertained from the deduction of right reason, that though they may be more precisely known, and more explicitly declared by Divine Revelation . . .  

But Justice Story more than Chancellor Kent is now principally associated with the promotion of a federal common law. After all, Story’s opinion in *Swift v. Tyson* suggested that federal courts could apply a general common law. While early in his tenure as a Justice, Story deftly avoided whether the United States, as a sovereign, adopted the common law, he did “contend, that when once an authority is lawfully given, the nature and extent of that authority, and the mode, in which it shall be exercised, must be regulated by the rules of the common law.” Story added “it can hardly be doubted, that the Constitution and laws of the United States are predicated upon the existence of the common law.” When Story determined that a universal general principle of the common law applied, he expressed considerable trepidation about altering it:

I do not sit here to revise the general judgments of the common law, or to establish new doctrines, merely because they seem to me more convenient or equitable. My duty is to administer the law as I find it; and I have not the rashness to attempt more than this humble discharge of duty.

And while not categorically opposed to replacing aspects of the common law with codification (favoring it in the areas of criminal law, property, personal rights, and

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68 Wightman v. Wightman, 4 John Ch. R. 343. Justice Story agreed with the Chancellor’s observations. See *Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* 176 n.2 (2nd Ed. 1841).


71 *Id.* at 619. “In my judgment, nothing is more clear, than that the interpretation and exercises of the vested jurisdiction of the Courts of the United States must, in the absence of positive law, be governed exclusively by the common law.” *Id.* at 620.

72 Conyers v. Ennis, 6 F. Cas. (2 Mason 236) 377 (C.C. D. R.I. 1821). In *Conyers*, Story expressed reservations about the doctrine he felt compelled to apply, but observed “[t]he sufficient for me to stand upon the law, as it is now universally received. If there are public mischiefs growing out of its principles, let them be remedied by the legislature.” 6 Fed. Cas. at 378. Story often copiously explored whether certain doctrines were, indeed, *universally* accepted and the reasons behind those doctrines. See e.g., *Le Roy v. Crowninshield*, 15 F. Cas. (2 Mason 151) 362, 371 (C.C. D. Mass. 1820) (in a statute of limitations and conflict of laws question, Story canvassed all authorities, and noted “I do not sit here to consider, what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and jurisdical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides, in whose judgment the most implicit confidence might not have been originally reposed.”).
contracts). Justice Story believed that aspects of law should “continually expand[] with the progress of society, . . . adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country.”

Yet it was Story’s devotion to natural law that shaped his understanding of the common law. Each of the principal scholars examining Story’s jurisprudence explain that, while Story embraced a measure of utilitarianism justifying “making law” when appropriate, he nonetheless believed in a natural law. To Justice Story, “law of nature” is the “first step in the science of jurisprudence. The law of nature is nothing more than those rules which human reason deduces from the various relations of man.” As one of the northeast Unitarians, Story often invoked natural law, occasionally indirectly by referring to natural justice, and believed that through reason and revelation certain rules or principles—neither temporally nor geographically limited—would reveal themselves.

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73 Miller, supra note __, at 251 [Life Mind].
74 Joseph Story, Codification of the Common Law, 1837, in William W. Story, Ed., The Miscellaneous Writings of Joseph Story 702 (1852). Justice Story remarked that the common law sprang from the “dark and mysterious elements of the feudal system,” id., at 719, and his son described his father as a reformist. Id. at 19. But he championed the common law, and arguably its flexibility. In one of his classic statements, he observed “[t]he common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.” Van Ness v. Packard, 27 U.S. (2 Pet.) 137, 144 (1829).
75 See James McClellan, Joseph Story and the American Constitution 61-193 (1971); R. Kent Newmeyer, Supreme Court Justice Joseph Story (1985); see also Morgan Dowd, Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge, 18 Va. L. Rev. 634, 643, 661 (1965). Another biography of Justice Story is Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court 404 (1970). Many antebellum jurists were well acquainted with the moral philosopher William Paley, who championed the intersection of religion with a high dose of utilitarianism. “Actions are right or wrong,” he wrote, “according to their tendency. * * * It is the utility of any moral rule that constitutes its obligation.” B. Judd, Paley’s Moral Philosophy, Abridged & Adapted to the Constitution, Laws, and Usages, of the United States 23-24 (1828). Henry May, however, suggests, arguably too broadly, “Paley’s careful demonstrations of the prudential uses of Christianity were tooutilitarian for American moral taste. Americans wanted to believe at once in social and scientific progress and in unchanging moral principles.” May, supra note __, at 342.
76 William W. Story, supra note __, at 533.
77 Id. at 441.
78 Consistent with many during his era, Story had confidence in human reason, and believed that reason and revelation were interconnected. Id. at 442, 513. This translated into a belief that certain rules transcend political boundaries, such as equity principles. Id. at 540. In his treatise on bailments, for example, Story observed that commercial transactions can hardly reflect the rules of any particular country, and they may “be deemed to be founded upon, and to embody, the usages of merchants in different commercial countries, and the general principles . . . as to the rights, duties, and obligations of the parties, deducible from those usages, and from the principles of natural law applicable thereto.” Joseph Story, Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America, with Occasional Illustrations from the Commercial Law of the Nations of Continental Europe 25 (1843). Pothier’s influential treatise on partnerships echoed this understanding, proclaiming that partnerships reflected principles of natural justice—in effect, the law of nations. Joseph Pothier, A Treatise on the Contract of Partnerships 4 (Owen D. Tudor Trnsl. 1854). Blackstone too had merged natural law and revelation. See Kunal M. Parker, Common Law, History, and Democracy in America, 1790-1900 58 (2011) (“All law, for Blackstone, was grounded in a law of nature ‘co-eval with
Consequently, the debate over the ability of federal courts to employ the common law encompassed a variety of jurisprudential, practical and political issues. Early cases reflected the inherent difficulty in applying an English common law, particularly a federal common law, in the new country. As Stewart Jay observes, “[t]here was no coherent concept in the early nineteenth century of ‘federal common law’ as we now make use of that expression.” Assuredly, however, many of the leading jurists during this period supported a federal common law. In Chisholm v. Georgia, Justice Iredell reviewed the common law as a guide for applying Congress’ directive in Section 14 of the Judiciary Act, which authorized the federal courts to issue writs “which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.” And Iredell’s canvassing of the common law (noting at one point that it was consonant with natural law) led him to conclude that nothing in the “old law” authorized the type of suit. Of course, in Calder v. Bull, Justice Iredell opposed deploying natural justice as a guide for decision-making.

The now classic instance where the common law clashed with a positivistic approach toward law occurred in the context of deciding whether federal courts could

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81 2 U.S. (2 Dall.) 419 (1793).
82 2 U.S. at 429-50.
83 Id.
84 3 Dall. 386, 399 (1796). Justice Iredell’s views changed during the course of his career, however. Jay, supra note __, at 1041, 1053-54.
punish for common law crimes. The common law, after all, had become a Federalist tool for suppressing speech antagonistic to emerging republican principles, particularly against the supporters of Thomas Jefferson. Bruce Ackerman notes, “for Jefferson himself, the common law aspiration of the judiciary was the single most obnoxious feature of the Federalist program.” Some Federalists, such as Justice Chase, accepted that the United States lacked any common law. Others, including the first Chief Justice Oliver Ellsworth, defended a federal common law for crimes. William Rawle, for instance, argued that the federal courts could employ the common law to punish offenses that were unlikely to be prosecuted in any state court.

When the Court ceremoniously abandoned permitting any federal common law for crimes, it did so without recognizing the extant debate. In United States v. Hudson & Goodwin, Justice Johnson began by noting that the issue had “long since [been] settled in public opinion.” But the precedent was not so clear; the case “swept aside a number of lower federal court precedents and reversed a general acceptance of the prosecution of


87 ACKERMAN, supra note __, at 236. Madison too opposed a federal common law. Id. Stewart Jay acutely warns, “[u]nderstanding the early relationship between the common law and the federal government involves an exercise in constitutional history . . .” Jay, supra note __, at 1030.

88 United States v. Worrall, 2 Dall. 384 (1798). “Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?” Id. at __. See also Jay, supra note __, at 1067-68, 1072.


91 11 U.S. (7 CRANCH) 32 (1812).

92 Id. Premised on principles of state sovereignty and separation of powers, the opinion, according to Jay, “refut[ed] a supposed contention of the Federalists: that federal courts possessed a jurisdiction akin to the common-law courts of England—a connotation that would have entirely displaced the independent authority of the states.” Jay, supra note __, at 1241.
common-law crimes in federal courts” and “subordinated common law to constitutional principle.” 93 Justice Story, for one, disagreed with Hudson & Goodwin. Four years after the decision, Story twice noted his objection, first in passing in Martin v. Hunter’s Lessee,94 and then in United States v. Coolidge.95 Justice Washington later observed that federal courts would not apply a federal common (civil or criminal) law under the Hudson & Goodwin decision, although the matter was “open for discussion” should the appropriate case arise.96 That never occurred.97

What occurred instead is that Justice Story solidified a federal civil general law for roughly the next century. To begin with, Justice Story distinguished between federal jurisdiction to hear a case and the governing substantive rules, if the Constitution or Congress assigned jurisdiction to the federal bench.98 The Court addressed that distinction in Swift v. Tyson,99 in the context of “mercantile” law perceived of at the time as embodying national or international principles rather than local ones. The case involved a complicated transaction, infected by fraudulent activity, and the ability of a creditor to recover on a negotiable instrument regardless of the facts surrounding the history of the instrument. 100 Negotiable instruments had become a critical element in the domestic and international mercantile system, and yet uncertainty surrounded the law governing commercial transactions.101 Did, for instance, the holder of a negotiable instrument received in exchange for a pre-existing debt hold an enforceable instrument? The English common law suggested no, the eminent English jurist Lord Mansfield suggested yes, and the New York courts were ambiguous.102 Similarly, would an instrument tainted by prior fraudulent activity be enforceable?103 When, therefore, Swift sued Tysen in the Southern District of New York, and Tysen’s attorney attempted to

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93 Herbert A Johnson, supra note __, at 141; see also Rowe, supra note __.
94 1 Wheat. 304, 335 (1816) (referring to a federal court’s ability to hear criminal cases when matters of national rights or national policy involved).
95 1 U.S. (1 Wheat.) 415 (1816). See Ackerman, supra note __, at 239 (Story’s opinion in Coolidge “claimed that the Constitution presupposed the common law”). In United States v. Coolidge, 1 U.S. (1 Wheat.) 415 (1816), the Court followed Hudson & Goodwin, although Justices Story, Washington and Johnson all expressed interest in revisiting the issue. Justice Story assiduously believed that a federal criminal common law was necessary to protect the federal government. See Jay, supra note __, at 1294-1300.
97 See generally Tony Freyer, Harmony & Dissonance: The Swift & Erie Cases in American Federalism 33 (1981) (noting that Chief Justice Marshall avoided addressing the doctrine of a federal common law). Freyer explains that most of the leading contemporary commentators, including Peter DuPonceau, St. George Tucker, William Rawle, and Thomas Sergeant, distinguished between “local” matters and “commercial” matters governed by the law merchant. Id. at 34-5.
98 See G.E. White, supra note __, at 494 (describing distinction). White explains, “jurists at the time of the Marshall Court were vitally concerned about the jurisdictional limits of the federal courts. . .” Id. at 113. This distinction resonated with Chief Justice Marshall, and even more ardent Federalists: It followed that, if the federal judiciary was afforded jurisdiction, the scope of its jurisdiction should be coextensive with Congress. Id. at 564. The converse also applied: If the federal judiciary had few limits on what it could address under the auspices of the common law, the same would be true for Congress. Id. at 124.
100 See Freyer, supra note __, at 166.
101 Freyer, supra note __, at 6-9.
102 Freyer, supra note __, at 10-11.
103 Freyer, supra note __, at 10-11.
show that Swift had procured the instrument through fraud and was not a bona fide creditor, the question eventually surfaced of whether New York law applied under Section 24 of the Judiciary Act of 1789. After bouncing back and forth from the Circuit Court to the Supreme Court, the Court accepted the case in 1841 and decided it the following year.

Justice Story treated the matter as if little doubt existed about “the law,” indicating early in his opinion that some principles are “so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support.” And he then dismissed the suggestion that Section 24 of the Judiciary Act somehow applied to common law decisions on matters not of a local concern: Commercial law, or the law merchant, he reasoned is not dependent upon local usages but rather on “general principles and doctrines of commercial jurisprudence.” Tony Freyer amply demonstrates that Story’s opinion in Swift reflected a widely accepted distinction between local and general law: general law being a part of the law merchant governed by law of nations rather than local law or municipal law. This general commercial law, moreover, “was based on the notion that unwritten law was something to be discovered and was merely evidenced by judicial opinions.”

Swift not only benefited the emerging new economy in the post-Civil War ear, it seemed compatible with the sentiment of law as a science, which flourished in the legal academy throughout the fourth quarter of the nineteenth century—and later. As lawyers, we are all too familiar with the Langdellian case method, developed by Harvard law professor Christopher Langdell. Langdell believed law operates as a science, with principles or doctrines governing human relations (in the common law) capable of being discerned through carefully culling judicial opinions.


Id. at 19.

Freyer, supra note __, at 36. See also Charles A. Hickman, The Relationship of Swift v. Tyson to the Status of Commercial Law in the Nineteenth Century and the Federal System, 17 Am. J. Legis. Hist. 246 (1973) (explaining that Story distinguished local from general law and the latter formed part of the law merchant, which in turn was governed by the law of nations). Newmeyer similarly observes that Swift “was generally compatible with the prevailing assumptions of law at the time it was given.” Newmeyer, supra note __, at 336.

Jay, supra note __, at 1266.

Langdell, was as much a science as physics, chemistry, biology, or geography. Implicit in this approach is the assumption that one immutable rule of law, empirically verified though closely culling printed materials, exists: In other words, a “brooding omnipresence in the sky” that, through the careful review of cases would become exposed. This assumption fit nicely with the doctrine in *Swift v. Tyson*: a scientifically derived and nationally uniform principle (custom) could be divined, at least in areas of the law deemed necessary to promote a national market. And *Swift v. Tyson* is where Justice Story proclaimed that “[c]ases are, at most, only evidence of what the laws are; and are not of themselves law.” In short, cases could reflect a higher, scientifically derivable, common or customary law. Under such a system, continuity with the past purported to offer certainty for the future.

Ironically, as the case-method gained ascendancy, the rise of the social sciences and concomitant late-nineteenth century intellectualism shattered aspects of the formalism inherent in his method. American intellectuals, in the words of Morton White, revolted against formalism, “since they had been convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life.” The new social scientists, as strident empiricists, rejected the past as inhibiting change. Dorothy Ross chronicles how “realism” came to embody a sense that the present differed from the past, warranting reexamining tradition and possibly developing new institutions capable of responding to

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110 Langdell’s method paralleled the newly emerging paradigm created by Charles Darwin’s Origin of Species. For both Darwin and Langdell, the process involved observation and then the rule. Marcia Speziate, therefore, suggests that Langdell, “[i]f he was not the very first legal realist, . . . he must at least be seen as the bridge from formalism to what came later in American legal theory.” Marcia Speziate, *Langdell’s Concept of Law As Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980). While the “source” for what would be examined to determine “custom” might have shifted to reported decisions and away from those sources that earlier jurists and scholars relied upon, the Newtonian/Baconian paradigm remained inherent in the Langdellian case method.

modern human society. And at the risk of oversimplification, the anti-formalism and emerging social sciences undermined law as a static system, facilitated divorcing law from religion and morality, promoted examining law empirically in its historical and evolutionary context, and sanctioned the use of law as a tool for social progress rather than a passive actor.

Freed from custom and the despair occasioned by pre-determined inevitable or perhaps cyclical progress, law for many then became an instrument for change, affected by the subjective judgment of the actor, the judge—and guided, if at all, by reason and informal institutional constraints. The anti-formalist jurists viewed the process of judging, and thus the common law, as much more subjective than a search for universal truths. Throughout his writings, Justice Holmes underscored this point: Judges effectively make law, whether when interpreting the spoken or written word. He strongly chastised the formalism and its accompanying acceptance of natural law: “The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.” Mirroring aspects of historical jurisprudence,

112 DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 58-9 (1991). See also id. at 261 (“The sharp recognition of change, the sense of inherited traditions no longer appropriate to a new reality, in turn gave new energy to the impulse toward realism.”).

113 “If historicism meant that the past could no longer be linked unequivocally to the present and future, it could no longer serve as the basis for action.” ROSS, supra note __, at 286. This altered the idea of progress, away from one tied inextricably to the inevitable cyclical rise and decline of civilizations. Stephen Feldman explains that, following the Civil War, “American legal thought entered its modernist period with the onset of positivism: for the most part, jurisprudents repudiated natural law. Consequently, the idea of progress was unleashed from the natural law limits that inhered during the pre-modern era. Progress came to be seen as potentially endless, dependent solely on human ingenuity.” FELDMAN, supra note __, at 188 [ALT]. But many scholars could not break cleanly from the past, and still viewed the past as capable of revealing universal truths, a view that waned more dramatically by the 1920s. ROSS, supra note __, at 287, 292-3, 315-19. Ross adds that, from 1912 to 1926, “[t]he combination of progressivism and war worked in a number of ways to distance Americans from their past and to strengthen the call for sciences of social control.” Id. at 319.


115 The historical jurisprudence school emerged during the republic’s nascent years. Although Perry Miller suggests that few colonists were aware of this movement, see MILLER, supra note __, at 259 [Life Mind], this school of thought embraced the notion that law was not ahistorical, rather it reflected the experience of the people, at a particular time and place in history. Barron Montesquieu, for instance, although perhaps underemphasizing any temporal component, wrote that laws are peculiar to a society, affected by such variables as climate or geography. C. DESECONDAT, BARON DE MONTESQUIEU, SPIRIT OF LAWS (1752). Julius Stone explains that historical jurisprudence, led by Friedrich Karl von Savigny, “appeared on the continent early in the 19th century as a part of the romanticist revival and in reaction from the universalist and creative juristic thought of the preceding natural law period.” JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 35 (1950). It provided a temporal component to law, although tying it to the rise and ultimate decay of a nation’s life. See PETER STEIN, LEGAL EVOLUTION 59 (1980). Others such as Rudolph van Jhering added that legal development is a product of conscious choices by legal actors attempting to resolve “the problems of social life.” Id. at 67. Maine’s classic Ancient Law is a product of this appreciation, and so too is Holmes’s The Common Law. OLIVER WENDELL HOLMES, THE COMMON LAW (1881); HENRY MAINE, ANCIENT LAW (1861). And while the late nineteenth century society looked materially different than the antebellum period, the adherents to some or all aspects of historical jurisprudence championed the vitality of the common law, particularly over those who favored codification,
Holmes emphasized that law embraced experience over logic, social goals over adherence to tradition. Portraying the sociological aspect of law, Roscoe Pound added that, “[w]e do not base institutions upon deduction from assumed principles of human nature: we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs. We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological jurisprudence.”

And the legal realists, an eclectic amalgamation of disparate scholars but utterly enthralled with the possibilities of empirically based science and committed to reducing uncertainty, underscored law’s dynamic and malleable qualities. “A particular emphasis of the legal realists, in a decade of rapid and dramatic technological change, was upon the need for a dynamic law. They stressed the inability of old rules to provide clear guidance for the unprecedented situation characteristic of a world in flux and the need for judges to confront present reality.” Whether individually or collectively, the historical jurisprudents, the sociological jurisprudents, and the legal realists, laid barren the preexisting intellectual foundations for a federal common law—and quite possibly left the common law itself naked amidst claims of unbridled discretion. If, after all, law is an instrument for social engineering by those with power, and the common law, in the words of Pound, is malleable to adapt according to a judge’s appreciation for “social progress,” how and on what basis could a federal court divine some nationally uniform customary rule to prescribe individual societal relations? It is no wonder that President

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117 Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 609 (1908).
120 See Roscoe Pound, The Foundation of Law (1961); see also David Wigdor, Roscoe Pound: Philosopher of Law 118 (1974) (Pound emphasized “the need for men to use law as an instrument for securing changing social interests.”).
Theodore Roosevelt spoke so plainly about the power of judges in his 1908 State of the Union Address.\footnote{121}

Against this background, that Swift v. Tyson lasted so long, or that Erie Railroad Co. v. Tompkins\footnote{122} was decided at the height of the evolving dialogue about the nature and function of the judicial process, is not surprising.\footnote{123} One of the nation’s foremost legal historians of this period, Edward Purcell, aptly describes this case as “one of the most famous cases in American law.”\footnote{124} And he explains how legal positivism and Justice Holmes’ rejection of any transcendental higher, natural law made “Swift an irresistible target.”\footnote{125} Purcell observes that “[t]he idea that the federal courts could make an ‘independent judgment’ about abstract legal principles and thereby identify a ‘true’ common-law rule struck [Holmes] as absurd.”\footnote{126} Holmes wrote Frederick Pollock that Swift was “indefensible but did not much harm when confined to what he was thinking of.”\footnote{127}

\footnote{121} The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy, and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.


\footnote{122} 304 U.S. 64, 78 (1938).

\footnote{123} Freyer chronicles the expansion of the Swift doctrine beyond its original application to general commercial law. Freyer, supra note __, at 45, 74. The doctrines’ growth forced it to become entangled with federal and state relations, and “by the 1890s this notion was developed into an argument for the existence of a national common law—extending beyond general commercial jurisprudence—and including a whole corpus of federal judge-made decisions.” Id. at 72. By the “late nineteenth century, searching criticism of Swift doctrine and its application by federal judges emerged in the legal periodicals and law school classrooms.” Id. at 84. See also id. at 92 (“By the 1890s the Swift doctrine had become a center of controversy”). In Baltimore & O.R. Co. v. Baugh, 149 U.S. 368, 378 (1893), for example, Justice Brewer wrote in a fellow-servant rule case that the “question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the ‘common law.’” This provoked Justice Field to write that he could not “assent to the doctrine that there is an atmosphere of general law floating about all the states, not belonging to any of them, and of which the federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.” Id. at 399 (Field, J., dissenting). For a survey of the cases between Swift and Erie, as well as few post Erie cases, see Mitchell Wendell, Relations Between the Federal and State Courts 113-247 (1949).


\footnote{125} Purcell, Story of Erie, supra note __, at 21.

\footnote{126} Id.

\footnote{127} Mark DeWolfe Howe, Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932 Vol. 2 219 (1941).
Erie involved the accident to Harry Tompkins, whose left arm was severed by a passing train when a swinging door from the train knocked him to the ground alongside the railroad tracks. Because Harry had been walking beside the tracks, local law treated him as a trespasser and unable to recover for negligence. To avoid this problem, Tompkins filed suit in federal district under the court’s diversity jurisdiction, and also invoked *Swift* to justify applying a *general law* that would allow him to prevail. Tompkins won at both the district court and appellate level, with both courts applying *general law*. Erie’s lawyers argued to the Supreme Court that *Swift* only applied when the local law had not been settled. But the Court appeared intent on the larger question of *Swift’s* lingering vitality. And when the 6-2 majority of the Court decided to “bury” *Swift*, it needed to do so on constitutional grounds to avoid having it rise again. Justice Brandeis’ majority opinion is “spare and abstract,” and focused on the mischief the doctrine facilitated in diversity cases. He acknowledged the criticism both of the doctrine and Story’s interpretation of the Judiciary Act of 1789, and then held “[t]here is no federal general common law.” Although somewhat opaque, the opinion suggested that the constitution demanded as much, because the Congress could not legislate the common law of the states and, derivatively, the federal courts could not perform a function that even Congress lacked.

But despite *Erie*, remnants of an ostensible federal common law remain. Indeed, on the same day that Justice Brandeis announced *Erie*, the Justice in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, offered in *dicta* that a federal common law still existed in interstate disputes. Then in *Clearfield Trust Co. v. United States*, the Court applied federal law for a claim involving commercial paper issued by the United States. One prominent vestige is the Court’s post-*Erie* interstate fights over boundaries, water, and then pollution. These cases often are

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128 Purcell, *supra* note __, at 45.
129 Id. at 47.
130 Id. at 51-53. Purcell explains how the Justices debated whether to limit the decision to constitutional or statutory grounds, and that Justice Brandeis prevailed in his effort to secure a constitutional justification. Id.
131 Id. at 55-59.
132 304 U.S. at 72-78. Brandeis acknowledged supporters of the doctrine, as well. Id. at 77 n. 22.
133 304 U.S. at 78 (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.”).
134 Id. at 79 (quoting Holmes).
135 Id. at 78-79. See also Purcell, *supra* note __, at 60-63. Brandeis’ principal biographer refers to this opinion as “uncharacteristically obtuse.” Melvin L. Urofsky, Louis D. Brandeis: A Life 747 (2009).
136 *Erie* arguably has been muted by having it primarily used against forum shopping in diversity cases. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 363 (1941).
137 304 U.S. 92 (1938). See *infra* notes __ and accompanying text.
138 318 U.S. 363 (1943). Writing for the Court, Justice Douglas not only suggested that federal law would apply because the case involved the rights emanating from a federal sources, he oddly observed that the general commercial law under *Swift* based on the law merchant “stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.” Id. at 367. See *infra* notes __ and accompanying text.
mistakenly assumed as evidence of a persistence of some federal common law, even after jurists long discarded the idea of ex ante legal rules capable of being crystallized from uniform principles. Yet, as explained in Part III, these cases are instead a product of the Court’s effort to explore the scope of its original jurisdiction and less about federal common law.

III. Interstate Disputes: Federal Jurisdiction or Federal Common Law?

This mosaic of issues shadowing the federal common law during our first century and a half signals that we should be cautious before simply accepting that aspects of a federal common law remain, particularly in interstate disputes. While many of the Court’s pre-Erie decisions might appear to involve federal common law claims, they do not. The cases involving interstate disputes are no exception; these were not federal common law cases, but rather they collectively represent the Court’s exploration into the scope of its original jurisdiction, and the application of “equity” jurisprudence. The early cases, in particular, illustrate the Court’s emphasis on the scope of its original jurisdiction, including the scope of a federal court’s equity jurisdiction, as well as the corollary incipient theory of parens patriae. Florida v. Anderson is illustrative. The

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139 A good example is Coosaw Mining Co. v. South Carolina, 144 U.S. 550 (1892), where the state initiated the lawsuit in state court to restrain a company from mining in the Coosaw river, and the case was removed to federal court with an allegation that the state’s action violated the Constitution’s Contract Clause. In New Hampshire v. Louisiana, 108 U.S. 76 (1883), New Hampshire and New York passed laws allowing private citizens to assign to the state their claims against another state for the express purpose of allowing New Hampshire or New York to sue the other state in the Supreme Court. After recounting the history surrounding Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), and the passage of the Eleventh Amendment, the Court held that such manufactured suits, where the citizens were using the name of the state to secure jurisdiction, could not be allowed under either the letter or spirit of the Constitution. The Court further indicated that nothing in the law of nations permitted a state to sue on behalf of its citizens (in effect, as parens patriae). Later, in Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that federal courts lacked jurisdiction to hear cases between a state and one of its citizens. In so doing, the Court observed that “[s]ome things, undoubtedly, were made justifiable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution.” Id. at 15.

140 See supra note ___ [JL] and accompanying text.

141 In Mayor of Georgetown v. The Alexandria Canal Co., 37 U.S. (12 Pet.) 91 (1838), for example, the Court applied common law public nuisance principles when exploring whether it could exercise equity jurisdiction to enjoin a bridge construction authorized by Congress. The Court held that the Town of Georgetown, as a corporation, could not sue on behalf of its residents for a public nuisance. Other cases later in the century grappled with how to approach state-sanctioned obstructions to interstate commerce. See generally Sam Kalen, Reawakening the Dormant Commerce Clause in the Nineteenth Century, 13 U. DAYTON L. REV. 417 (1988). In Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888), for instance, the Court expressly rejected a “common law of the United States which prohibits obstructions and nuisances in navigable waters.” It distinguished the Wheeling Bridge Case, 54 U.S. (13 How.) 518 (1851), noting that in Wheeling Bridge the Court had held that the State of Pennsylvania was a proper party to invoke the Court’s original jurisdiction, and once invoked the Court “had power to apply, any law applicable to the case, whether state law, federal law, or international law.” 125 U.S. at 15. In Wheeling Bridge, counsel for Pennsylvania argued that free flowing navigation along the Ohio River was protected by the Constitution and pre-existing state compacts. See generally Elizabeth B. Monroe, Spanning the Commerce Clause: The Wheeling Bridge Case, 1850-1856, 32 AM. J. LEGAL HIST. 265 (1988); ELIZABETH B. MONROE, THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY (1992). A similar economic fight occurred between Superior City, Wisconsin, and Duluth, Minnesota, with citizens of the former city concerned that their commerce would be adversely affected by Duluth’s canal.
case involved a bill in equity filed by Florida on its own behalf and on behalf of the State’s internal improvement fund, against citizens of Georgia. Pursuant to the Judiciary Act of 1789, Congress gave the Court exclusive original jurisdiction in cases between two states, and concurrent jurisdiction in cases involving a state and citizens of another state. The Court initially inquired whether Florida was a proper party, whether it’s interests were sufficiently direct to invoke the Court’s original jurisdiction; once the Court decided affirmatively, it then addressed whether equity warranted an injunction—the part of its opinion lacking any discussion of “law.”

Similar issues surfaced in state boundary disputes. Early in his legal career, Alexander Hamilton represented states in boundary fights. He and others naturally anticipated the need for an impartial forum for resolving such disputes, one better suited than the process required by the Articles of Confederation. Initially the framers contemplated that Constitution would mirror the old process for boundary disputes: The Articles provided for a specially developed forum under the direction of the Senate. The Committee of Detail recommended a similar process, with “[c]ontroversies between states respecting jurisdiction or territory, and controversies concerning lands claimed under grants of different states, . . . tried by the Senate.” And yet Hamilton, who would serve on the Committee of Style, had written in the Federalist Papers that a forum was essential for states to resolve their disputes, and that state dignity warranted other than an “inferior tribunal.” After the Committee on Detail submitted draft language to the convention on August 6, 1787, including language granting the Court

construction and water diversion. The Court avoided any serious inquiry, by concluding that Congress authorized Duluth’s activities and the Court could not enjoin a legitimately authorized federal program. Wisconsin v. Duluth, 96 U.S. (6 Otto) 379 (1877).

143 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80. See 28 U.S.C. § 1251 (Court exercises exclusive original jurisdiction only when both parties are states, otherwise concurrent). For a thorough summary of many original jurisdiction cases, see Note, The Original Jurisdiction of the United States Supreme Court, 11 Stan. L. Rev. 665 (1959).

144 E.g., Iowa v. Illinois, 151 U.S. 238 (1894).


146 Julius Goebel explains that the boundary disputes were delayed during the revolution, but “[f]uture settlement of such interstate problems had been anticipated, however, in the framing of the Articles of the Confederation, and the machinery had been devised for their solution.” Id. at 563; see also id. at 564 (explaining process under the Articles of Confederation).

147 Id. at 663. See J. Franklin Jameson, The Predecessor of the Supreme Court, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1775-1789 1, 2 (Franklin, ed., 1889, Da Capo Reprint 1970) (Articles of Confederation, art. IX, paragraphs 2 and 3 “provided an especial process by which Congress was to determine . . . these disputes”). For a discussion of state land disputes, see RICHARD B. MORRIS, THE FORGING OF THE UNION 1781-1789 220-25 (1987). See also Charles Warren, at 344.


149 In Federalist No. 81, Hamilton wrote “it would ill suit” a state’s dignity when it is a party to a lawsuit “to be turned over to an inferior tribunal.” THE FEDERALIST PAPERS 487 (Clinton Rossiter Ed. 1961). And in Federalist No. 80 Hamilton refers to territorial disputes and other “bickerings and animosities” and the need for an impartial arbiter. Id. at 477-78.

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original jurisdiction in any case involving a state, the convention debated how to address controversies between states and voted to have such matters decided by the Supreme Court.

One of the early boundary skirmishes occurred between Connecticut and New York, where each state purported to convey the same property to different grantees. The grantees from each state sought to have the dispute heard in their own state courts, or at the least before the federal courts in their states, and the question was whether the Supreme Court would intervene. Justice Patterson observed that the Court owed a “duty . . . to declare, and not to make, the law,” and because the case did not involve a controversy between two states, the Court lacked jurisdiction. Justice Cushing added that the issued had to be determined by the “constitution,” not one governed by any analogy from “English practice,” and that absent the states’ presence as parties and fighting over jurisdiction, no jurisdiction existed. The Court subsequently refused New York’s request for an injunction (a bill in equity) and, as such, allowed a lawsuit between the two state grantees to continue in circuit court. Justice Patterson observed, “[i]t is difficult and painful to conjecture, unless this court can, under the constitution, lay hold of the case to decide the question of boundary, which will be a decision of all the appendages and consequences.” Justices Chase, Washington and Ellsworth rejected as sufficient the State’s asserted jurisdiction over—rather than any direct interest in—the property.

But Rhode Island v. Massachusetts became the seminal precedent for future interstate cases, with the Court confirming both its jurisdiction over “States” when sued by other “States,” and that the claims in these cases did not otherwise bar the Court from

150 Randolph’s original draft would have left to the legislature the authority to decide when disputes between two states would be in the jurisdiction of the “Supreme Tribunal.” CHARLES WARREN, THE MAKING OF THE CONSTITUTION 534 (1928). The Committee of Detail proposed that the Court’s jurisdiction would extend to controversies between two states, and between state and citizens of another state, and the language produced little debate. Id. at 535-60.
151 WARREN, THE MAKING OF THE CONSTITUTION, supra note __, at 544. On August 24, 1787, the Convention debated and, over the objection of North Carolina and Georgia, voted to have disputes between two states included in the Court’s original jurisdiction. The draft language presented by the Committee on Style on September 12, 1787 included such language. Id.
152 Fowler v. Lindsey, 3 Dall. 411 (1799).
153 Id.
154 New York v. Connecticut, 4 Dall. 1, 3 (1799). These early cases explored what procedure the court should follow. In “Grayson v. Virginia, 3 Dal. 320 . . the court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable.” Florida v. Georgia, 58 U.S. 478, 492 (1854). In Florida v. Georgia, Chief Justice Taney would later emphasize that chancery practice furnishes the most apt analogy, although the Court may deviate from that practice when justice so requires. Id. at 492-93. And there he rejected English chancery practice and allowed the United States attorney general to intervene in a state boundary dispute, as a matter of justice.
Rhode Island initiated the action under the Court’s equity jurisdiction, not under the common law, seeking to have the Court settle a boundary dispute between Rhode Island and Massachusetts. Rhode Island claimed a sovereign right to exercise jurisdiction over approximately 80 to 100 square miles, based upon pre-Constitution arrangements. For Massachusetts, Daniel Webster and the State’s Attorney General argued that the pre-Constitution agreements afforded Massachusetts with title to the disputed land, and that the Court lacked jurisdiction to hear the case. The Constitution, they argued, only allowed the Court to hear controversies between states that arose out of their capacity as states following the Constitution, and that absent any positive law the Court would lack any law to apply.

Rhode Island’s counsel countered that the Constitution’s terms afforded jurisdiction over inter-state disputes, and that nothing limited the clause to disputes over post-Constitution agreements. Rhode Island further argued that the dispute was judicial, not political in character—as suggested by Massachusetts. And when responding to Massachusetts’ argument that no “law” existed that would admit judicial inquiry, Rhode Island replied that the Constitution conferred jurisdiction and what law applies once jurisdiction exists is dependent upon “principles and rules of justice, equity and good conscience.”

Over the objection of Chief Justice Taney, Justice Baldwin’s majority opinion held that these boundary dispute cases were properly brought under the Court’s original jurisdiction. He noted that the framers were well aware of the many existing boundary disputes. No other apparent route existed to settle these disputes, neither war nor treaty, and the Constitution further provided that the states could only settle disputes through compact, if approved by Congress. “There can be but two tribunals under the constitution who can act on the boundaries of states,” he observed, “the legislative or the judicial power; the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the states, and the latter can be exercised only by this Court, when a state is a party and the power is here, or it cannot exist.” He next determined that the case did not necessarily involve a political question, but rather

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156 The case occurred shortly after Chief Justice Marshall had indicated, almost in passing, that the Constitution (and indirectly the Judiciary Act of 1789) provided exclusive jurisdiction in the Court for suits between two states. New Jersey v. New York, 30 U.S. (5 Pet.) 284, 290 (1831).
157 Massachusetts Attorney General Austin argued “[t]here are no principles of law, meaning the common law, or the statutes of the states, or of congress, that embrace a sovereign state. There is no usage in such cases.” 37 U.S. at 685.
158 Id. at 688-690. He added that the matter was addressed specifically during the constitutional convention and in the state conventions, permitting jurisdiction. Id. at 690-91.
159 Id. at 691.
160 Id. at 697. Rhode Island emphasized that the matter involved equity, and that many cases involved disputes unrelated to state common law. Id.
161 Carl Swisher explains that Massachusetts’ Attorney General Austin argued that the relief requested was neither legal nor equitable, but rather political and not capable of being resolved by the judiciary. SWISHER, supra note __, at 513. Taney agreed, noting that the state sought a declaration of sovereignty. 37 U.S. at 752-53. Oddly, Taney decided the next phase in the litigation, emphasizing the role of a chancery court to consider equitable principles and, as such, ordering that Massachusetts respond to Rhode Island’s bill of complaint. 40 U.S. 233. Rhode Island ultimately lost, at which point Taney again reaffirmed his belief that the Court lacked jurisdiction. Rhode Island v. Massachusetts, 45 (4 How.) U.S. 591, 639 (1846).
162 Id. at 723-24.
163 Id. at 726-27.
one capable of being decided by a court of law or equity. If we cannot ‘establish justice’ between these litigant states, as the tribunal to which they have both submitted the adjudication of their respective controversies,” Baldwin reasoned, “it will be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate orbit, as the instrument appointed by the constitution, so to execute its agency as to make this bond of union between the states more perfect, and thereby enforce the domestic tranquility of each and all.” With that, Justice Baldwin then proceeded to examine the merits as one for a bill in equity according to the usages of equity.

Not until late nineteenth century did the boundary cases emerge as precedent for other interstate disputes. The principal case was Missouri v. Illinois. There, Missouri filed a bill in the Supreme Court to “enjoin” Illinois and the City of Chicago Sanitary District “from discharging the undefecated sewage and noxious filth of the city of Chicago into the Mississippi river by artificial methods.” Chicago at the turn of the century had approximately 1.5 million residents, and little doubt existed that many downstream cities and towns along the Mississippi river relied upon the river water for drinking, domestic, manufacturing, and agricultural and stock watering uses; and, the Sanitary District of Chicago, created in 1889, did not dispute the importance of the water, but instead denied “that the carrying out its plans will destroy the flow and adaptability of the waters of the Mississippi River, along the territory of [Missouri], for domestic or other uses.”

Justice Shiras’ Missouri opinion tracks the parties’ arguments. Neither state argued that public nuisance was a federal common law, and therefore “laws” of the United States for purposes of jurisdiction; instead, they both focused, first, on the “nature of the parties” and whether that gave the Court original jurisdiction, and, second, the

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164 Id. at 737.
165 Id. at 731. Justice Baldwin referenced a long history of deciding such disputes, reaffirming that the issues were judicial not political. Id. at 742-48.
166 Id. at 732, 744. See also id. at 742 (“From the view of the law in England, the results are clear, that the settlement of boundaries by the king in council, is by his prerogative; which is political power acting on a political question between dependent corporations or proprietaries, in his dominions without the realm. When it is done in chancery, it is by its judicial power . . . and necessarily a judicial question . . .”).
167 The Court continued to decide boundary disputes. E.g., Iowa v. Illinois, 151 U.S. 238 (1894).
169 Suggestions in Support of Motion for Leave to File Bill, at 1, Missouri v. Illinois, 180 U.S. 208 (1901) (No. 5, Original).
170 In 1822, Congress granted Illinois the authority to build a canal connecting Lake Michigan and the Illinois River, further aided by an 1827 Act that transferred land to the State for purposes of the canal. In 1865, Illinois authorized Chicago to deepen the canal for the express purpose of disposing of sewage. An Act to Create Sanitary Districts, and to Remove Obstructions in the Des Plaines and Illinois Rivers, May 29, 1889. In City of St. Louis v. Rutz, 138 U.S. 226 (1981), the Court held that the two states exercised concurrent jurisdiction over the river, with each state exercising exclusive jurisdiction over the lands adjacent to their own shores.
nature of equity jurisprudence and ability of courts to issue injunctive relief. Missouri referenced several lead cases that “sufficiently establish the right of the State, in its character as such, to present to a court of equity a bill for the abatement of a public nuisance. The matter is one which concerns the State itself.” Missouri also invoked the Federalist Papers and argued that the Court had jurisdiction to settle disputes between two states, noting that it lacked any other means of protecting its citizens, such as waging war or invading Illinois. Missouri, therefore, asked the Court to decide whether it had “surrendered or given up so completely her sovereignty as will prevent her, at least in a court of the United States, from suing to protect the waters and streams over which she has jurisdiction, in order to protect the lives and health of her citizens against unlawful acts of another State or the citizens of another State?” Illinois’ principal retort was to ask the Court to focus less on the character of the case and more on the parties. And here Illinois attempted to persuade the Court that Missouri was not a legitimate party, that the dispute really was between the Sanitation District and certain cities and towns, as well as persons, in Missouri, and that Missouri was not alleging any harm to its own property.

In rejecting Illinois’ argument, the Court examined the framers’ understanding of the original jurisdiction clause. Both this history as well as earlier cases confirmed that Missouri’s complaint fell within the ambit of the Court’s original jurisdiction. Justice Shiras observed,

The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for the Constitution has provided a remedy; and it would be objectionable, and, indeed,

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172 Brief and Argument in Support of Demurrer to the Bill of Complaint, at 3, Missouri v. Illinois, 180 U.S. 208. The Constitution extends the federal judiciary’s authority to hear cases in both law and equity. Const. art. III, § 2, cl.1. See STORY, supra note __, at 608, 611-12.
173 Brief and Argument of Complainant In Opposition to Joint Demurrer of Defendants to Bill of Complaint, at 35, Missouri v. Illinois, 180 U.S. 208. Missouri argued that Illinois’ reliance on Louisiana v. Texas, 176 U.S. 1 (1900), ignored that, there, the State of Louisiana was not itself engaged in interstate commerce, but instead was lending its name to Louisiana citizens engaged in interstate commerce who allegedly were being harmed by Texas. Id. at 34-38; Missouri instead relied on Florida v. Anderson, 91 U.S. 667, 675-76 (1875), where Justice Harlan held that Florida had a sufficient interest in the subject matter of the suit to afford it “standing” to sue in equity. Brief and Argument of Complainant, at 38-39, 180 U.S. 208.
177 Id. at 3-7.
178 Id. at 220-23.
impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.179

And the Court concluded that Missouri could seek to protect the health and comfort of its residents, particularly when the issues could affect the entire State.180 When the case subsequently proceeded on the merits, Justice Holmes expressed caution before the Court would intervene and award equitable relief, and the facts before the Court did not warrant relief.181 It would be a mistake, therefore, to suggest that the Court in Missouri v. Illinois consciously recognized the availability of any federal common law cause of action for interstate pollution.182

And when the Court shortly thereafter confirmed its jurisdiction to resolve interstate water disputes and, again, interstate pollution, it had ample precedent, particularly with Missouri v. Illinois and Rhode Island v. Massachusetts. When Kansas sued Colorado for Colorado’s diversion of water from the Arkansas River, depriving Kansas’s farmers with irrigation water, Colorado argued that the Court lacked original jurisdiction because Kansas was suing to protect its residents not its own property.183 Chief Justice Fuller, although having dissented in Missouri v. Illinois, wrote that states could maintain suits on behalf of their citizens as “parens patriae, trustee, guardian, or

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179 Id. at 240-41 (emphasis added).
180 Id. at 241-2. The Court further determined that the Sanitation District effectively operated under the auspices of the State and that Illinois, therefore, was a proper state defendant. Id. at 242. The final part of the Court’s opinion addressed Missouri’s requested equitable remedy, with the Court supporting the use of public nuisance as a valid equitable remedy. Id. at 243-49. Justices Fuller, Harlan and White dissented, concluding that no “direct antagonism” existed between the two states and further that the Bill failed to establish sufficient elements to warrant proceeding under a nuisance theory. Id. at 249-50.
182 Missouri v. Illinois, moreover, cannot be understood from a modern lawyer’s perspective. Along with the scope of the Court’s original jurisdiction, two other doctrines emerged during this period, infecting both the tenor of the arguments and the Court’s decision: the scope of federal equity jurisprudence and a tort-based concept of public nuisance. Modern tort law only began to emerge during this era. See G. Edward White, Tort Law in America: An Intellectual History 20-62 (1980). Contemporary treatises on torts focused primarily on the law of negligence. See F. Wharton, A Treatise on the Law of Negligence (2d Ed. 1878); C. Chase, Leading Cases Upon the Law of Torts (1892); S. Thompson, Commentaries on the Law Negligence (1901). T. Shearman and A. Redfield, A Treatise on the Law of Negligence (4th Ed. 1888); Thomas Cooley, A Treatise on the Law of Torts (1878). And lawyers often compartmentalized public nuisance as part of criminal law or equity jurisprudence. Indeed, Illinois’s argument emphasized that a public nuisance was enforced through indictments, not through equitable injunctions. And much of the Missouri’s brief relies heaving on then prevailing principles of equity jurisprudence, as well as Wood On Nuisances. Cf. Austin Abbott, Co-Operation of Law and Equity and the Engrafting of Equitable Remedies upon Common-Law Proceedings, 7 Harv. L. Rev. 76 (1893-1894). Morton Keller explains how one of the more important late nineteenth century developments was the expansion of federal courts’ injunctive power. Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America 361 (1977). The railroad strikes in the 1880s prompted the federal courts to issue injunctions against the boycotts on several different theories. Id. at 405-06. The most infamous case is In re Debs, 158 U.S. 564 (1895). And “courts at mid-century remained quite willing to issue injunctions, grant damages, and throw people in prison for fouling community health and environment.” William J. Novack, The People’s Welfare: Law & Regulation in Nineteenth Century America 221 (1996).
representative of all or a considerable portion of its citizens.” And responding to Kansas’ merits argument that Colorado was depriving the residents of Kansas of riparian flows, Fuller avoided the issue by observing that when the Court sits “as an international, as well as a domestic tribunal,” it applies “Federal law, state law, and international law, as the exigencies of the particular case may demand,” but such matters were premature.

Such was the precedent when Holmes wrote his succinct opinion in *Georgia v. Tennessee Copper Co.* The case involved Georgia’s original jurisdiction suit against the Tennessee Copper Company, seeking to restrain the facility from continuing to emit pollutants and injuring state forests and citizens. The reported Tennessee Copper case is the second case filed by Georgia against the neighboring copper plants. Georgia noted in its brief that, because the Court had allowed jurisdiction in the first case, it did not believe that the jurisdictional issue needed to be argued again. Holmes’ opinion focuses on the unique role of a state in a suit in equity, to protect its earth and air within its borders, and the need to approach the Court’s equitable role differently than if the case involved private parties. On the evidence, he then concludes that an injunction would be warranted if the defendant failed to restrain the fumes. The case reflects what G. Edward White is Holmes’ style of “letting his language” announce the applicable rule, rather than any extended use of logic, and often leaving “out many of the steps in his reasoning.”

The Court continued to hear interstate disputes, generally focusing on the merits of any injunctive relief rather than the role of the Court or the scope of its jurisdiction.

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184 *Id.* at 142. The Chief Justice invoked the phrase from *Missouri v. Illinois* that states could seek to protect the “health” and comfort” of their citizens. *Id.* Indeed, Fuller added that the case presented little difficulty. *Id.* at 144.

185 *Id.* at 147. The parties debated the applicable law, whether Colorado law or some ex ante law that would have applied prior to statehood, or riparian common law, as had been recently expressed in *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 702 (1899). *See generally* Carman F. Randolph, *Notes on Suits Between States: Kansas v. Colorado*, 2 COLUM. L. REV. 364 (1902). Kansas argued that the common law would apply, discussing the march of the common law in the region, as if to evidence a uniform common law (not a separate federal common law). Brief of Complainant, at 9-10, Kansas v. Colorado, 185 U.S. 125 (Original No. 3). The state nevertheless acknowledged uncertainty surrounding what law applies. *Id.* at 72 (“Are the states of the American union, in their conduct towards each other, to be governed by theories of international law, which each nation, itself indifferent, wishes every other nation to fully observe”). But it then suggested that “[i]t seems to us that there exists an American jus gentium as between states, based upon the common law, as just and as fair as the common law, and as rigid in its requirements.” *Id.* The Court subsequently parroted the *Kansas v. Colorado* language, referring to it collectively as an “interstate common law.” *Connecticut v. Massachusetts*, 282 U.S. 660, 671 (1931).

186 206 U.S. 230 (1907).


188 G.E. WHITE, supra note __, at 480 [Bio].

The Court seemingly struggled with when it would exercise its discretionary original jurisdiction involving only one state as a party.\textsuperscript{190} In \textit{Georgia v. Pennsylvania R. Co.},\textsuperscript{191} for example, Justice Douglas’ majority opinion allowed Georgia, acting in a \textit{parens patriae} capacity, to sue railroad companies for federal antitrust violations. Douglas’s opinion suggests that the Court accepted original jurisdiction due to the gravity of the issues.\textsuperscript{192}

But when the interstate pollution cases emerged in the post-New Deal, modernist legal environment, the Court subtly began to lay the foundations for a broader environmentally based federal common law. It did so, however, ironically in a series of cases that effectively constricted the use of the Court’s original jurisdiction. In \textit{Ohio v. Wyandotte Chemicals Corp.},\textsuperscript{193} the Court rebuffed Ohio’s concern that mercury from plants in Michigan was killing fish in Lake Erie. \textit{Wyandotte} is a slightly different case from many of the earlier ones, because it involved a suit between a state and citizens of\

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instance, when North Dakota sued for flooding of farm lands by activities in Minnesota, the Court noted that the “comfort, health, and prosperity of her farm owners that resort may be had to this court for relief. It is the creation of a public nuisance of simple type for which a state may properly ask an injunction.” \textsuperscript{190}In \textit{Massachusetts v. Missouri}, 308 U.S. 1, 15 (1939), for instance, the Court noted that it would, in appropriate cases, apply “accepted principles of the common law or equity systems of jurisprudence,” but in that case it already signaled that the Court would not exercise its original jurisdiction, and the attendant burden on the Court, when other avenues of relief might be available. The Court only a few years earlier had been willing to decide a dispute involving one state’s effort to collect a judgment against an out-of-state entity. \textit{Ohio v. Chattanooga Boiler & Tank Co.}, 289 U.S. 439 (1933). Yet, in another instance involving two states, Justice Frankfurter expressed difficulty with the Court’s original jurisdiction:

[T]here are practical limits to the efficacy of the adjudicatory process in the adjustment of interstate controversies. The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution. Considerations such as these have from time to time led this Court or some of its most distinguished members either to deprecate resort to this Court by states for settlement of their controversies, or to oppose assumption of jurisdiction.


\textsuperscript{191} 324 U.S. 439 (1945).
\textsuperscript{192} Id. at 450-51. The Court distinguished a prior case where the Court rejected a state claim against railroad rates. \textit{Oklahoma v. Atchison, T & S.F. Ry. Co.}, 220 U.S. 277 (1911).
an adjoining state, not between two states. Justice Harlan, writing for his colleagues other than Justice Douglas, expressed reservations about the practically of the Court hearing such cases, involving “not serious issue of federal law,” and further indicating that little suggested the need for the Supreme Court to hear these cases under its original jurisdiction. Although unnecessary to its decision, the Court added that the case presented no federal question—implicitly rejecting any suggestion of a federal common law. One contemporary commentary on the case suggested that the “opinion is laden with dicta and gratuitous observation that it will be the source of great jurisdictional controversy in the future.” A comparable fate befell the plaintiffs in *Washington v. General Motors Corp.*, although similar to *Georgia v. Pennsylvania R. Co.*, the Court rejected hearing a case involving an alleged conspiracy by automobile manufacturers to “restrain the development of pollution control equipment.” And then in *Vermont v. New York*, the Court, in a case somewhat similar to *Wyandotte*, accepted jurisdiction but decided that the Special Master’s approach for resolving an alleged public nuisance from the discharge of sludge into certain waters did not present enough of a judicial question. In doing so, however, the Court observed “[o]ur original jurisdiction heretofore

194 Percival, *supra* note __, at 747-52 [Ala]. Percival suggests that this case marks a “fundamental shift” in the Court’s jurisprudence (*id.* at 751), yet the issue is more complicated. The case ought to be viewed as part of the Court’s evolving approach toward its jurisdiction, starting first with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and then *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *Marbury* concludes that Congress may not enlarge the scope of the Court’s original jurisdiction, reasoning that the affirmative grant implies a negative prohibition against enlargement. But in *Cohens*, the Chief Justice opines that “[i]f a State be a party, the jurisdiction of this Court is original” rather than appellate. *Id.* at 393. But he then adds that if the case arises under the Constitution or laws of the United States, the Court exercise appellate jurisdiction. *Id.* The former focuses on the character of the parties and the nature of the case is irrelevant, while the latter focuses on the nature of the case and the character of the parties is irrelevant. *Id.* When both occur, Marshall then explains that the Court’s appellate jurisdiction is not obviated merely because a State is party in the lower courts. The Court’s original jurisdiction, therefore, is not exclusive merely because a state is a party. *Id.* at 394-98. The affirmative grant of original jurisdiction does not, Marshall reasons, carry a corollary negative operation. *Id.* at 398. But later in *Texas v. White*, 74 U.S. (7 Wall.) 700, 719 (1869), the Court announced “[i]t is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States . . . .” *Cf.* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867). *See also supra* note __.


has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a ‘common law’ formulated over the decades by this Court.”

When, therefore, Illinois filed at the Court a bill to restrain Wisconsin cities and sewerage commissions from polluting Lake Michigan, the case appeared quite ordinary. The Court until then had not held that a general federal common law of public nuisance existed. It had established, instead, that the Court would exercise its exclusive original jurisdiction when two states were legitimate parties, and in doing so it would apply whatever law it deemed appropriate. And the Court triggered a discussion about what law would apply, when it asked the parties to brief specifically the question of whether state or federal law would apply. Illinois responded that federal common law applied in disputes between two states. The State relied principally upon the boundary dispute and interstate water allocation cases to assert that the Court “has repeatedly recognized the existence of a body of ‘interstate common law,’ made up of a number of components.” Only in passing did the State inadvertently capture the Court’s past jurisprudence when it added that the Court could fashion its own authority in instances where the Court was exercising its constitutionally granted jurisdiction. The defendants too informed the Court that “‘Interstate Common Law’ as expressed in Connecticut vs. Massachusetts” would apply, absent the Court concluding that the newly passed Federal Water Pollution Control Act and a 1968 agreement between the states governed the dispute.

Writing for the Court, Justice Douglas initially reviewed the scope of the Court’s original jurisdiction and then concluded that the case fell with the Court’s concurrent jurisdiction with the lower federal district courts. His analysis generally follows the contours of the cases discussed in this article, reasoning that the Court’s exclusive jurisdiction only covers suits between two or more states, not their political subdivisions. But from there, his opinion arguably takes a herculean leap generated by his apparent desire to ensure that lower courts can exercise concurrent jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction). He did this first by conflating the Constitution’s grant of jurisdiction over maritime and other constitutionally assigned

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200 417 U.S. at 277. That cavalier language about the common law lacked precision, because the Court applied whatever ex ante “law” it deemed appropriate if it concluded that it had original jurisdiction.
202 In Wyoming v. Colorado, 259 U.S. 419 (1922), for instance, where two states applied the same common law doctrine, the Court indicated it would apply that doctrine.
204 Id. at 5-10. Illinois also referenced a 1921 one-page Harvard Law Review note (id at 5), suggesting that it would appear as if the Supreme Court was establishing a particular type of common law tailored to the unique status of quasi-sovereign states suing each other.
205 Id. at 11. Illinois distinguished Ohio v. Wyandotte Chemicals Corp., noting that Illinois’ case involved a direct clash of competing sovereign interests, unlike in Wyandotte. Id. at 12.
206 Supplemental Brief of Racine and Kenosha, at 12, Illinois v. City of Milwaukee, 406 U.S. 91. See also Brief in Opposition to Plaintiff’s Motion for Leave to File the Bill of Compliant, Illinois v. City of Milwaukee, 406 U.S. 91 (arguing that the States had entered into an agreement, obviating need for the original jurisdiction action).
207 406 U.S. at 98.
matters with a federal common law, reasoning that, in maritime cases and therefore federal common law cases, federal courts can exercise federal question jurisdiction.\(^{208}\)

Next, Justice Douglas through brilliant slight-of-hand created the general federal public nuisance common law. With little actual precedent for the broad statement, Douglas proclaimed “When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”\(^{209}\) And then in a footnote, after quoting from *Georgia v. Tennessee Copper* and opining that boundary disputes and interstate water allocations present federal questions, Justice Douglas recasts the Court’s history by suggesting that even in the interstate pollution cases “it is not only the character of the parties that requires us to apply federal law.”\(^{210}\) He then proceeds to equate the Court’s prior interstate water cases and boundary disputes with claims by parties over interstate pollution.\(^{211}\) While observing that federal laws might soon preempt “the field of federal common law of nuisance,” he wrote for the Court that until then “federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.”\(^{212}\) Although the Court concluded the case must proceed in district court, Justice Douglas, a New Deal realist and environmental champion, provided the actual opening salvo for a federal common law public nuisance for interstate pollution divorced from the character of the parties.

\(^{208}\) *Id.* at 99-101. Justice Douglas relied, *inter alia*, on Justice Brennan’s opinion in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). There, the Court engaged in an exhaustive review of federal maritime law to illustrate that maritime claims are cognizable in federal district court under 28 U.S.C. § 1331. This issue surfaced because the Constitution separately assigns jurisdiction over suits at law and equity arising under the Constitution and laws of the United States and jurisdiction over admiralty and maritime cases. Could the latter, therefore, be folded into the former and warrant invoking federal question jurisdiction, and removal from state to federal court? Justice Frankfurter’s detailed opinion explores how states and federal courts historically exerted concurrent jurisdiction over maritime matters. And he explains why maritime law, as a general law assigned by the Constitution to the federal courts, is separate from today’s 28 U.S.C. § 1331. 358 U.S. at 73-80. Justice Brennan dissented from this aspect of Frankfurter’s opinion, which would have allowed the claims to be heard by federal juries in lieu of judges. And Justice Douglas, who joined in this aspect of Justice Brennan’s dissent (*id.* at 389)(Douglas, J., dissenting), then in *Illinois v. Milwaukee* lifts one of Justice Brennan’s paragraphs slightly out of context. Douglas also quotes two lower court cases suggesting that 28 U.S.C. § 1331 includes federal common law claims, and from there erroneously concludes that parties can rely on federal question jurisdiction for alleged federal common law claims. *See infra* notes ___ and accompanying text. Prior to this case, the Court “had not previously indicated that the federal common law of nuisance provided a basis for federal question jurisdiction under 28 U.S.C. § 1331.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 337 n.4 (1981) (Blackmun, J., dissenting).

\(^{209}\) *Id.* at 103. Douglas supported his statement with a reference to the Tenth Circuit’s decision in *Texas v. Pankey*, 441 F.2d 236 (10\(^{th}\) Cir. 1971) and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). For a discussion of *Lincoln Mills* and why Douglas may have misused the case, *see infra* note ___ and accompanying text.

\(^{210}\) *Id.* at 105 at n.6.

\(^{211}\) *Id.* at 105-07.

\(^{212}\) *Id.* at 107. In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Court subsequently held that the Federal Water Pollution Control Act of 1972, Pub. L. 92-500, 86 Stat. 816, displaced the alleged federal common law claim. Dissenting, Justices Blackmun, Marshall and Stevens opined that the Court’s earlier cases established a federally created substantive right in instances where there are overriding federal interests warranting a uniform rule, such as in cases involving states and interstate pollution. 451 U.S. 304, 332 (Blackmun, J., dissenting). These justices further argued that the Congress had not intended to displace the federal common of public nuisance recognized in these earlier cases. *Id.* at 339.
IV. Considerations Affecting An Expanded Federal Common Law

Undoubtedly “the prevailing conception of the common law has changed since 1789.” And with it the notion of a uniform general common law has dwindled. What seems relatively certain, however, is that the interstate pollution cases are less about any remnant of a federal common law and more about the Court’s struggle with the scope of its constitutionally assigned jurisdiction. Justice Hughes, for instance, discussed these cases not as common law cases but as cases involving the Court’s original jurisdiction. Bradford Clark similarly observed, “Because neither states nor Congress generally possesses unilateral legislative competence to resolve interstate disputes, the Constitution necessarily contemplates that the Supreme Court will resolve such disputes. The rules adopted and applied by the Court in these cases are best understood, not as federal common law, but as rules designed to implement the constitutional structure—specifically, the constitutional equality of the states.” Un fortunately, today’s Supreme Court ignores this history. But before merely relegating this history to dusty old books, we should explore whether a federal common law of public nuisance is on a sufficiently related continuum with this past.

Throughout our history, we have witnessed the tension between the past and the present, and between the need for continuity and predictability and the appreciation that law must evolve as part of the fabric of a changing society. This occurred during the antebellum period and the years following the civil war; when the progressive movement navigated between formalism and realism; and it was prominently displayed during the New Deal period. At times, an unwritten customary law merged with higher law principles to support necessary change, as with the fight against slavery. At other times, it retarded social change, as during the formalist era. History, therefore, 

214 See Charles E. Hughes, The Supreme Court of the United States: Its Foundation, Methods and Achievements An Interpretation 118-56 (1928).
217 See supra note ___.
220 See Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 (1908) (discussing hostility by common law advocates for legislation promoting social change). See also Purcell, supra note ___, at 189-190 (the federal common law and notion of general versus local law permitted conservative judges to thwart social legislation)[PC].
illustrates that balancing the need for continuity and predictability with an appreciation that a legal system ought to reflect its society, and evolve as society changes, requires more than a normative judgment about the importance of the end being sought. It first requires an acute appreciation for precedent, understanding for instance that previous cases reflected the Court’s struggle with its original jurisdiction rather than any inquiry into the legitimacy of a federal common law for public nuisance. And next it suggests the need for a searching analysis into whether that precedent ought to be extended, whether for instance it is appropriate to divorce the character of the parties from the nature of the claims.

When, therefore, we explore the modern concept of a federal common law, we ought to consider carefully the underlying legal, political, social, and practical issues and assumptions animating our choice to expand or constrict federal common law. The Court now axiomatically parrots that no federal common law exists except in a few instances—where it exists. In Texas Industries, Inc. v. Radcliff Materials, for instance, the Court observed:

Rather, absent some congressional authorization to formulate substantive rules of decision, 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. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

The difficulty with the Texas Industries language is that the exception arguably swallows the rule: in a mobile society, or because interests other than purely local are often at stake, the Court is free to decide what types of disputes are “interstate” whose “nature” makes it “appropriate” to fashion a federal rule, and the only issue then is whether it is limited by the Court’s clause addressing “conflicting rights of States.” If it were so limited, then cases like AEP v. Connecticut would not even present a facially valid cause of action. And merely suggesting a federal common law for “interstate” disputes overlooks the considerable history surrounding the relevant cases, discussed in this article, where the Court principally focused on the scope of its original jurisdiction rather

223 451 U.S. at 641 (emphasis added). The Court similarly stated:

[ ]here is, of course, “no federal common law.” Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as “federal common law.” These instances are “few and restricted,” and fall into essentially two categories: those in which a federal rule of decision is “necessary to protect uniquely federal interests,” and those in which Congress has given the courts the power to develop substantive law.

Id. at 640.
than on establishing a theory for a federal common law. Also, a few years after Texas Industries, the Court in Boyle v. United Technologies Corp. observed that federal common law would displace state law whenever uniquely federal interests are at stake. But again, unless uniquely federal interests are limited to “the rights and obligations of the United States,” the concept arguably lacks ex ante discernable limits. Locating those limits remains clouded by vague language, and a meager dialogue on when a federal court can create a federally enforceable cause of action.

At the outset, we should distinguish truly federal common law causes of action from the judiciary’s role of filling in the interstices of federal statutes, or of establishing procedural rules. When courts interpret or imply rights or remedies not expressly contained in federal or constitutional provisions, they are not purporting to create a federal common law per se. They are deciding that the legislature or founders intended or would have intended that the provision be applied in a certain fashion.

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224 487 U.S. 500, 504 (1988) (“A few areas, involving “uniquely federal interests,” are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called “federal common law.”).

225 Justice Brandeis’ curious language in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), decided the same term as Erie, is illustrative. The issue there involved the scope of the Compact Clause, and the states’ ability to use the clause to allocate a common resource; in dicta, unnecessary to any of the issues in the case, Brandies suggests toward the end of the opinion that interstate water disputes are governed by a “‘federal’ common law,” referring oddly to Kansas v. Colorado and other cases where the Court was more careful in its language. Id. at 110.


227 Some of the 1970’s scholarship unfortunately conflated “truly” federal common law power with the ability of the Court to formulate pre-emptive federal rules of decision, when the Court otherwise unquestionably had jurisdiction to decide the controversy. E.g., Henry P. Monaghan, Foreward: Constitutional Common Law, 89 HARV. L. REV. 1, 12 (1975). Professor Monaghan, for instance, treated interpreting the Constitution as somehow equivalent to interpreting statutes, and then described the resulting process as a constitutional common law. Id. at 13. That Monaghan embraced an overly expansive understanding of “common law” is evident when he asserts that the Court’s gloss on administrative agencies under the Administrative Procedure Act constitutes a “limited common law.” Id. at 35 n.2. These are all incidents of the judiciary’s recognition that the language of any particular text (Constitutional or statutory) often requires interpretation, or application in specific contexts, and the result Monaghan labels perhaps too cavalierly as federal common law. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 388 (1964) (Constitution interpreted as applying implicit federal rules governing foreign affairs). Field shares an equally broad view of the concept. Field, supra note __, at 893-95. Others since appear to acknowledge the difference, but with little significance. E.g., Clark, supra note __, at 1248.

228 “Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress.” Texas Indus., Inc. v. Radcliff Materials, 451 U.S. 630, 639 (1981). In the antitrust arena, for instance, courts are not creating federal common law, but rather implementing Congress’ direction for the judiciary to fashion rules of decision. See Redish, supra note __, at 789. E.g., Texas Indus., Inc., 451 U.S. 630 (Court declined to permit contribution actions under antitrust laws). See also Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (delegating to federal courts authority in the labor arena). The same is true for the Court’s use of the common law to help fashion the broadly worded Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et. seq. See United
When courts interpret statutes, or even add judicially created elements to statutory regimes, the process and sources the court invokes as authority to legitimize its decision are quite different from the process and sources that surface when creating a “common law” obligation or right.\textsuperscript{229} Too much commentary unfortunately overlooks this simple point, and the concomitant fact that our judicial process is an adversary one, and when we talk about a federal common law we necessarily are talking about opposing parties arguing about the merits of creating a cause of action, not interpreting existing sources.

Next, we should separately identify circumstances where courts must develop a federal rule (whether incorporating a state rule or not) because of some federal involvement in a case. For the most part, these instances reflect what Judge Friendly praised as the new federal common law.\textsuperscript{230} For example, when the United States enters the economic marketplace by engaging in commercial transactions, including with its contractors, these transactions occur pursuant to federal law and policy. By necessity, federal courts then must explore whether the United States’ interest warrants developing federal doctrines ancillary to these transactions or whether to apply \textit{ex ante} state doctrines. Many of the post-	extit{Erie} allegedly federal common law cases fall into this category. The seminal case of \textit{Clearfield Trust Co. v. United States},\textsuperscript{231} for instance, concluded that “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.”\textsuperscript{232} In \textit{United States v. Kimball Foods, Inc.},\textsuperscript{233} the Court held that a federal rule (albeit then incorporating a state rule) applies to liens in connection with federal loan programs. In \textit{Howard v. Lyons,}\textsuperscript{234} the Court crafted a federal privilege in a defamation action against a federal officer.\textsuperscript{235} And

\textsuperscript{229} See Monaghan, \textit{supra} note __, at 12 (noting inquiry into congressional purpose and sources being explored).

\textsuperscript{230} See Hon. Henry J. Friendly, \textit{In Praise of Erie—And of the New Federal Common Law}, 39 N.Y.U. L. Rev. 383, 405-422 (1964). Bradford Clark’s structural approach to federal common essentially represents a modern application of Judge Friendly, with Clark suggesting that certain areas, including foreign affairs, are acutely federal issues under our constitutional structure. Clark, \textit{supra} note __, at 1252. The same is true with Martha Field’s analysis, with most of her examples instances of the judiciary employing a federally derived rule of decision when applying some \textit{ex ante} statutory or constitutional directive. Field, \textit{supra} note __, at 942 (invoking \textit{Lincoln Mills}).

\textsuperscript{231} 318 U.S. 363 (1943).

\textsuperscript{232} 318 U.S. at 366. The Court emphasized that “[t]he authority to issue the check had its origin in the Constitution and statutes of the United States . . .” Id. “The \textit{Clearfield} doctrine has spread into many other types of litigation over obligations by or to the United States.” Friendly, \textit{supra} note __, at 409.


\textsuperscript{234} 360 U.S. 593 (1959).

\textsuperscript{235} “The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government.” 360 U.S. at 597.
similarly, in Boyle v. United Technologies Corp., the Court created a federal military contractor’s defense in state tort claims.

These and other similar cases are all tethered somehow to the Constitution, statutes, or federal activities. Even had the ardent Federalists been successful in securing a federal common law for crimes, it too would have been as a consequence of an expanded understanding of protecting constitutionally assigned federal interests. Consequently, further exploration is necessary to decide whether the types of claims in Michigan v. Corps or AEP v. Connecticut ought to be permitted.

a. Claims Against the United States

Although this article’s objective is limited to elevating the conversation about the role, nature, and function of a federal common law—particularly in the environmental context, in lieu of advocating for any particular outcome, a federal common law claim against the United States seems particularly troublesome. To begin with, as the Seventh Circuit noted, no modern court has examined in depth the viability of such a claim. And while the Seventh Circuit indicated that the parties—and derivatively the court—had only given the issue “cursory exposition,” the court proceeded to suggest that a “federal common law of public nuisance” exists and that “respectable arguments” support applying it to the federal agencies. But the Court’s analysis overlooks the interplay of modern federal environmental laws and the APA. And it overlooks that, in complex environmental cases, courts emphasize that they should respect “the strengths of agency processes on which Congress has placed its imprimatur.”

Cases against federal agencies seeking non-monetary relief occur routinely in the environmental and natural resource arena. When an agency’s action affects the environment, as the Corps did with allegedly allowing the transport of Asian carp, the agency must ensure that it has complied with the National Environmental Policy Act, the CWA, and that its actions are not otherwise arbitrary, capricious, or an abuse of discretion. The goal of NEPA and these other programs is to ensure that agencies adequately examine the environmental consequences of their decisions, and otherwise do not act arbitrarily or capriciously based on the information before them. If an agency fails to act affirmatively to address environmental threats and Congress has expressed a

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237 2011 WL at ___. The court further concluded that Congress had not displaced the area by specifically addressing the precise issue of the interstate transport of Asian carp. Id. at ___.

238 State of North Carolina v. Tennessee Valley Authority, 615 F.3d 291, 305-06 (4th Cir. 2010).


240 42 U.S.C. §§ 4321 to 4370h.

policy requiring such action, parties can force an agency’s hand. And any federal action that likely constitutes a public nuisance can be measured against that standard, and the principal difference is that parties in a public nuisance suit can ignore the administrative process and record and try the case as if it were a regular civil lawsuit. Indeed, in *Michigan v. Corps*, the State challenged the action under the APA but included the common law count apparently because the Corps arguably had yet to complete its analysis and render a reviewable final agency action. Such a concern arguably animated the Court in *AEP v. Connecticut* to note that complex environmental issues requires consideration of competing concerns by the expert agencies, in the first instance, and then review by the judiciary.  

The possibility that such claims against the United States could unwisely intrude into the administrative process is illustrated by the laudable effort to create a federal common law public trust doctrine. The plaintiffs in *Alec L v. Jackson* argue that a federal common law “public trust” exists that requires the government to undertake the necessary steps to reduce greenhouse gas emissions. In lieu of any significant debate about the presence of a federal common law, the plaintiffs instead marshal a considerable array of sources that, for the most part, address the public trust doctrine at the state level. And while the plaintiffs profess that their claim does not ask the court

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243 See infra notes ___ and accompanying text.
244 131 S. Ct. at 2539.
246 In seeking a preliminary injunction, the plaintiffs argued:
Under the Public Trust Doctrine, our federal government has an unalienable duty to protect essential natural resources as a public trust. An atmospheric emergency threatens these natural resources. Because of the urgent need for action, and consistent with its obligation under the Public Trust Doctrine, our federal government must protect our Country’s natural resources by developing a Climate Recovery Plan setting forth the means to implement the necessary emissions reductions by January 1, 2013.

Plaintiff’s Notice of Motion and Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support Thereof I, Alec L. v. Jackson (Filed Sept. 28, 2011).

247 Indeed, as the United States notes, plaintiffs only invoked the court’s jurisdiction under 28 U.S.C. § 1331, Complaint, ¶ 21, and failed to pair federal question jurisdiction with a waiver of sovereign immunity under the APA. Memorandum in Support of Defendants’ Motion to Dismiss, at 11. But the United States perhaps inappropriately argued that this is an appropriate 12(b)(1) motion aimed at lack of subject matter jurisdiction. See Sierra Club v. Jackson, 648 F.3d 848 (D.C. Cir. 2011) (appropriate argument is failure to state a claim under 12(B)(6) rather than lack of subject matter jurisdiction under 12(b)(1)). The atypical nature of the Complaint is illustrated by its early passage that it “seeks to investigate the effectiveness of federal authorities in planning and managing our nation’s response to human-induced global energy imbalance.” Complaint, ¶ 16.
to make policy, one is hard-pressed to read the plaintiff’s complaint and pleadings without concluding otherwise.

### b. Claims Against Non-Governmental Entities

The suggestion that federal courts are institutionally and constitutionally capable of developing federal common law torts for interstate pollution presents a host of unresolved issues. My purpose here is to identify these issues and prompt a critical dialogue about how the law in this area ought to evolve, not to suggest any resolution. Jurisdiction is perhaps the first and yet most obscured issue. Unless plaintiffs can establish diversity jurisdiction, they must rely upon federal question jurisdiction. Should, however, a federal common law tort qualify for federal question jurisdiction? To date, the issue has been averted in most of the cases, because jurisdiction otherwise existed. The interstate pollution cases, as noted in Part III, focused on the character of the parties, not the claims. Indeed, in today’s parlance, unless an alleged claim involves a matter equivalent to a constitutional tort (or right) or implicates a constitutional penumbra, during the antebellum period it likely would have been insufficient to confer on a federal court federal question jurisdiction. And Justice Douglas’ lone abbreviated analysis in *Illinois v. City of Milwaukee* simply declared that jurisdiction exists without any real support or meaningful inquiry into its consequences.

Several practical problems surface if one allows a federal common law claim to serve as the basis for jurisdiction, and under the Supremacy Clause possibly preempt any

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251 A vital difference exists between (a) a court’s decision to create a common law claim and employ that as a basis for asserting jurisdiction; and (b) Congress’ decision conferring jurisdiction on the federal courts and an explicit or implied authority to employ common law principles. The majority of modern purportedly federal common law claims involve the latter, not the former. *See, e.g.*, Farmers Educational & Cooperative Union v. WDAY, Inc., 360 U.S. 525, 531 (1959) (federal common law immunity to protect a federal policy as expressed by congress); Howard v. Lyons, 360 U.S. 593, 597 (1959); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); D’Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Co., 315 U.S. 447 (1942) (a federal question, because the statute granted federal court jurisdiction, and federal corporation brought suit under the statute). One area specifically assigned to the federal judiciary is admiralty jurisdiction. *See David Currie, Federalism and Admiralty: “The Devil’s Own Mess,” 1960 Sup. Ct. Rev. 158.* And while the Texas Indus. v. Radcliff Materials Court referenced admiralty as a federal common law area, 451 U.S. at 642, that is perhaps misleading, because the Constitution assigns the area exclusively to the federal judiciary and by default the federal judiciary must employ principles that the federal judiciary itself creates, unless otherwise directed by Congress. *See Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920).* *Cf. Amar, supra note __, at 1525-29 (admiralty and common law different); Redish, supra note __, at 795 (“It is interesting to note, however, the many examples of existing ‘federal common law’ doctrine” cases that are not true common law cases).

252 Jay indicates that “[i]t was well established that an issue of general common law presented no federal question for purposes of the Supreme Court’s jurisdiction,” at least until the later part of the 1800s. Jay, supra note __, at 1274 n.220, 1282. But Jay overlooks that the opinions in the late1800s were not premised on a general common law, but rather on a constitutional right to engage in interstate commerce, a federal question that undoubtedly arises under the Constitution. *See Kalen, supra note __, at ___. Field suggests that federal question jurisdiction may exist, but she barely mentions the issue and overlooks that the cases involving a constitutional issue are necessarily federal questions, quite a different issue than a true federal common law claim. Field, supra note __ at 898.

253 *See supra* notes __ and accompany discussion.
otherwise inconsistent state law claims. To begin with, such claims are likely to provoke both a 12(b)(1) and 12(b)(6) motion to dismiss. A court will be forced to decide, in advance of discovery, whether abstractly the complaint presents sufficient facts warranting the development of an inchoate federal common law tort. The court might search for uniform principles permeating modern tort (nuisance) law, as embodied in Restatement, much like Justice Story believed in a uniform general commercial law. Or, the court might focus exclusively on the Court’s interstate pollution cases, but those cases reflected the Court’s struggle with its original jurisdiction and exercise of its constitutionally assigned “equity” power to resolve disputes assigned to the Court. And, if those cases are expanded and applied to private disputes, is that sufficient continuity with the past, or is an abrupt departure and expansion appropriate? And, if instead, the court delays deciding until after discovery and on a motion for summary judgment, is that fair to either party and how will they know what facts to adduce that might sway the court either way?

Coupled with these pragmatic concerns are important jurisprudential considerations. Federalism, for instance, oddly enough not only serves as the most commonly expressed justification for a federal common law, it surfaces equally as a dominant rationale for limiting the doctrine. The republic’s early advocates for a federal common law for crimes emphasized the national (or Federal) interest in protecting the new Federal government; states in the new federal system could not be trusted to protect the national rather than local interest. This fear of local interests trumping national interests surfaced in Swift, it infected the Court’s treatment of the Commerce Clause throughout the Nineteenth Century, and today it arguably influences preemption analyses.

But federalism conversely suggests caution before expanding the federal common law. Erie itself “plainly rests on federalism” and preserving the prerogatives of the states rather than on any other consideration. George Brown warns that an expansion of federal common law could vastly transform “the allocation of lawmaking roles between state and nation,” by having federal common law operate under the supremacy clause as binding on states. That is true, but only to a point.

Separation of powers is another salient consideration when federal courts are asked to craft rules defining the rights and obligations of parties, rather than apply ex ante

255 See supra notes __ to __ and accompanying text. Nelson suggests that courts do precisely that, by canvassing a “multitude of jurisdictions” to distill general or almost uniform rules. Nelson, supra note __, at 505. But his analysis generally explores areas where either the Constitution or Congress requires federal court adjudication without sufficient guidance.
256 See supra notes __ to __ and accompanying text.
257 See Redish, supra note __, at 792.
258 Daniel A. Farber, Philip P. Frickey, In the Shadow of the Legislature: The Common Law in the Age of the New Public Law, 89 MICH. L. REV. 875, 893 (1991). See also Clark, supra note __, at 1259, 1273 (noting that judicial federalism operates stronger than congressional federalism due to the absence of political safeguards for the federal judiciary).
rules. With that said, any “general theory of separation of powers,” in the words of Professor Jack Beermann, “has proven elusive.”260 The doctrine embodies the structural and procedural safeguards in the Constitution, assigning certain functions to particular branches and creating a system of checks and balances. “When the Constitution assigns a function to a particular branch of government, only that official may perform that function.” 261 Although recognizing that what constitutes “legislative power” is ambiguous, Thomas Merrill argues that federal courts lack the “power to ‘make law’ in a discretionary fashion.”262 He acknowledges that the framers of the Constitution provided little gloss on whether the judicial power included the power to decide cases under the common law.263 This, after all, is reflected by the early debate over a federal common law of crime.264 But the various constitutional provisions aggregated, coupled with the strong language in Marbury v. Madison265 that ours is a government based upon written law, all suggest to Merrill that federal courts lack law making power.266 He bolsters this analysis by observing that many of the early colonies specifically delegated to the state courts the power to employ the common law, and similarly federal statutes delegated to the federal courts the authority to decide—and by implication—create rules of decision for maritime and admiralty matters.267 Yet, Professor Louis Weinberg counters that at least two of the three spheres are co-extensive, such that the judiciary possesses the scope of authority vested in the legislative branch—at least until the legislative branch affirmatively acts.268 Professor Martha Field shares an equally expansive view, at least as long as the judiciary is left with sufficient discretion and can rely upon some

260 Jack M. Beermann, An Inductive Understanding of Separation of Powers, 63 ADMIN. L. REV. 467, 472 (2011). Others question how a separation of powers analysis has any force if the doctrine failed to inhibit the development of state common law. See Larry Kramer, The Lawmaking Power of the Federal Courts, 12 PACE L. REV. 263, 279 (1992). Kramer suggests “we must formulate our own solution to the problem of federal common law and separation of powers,” and decide whether it will improve the quality of government—he suggests if it can be tied to a federal statute. Id. at 285-6.
261 Id. at 510.
263 Id. at 336.
264 See supra notes __ to ___ and accompanying text.
265 5 U.S. (1 Cranch) 137 (1803).
266 Merrill, supra note __, at 338-39.
267 Id. at 346-48.

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authorization for its exercise of that discretion. This dialogue unfortunately conflates law with legislation and overlooks that judges simply cannot “legislate.”

Also, any meaningful separation-of-powers analysis is influenced by what political theory one endorses. After all, attempting to apply any mechanistic legal theory about whether judges “legislate” or “find” the law harkens back to a bygone era. At the state level, where separation of powers issues surface as well, judges unquestioningly have made—that is judicially pronounced—law for over two centuries. Whether today, in our age of statutes, federal judges may announce legal norms necessitates exploring how one perceives the respective capacity of the legislative or judicial branches to develop rules governing the rights and obligations of parties. Public choice theory, for instance, portrays the legislative process as a rent-seeking forum with a myriad of self-interested, greedy, rent-seekers that often produces either incoherent or corrupt decisions.

269 Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 887, 911-12 (1986). Field’s canvass of then existing scholarship suggested “little analysis of the boundaries of courts’ power to make federal common law. Commentators typically simply list areas in which federal common law is acceptable without providing any animating principle to unify the categories.” Id. at 886. Although Clark uses judicial federalism to explain Erie, he adds that when federal courts overstep their bounds they violate the Constitution’s separation of powers structure. Clark, supra note ___, at 1262.

270 Judges undoubtedly can render first order, legally effective and even binding statements, which constitute law. See Georg P. Fletcher, Two Modes of Legal Thought, 90 YALE L. J. 970, 977 (1981) (discussing positivist legal theory). But that is quite different than legislation. Brian Simpson aptly writes: The notion that the common law consists of rules which are the product of a series of acts of legislation (most untraceable) by judges (most of whose names are forgotten) cannot be made to work, if taken seriously, because common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception. Of course, it is true that judges are voluntary agents, and the way in which they decide cases and the views they express in their opinions are what they choose to decide and express. Their actions create precedents, but creating a precedent is not the same thing as laying down the law. The opinions they express possess in varying and uncertain degree authority, as do opinions expressed by learned writers: that is not to say the quality of being viewed as a good reason for saying that what they assert is correct. But to express an authoritative opinion is not the same thing as to legislate, and there exists no context in which a judicial statement to the effect that this or that is law confers the status of law on the words uttered. It is merely misleading to speak of judicial legislation.


If so, the judiciary with distinctly opposing rent seekers battling for a particular decision might produce a more coherent or at least less corrupt decision. Similarly, those (if any are left) who ascribe to modern *civic republicanism* might favor an expanded judicial function, with judges capable of discerning normative societal values. But civic republicans conversely might favor a limited judicial role. They could perceive the legislative process as a legitimate and deliberate forum for producing winners and losers, with the winners somehow reflecting shared societal values. Others suggest that legislative choices, including arguably even inaction, reflect a society’s moral fabric. The judiciary, then, must be cautious and circumscribed when deciding when to intercede and somehow stretch that fabric in a slightly new direction. Each of these considerations is prominently on display in dialogues involving constitutional principles, but they are absent from the present conversation about expanding the federal common law.

And this dialogue ought to address whether the public at large will consider an expanded federal common law as being *legitimate*. Legitimacy encompasses many facets. Two of which are continuity with the past and competence to decide when to depart from that past. The common law of today holds no mystical value, and merely repeating the past because it somehow reflects a “higher law” is untenable. So too, it is a mistake to repeat past refrains without an appreciation for the process and surrounding “baggage” of that past. Stewart Jay aptly observes, “[e]very judicial opinion is itself a political act, an exercise of power. A process of justification is involved, and the use of the past is always directed toward the resolution of a current controversy.” But the past as a justification for resolving a seemingly different present controversy requires not only deciding whether past precedent creates expectations for parties in adjusting their behavior, but it also engenders a critical inquiry into the rationale underlying past decisions. Law, after all, in the words of Lon Fuller is “the enterprise of subjecting human conduct to the governance of rules.” For rules to garner legitimacy, they ostensibly should be clear, not fluctuate too quickly, be accessible to the public, and except in unusual instances be prospective. Only through sufficient continuity with

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275 See *supra* notes __ to __ and accompanying text.

276 See *supra* note __, at 1302, 1305, 1323.

277 *supra* note __, at 1302.


279 *Id.* at 39, 46-90. See also Jeremy Waldron, *Why Law – Efficacy, Freedom and Fidelity?*, 13 LAW & PHIL. 259 (1994). And if law merely directs human behavior and must be obeyed because of that, then the
past precedent, then, can that occur with the common law. And whether that is true today as litigants press the courts with federal common law public nuisance claims requires careful scrutiny and possibly a normative judgment.

Perceived or actual competence also plays a significant role in deciding whether a particular forum is institutionally capable of developing policy. Often, the political question doctrine mistakenly is conflated with competence, and unfortunately the doctrine emerged inappropriately in the GHG public nuisance litigation. A group of law professors from around the country made this point in their amicus brief to the Supreme Court in *AEP v. Connecticut*. The political question doctrine bars the judiciary from adjudicating certain disputes. It can do so, in certain instances, when the Constitution assigns responsibility to another branch, when judicial interference might create conflicting directives with other branches, when the judiciary cannot

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“discover” manageable standards for resolving the dispute, when resolution requires initially some non-judicial policy determination, or when respect to some prior political decision counsels against judicial interference. These all might serve as legitimate considerations that a court can weigh when deciding whether to establish a federal liability scheme, but it would be a mistake to have these considerations obfuscated under the rubric of the political question doctrine. The idea of “discovering” manageable standards harkens back to a bygone era: Whether to create a liability regime cannot be answered by a circular inquiry into whether an ex ante standard exists. Whether, also, the Constitution assigns the issue to another coordinate political branch is the ultimate separation of powers question, not something capable of being decided abstractly. Perhaps the only meaningful political question inquiry is whether judicial intervention intrudes into the political process, by interfering with another branches’ decision or the need for another branch to render an initial policy decision. But that issue effectively is whether the issue has been displaced by another coordinate branch. And that is how the Court decided AEP v. Connecticut.

The critical challenge for proponents of an expanded federal common law might be the perceived competence of having the judiciary develop doctrinal rules governing the rights and obligations of parties in a complex area such as greenhouse gas emissions. After all, the judicial process operates within an adversarial structure, where the goal is neither “truth” nor “objective fact.” A while ago, in the infamous case of Boomer v. Atlantic Cement Co., Inc., Judge Bergan commented that

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court’s main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

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284 Baker, 369 U.S. at 217.
285 This approach suggests that courts can consider such disputes until the issues become displaced. See Kristen H. Engel, Harmonizing Regulatory and Litigation Approaches to Climate Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies, 155 U. Pa. L. Rev. 1563, 1576 (2007).
286 See supra notes 26 and accompanying text. A number of law professors argued to the contrary in their amicus brief to the Court. Brief of Law Professors as Amici Curiae In Support of Respondents, AEP v. Connecticut, 131 S.C. 2527 (2011) (No. 10-174). In reaching its judgment, the Court declined to address whether this displacement theory suggested that state common law claims might be preempted. For an excellent analysis of the issue in the context of the Clean Water Act, see Glicksman, supra note 26.
289 Id. at ___.
The GHG public nuisance litigation illustrates his point. To the extent that plaintiffs in such cases seek some form of injunctive relief, the ability of the court to fashion legitimate relief is constrained by the adversarial process. The adversarial process shields the court from the complex modern regulatory state. The court is insulated from state public utility commissions and their desire to ensure that utilities have sufficient capacity and reserve capacity for their loads; it is shielded from the contracts for the delivery of fuel to the facilities, from the power purchase agreements, from the role of the Federal Energy Regulatory Commission, from the regional transmission organizations and how removing the capacity of some generation facilities might affect reliability of the transmission grid. In short, the court’s ability to appreciate and respond to the multifaceted, interconnected, highly regulated energy grid is circumscribed.

This is not to suggest that we should abandon an expanded federal common law. An enlarged federal common law it might serve an important jurisprudential function, particularly when the type of harm being caused by a defendant’s conduct is one that society generally recognizes is a tort, and it is a tort whose recognition and elements ought to be defined by the federal rather than state judiciary. But whether we are at that stage with GHG emissions, invasive species, or potentially other interstate environmental threats, requires more than simply promoting the legitimacy of the ends. It necessitates, in short, critically exploring the means. And that requires balancing the continuity with the past and the societal demand for change.

V. Conclusion

Strikingly, the evolution of American law displays the inherent difficulty of resorting to the past while ensuring enough flexibility to adapt to new circumstances. “It is,” therefore, “the duty of the student of political habits and customs to trace the elements of continuity in those customs that appear to be new, and the elements of change beneath the appearance of their continuity.” The revolutionary period witnessed the tension between the need for change, while preserving aspects of a past, customary heritage that protected ex ante expectations and basic liberties. Just as during the clash between Blackstone and Bentham, with the latter denouncing the former “as an enemy of reform whose sophistry was so perverse as to be almost a crime,” we today still confront historic moments that test whether to weave change into the fabric of our customary, unwritten law. “If,” as J.G. A. Pocock wrote when discussing historical English legal thought, “the idea that law is custom implies anything, it is that law is in constant change and adaptation, altered to meet each new experience in the life of the people . . .” Yet law’s amenability for change is hindered by the conservative nature of the legal tradition; it typically looks backward rather than ahead; it often becomes

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290 If plaintiffs seek damages, that presents the same problem in Boomer: Private litigation may address individual harms, not the overall public good: Judicial relief might accept compensated environmental damage—to the extent plaintiffs can even trace the particular conduct to specific individual harm.

291 RODICK, supra note ___, at 132.


disassociated from present societal values; and it generally is molded by a society’s legal elite.\footnote{294 WATSON, supra note __, at 116-119.} But, as Sir Frederick Pollock championed so long ago, the common law is where modern experience can reflect modern values.\footnote{295 See COSGROVE, supra note __, at 151.}

The question, then, is whether we are at that point.