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## ESSAY

### ERIE AND THE IRRELEVANCE OF LEGAL POSITIVISM

Jack Goldsmith\* and Steven Walt\*\*

OF the many things that *Erie Railroad Co. v. Tompkins*<sup>1</sup> is famous for, two stand out. The first is its jurisprudential commitment to legal positivism. The second is its holding that the common law powers of federal courts exercised in *Swift v. Tyson*<sup>2</sup> are unconstitutional. *Erie* suggests that there is a connection between its jurisprudential commitment and its constitutional holding. The language of the opinion intimates that the constitutional holding follows from the jurisprudential commitment. It says that the rule of *Swift* rests on a “fallacy.”<sup>3</sup> The fallacy is a belief that there is a “transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>4</sup> This belief is fallacious, the opinion continues, because “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”<sup>5</sup> The “sense” described is Austin’s

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<sup>1</sup> 304 U.S. 64 (1938).

<sup>2</sup> 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>3</sup> *Erie*, 304 U.S. at 79.

<sup>4</sup> *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted). For comment on the rhetorical attribution of fallacies to others, see William K. Frankena, *The Naturalistic Fallacy*, in *Perspectives on Morality: Essays by William K. Frankena* 1 (K.E. Goodpaster ed., 1976) (“The future historian of ‘thought and expression’ in the twentieth century will no doubt record with some amusement the ingenious trick, which some of the philosophical controversialists of the first quarter of our century had, of labeling their opponents’ views ‘fallacies.’”).

<sup>5</sup> *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J.,

legal positivist conception of the nature of law. After elaborating the point, the opinion concludes: "Thus the doctrine of *Swift v. Tyson* is . . . 'an unconstitutional assumption of powers by courts of the United States . . .'"<sup>6</sup> Recognize that the correct conception of law is legal positivism, *Erie* appears to say, and *Swift's* unconstitutionality follows. *Erie* thus asserts that a jurisprudential commitment to legal positivism has constitutional consequences.

Most commentators agree. In different and sometimes contradictory ways, they believe that *Erie's* constitutional holding relies on a commitment to legal positivism.<sup>7</sup> Our aim in this Essay is to analyze and challenge this conventional wisdom. Commentators sometimes state the conventional wisdom in causal terms as a historical connection between beliefs about positivism and *Erie's* overruling of *Swift*. We think this historical claim lacks affirmative support, overlooks significant evidence to the contrary, and misleadingly views *Erie's* pre-history through the distorting lens of Holmes's anti-*Swift* dissents.<sup>8</sup> Some commentators also contend that there is a conceptual or normative connection between the

dissenting)) (internal quotation marks omitted).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> For a sample of the claimed reliance among commentators, see Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 *Tex. L. Rev.* 79, 115-16 (1993); William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 *Tul. L. Rev.* 907, 907-08 (1988); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 *U. Pa. L. Rev.* 1459, 1462 (1997); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 *Pace L. Rev.* 263, 283 (1992); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 *Harv. L. Rev.* 1785, 1789-95 (1997) [hereinafter *Lessig, Erie-Effects*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395, 426-38 (1995) [hereinafter *Lessig, Understanding Changed Readings*]; William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 *Harv. L. Rev.* 1372, 1391-92 (1989); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 *Tul. L. Rev.* 991, 998 (1987); George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 *Const. Commentary* 285, 285 (1993); Louise Weinberg, *Federal Common Law*, 83 *Nw. U. L. Rev.* 805, 819-21 (1989); Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 *Tex. L. Rev.* 1743, 1760 (1992); cf. Tony Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism* 101 (1981) ("*Erie* reflected jurisprudential assumptions . . ."). For judicial support for the claimed reliance, in addition to some of the language in the opinion in *Erie*, see *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) ("*Erie* 'overruled a particular way of looking at law.'").

<sup>8</sup> See *infra* Part II.

truth of positivism and *Erie*'s holding. We think these contentions too are wrong.<sup>9</sup> Our claim here is one of irrelevance: *Erie*'s commitment to legal positivism is conceptually and normatively independent of its constitutional holding. Legal positivism is a general theory about the nature of law. Even if true, it has no implications for the allocation of authority between the state and federal governments.

Our argument informs the seemingly endless debate about *Erie* and its consequences in a variety of ways.<sup>10</sup> It shows that *Erie* is not a decision about the nature of law, but rather reflects a particular time-bound set of constitutional and policy priorities. It helps to explain why some recent philosophical attacks on *Erie* are groundless. The argument demonstrates that the many outstanding mysteries about the practical implications of *Erie*'s holding cannot, as many think, be resolved by recourse to legal positivism. And it presents a cautionary lesson about the dangers of attempting to derive constitutional conclusions from theories about law.

The Essay proceeds as follows. Part I clarifies the terms and content of our claims. Part II questions the strength of the historical connection between legal positivism and *Erie*. Part III argues that legal positivism is conceptually irrelevant to *Erie*'s holding. Part IV argues that it is normatively irrelevant. Part V illustrates several implications of rejecting legal positivism's relevance to *Erie*. A brief conclusion follows.

## I. THESIS

There are at least three possible connections between legal positivism and *Erie*'s holding: historical, conceptual, and normative. The historical connection concerns the historical relationship between the acceptance of legal positivism in the nineteenth and early twentieth centuries and the constitutional holding in *Erie*. It makes an assertion of historical causation. For example, the historical connection would include the claim that Brandeis and company believed that legal positivism required the *Erie* holding or made it more acceptable. The conceptual connection is that legal positivism is necessary in some way to the result in *Erie*. For

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<sup>9</sup> See *infra* Parts III, IV.

<sup>10</sup> See *infra* Part V.

instance, a conceptual connection might treat the truth of legal positivism as an indispensable premise in an argument whose conclusion is *Erie's* holding. The normative connection holds that the result in *Erie* is justified, supported, or given additional authority by the truth of legal positivism. It would include the contention that the truth of legal positivism is a good reason for *Erie's* holding. The relevant historical, conceptual, and normative connections state very different kinds of associations.

Commentators asserting a connection between legal positivism and *Erie's* holding do not specify the kind of connection they have in mind.<sup>11</sup> Their assertions are often made casually and without precision. We are less concerned with demonstrating who asserts which connection than in showing that the connections asserted are all problematic. In particular, we argue for two claims. First, the historical connection lacks support. It is based on a paucity of misleading evidence, and overlooks considerable countervailing evidence that suggests legal positivism had no causal significance for *Erie*. We do not argue that the historical connection is wrong. We only contend that its proponents have not shown there to be a causal connection, and that the weight of the historical evidence strongly suggests none exists. Second, we claim that there are no conceptual or normative connections between legal positivism and *Erie's* holding. The claim here is one of irrelevance: Legal positivism is conceptually and normatively irrelevant to *Erie's* holding.

To clarify these claims, we begin by clarifying terms. Start with *Erie's* holding. The holding has been subject to disagreement and controversy over the years. Some commentators thought that *Erie* held that the federal courts had no power to make general federal common law because such power exceeded the lawmaking power

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<sup>11</sup> For example, Lessig's prominent recent arguments about a relationship between legal positivism and *Erie* arguably assert all three connections. Sometimes he suggests that the connection is historical, see Lessig, *Understanding Changed Readings*, supra note 7, at 432 ("Premised upon a change in philosophy and upon its effect on a legal culture, the Court declared a practice with a ninety-six year pedigree unconstitutional."), sometimes he suggests it is conceptual, see id. at 431 ("Change one idea in philosophy, transform in some small way a bit of legal language, and this century-old doctrine of *Swift* quickly falls away."), and sometimes he suggests that it is normative, see Lessig, *Erie-Effects*, supra note 7, at 1794 ("'Positivism' and 'realism' became ways of organizing opposition to a practice that was no longer the benign delegation of *Swift*. Together they rendered contestable the role of federal courts in this articulation of the common law.") (footnotes omitted).

of the entire federal government, including Congress.<sup>12</sup> This broad reading of *Erie's* holding finds modest support in the opinion.<sup>13</sup> Whatever its validity as an original matter,<sup>14</sup> the broad reading was rendered unimportant by the expansion of congressional lawmaking power since 1938.<sup>15</sup> But in place of the broad reading still stands *Erie's* narrower holding that *federal courts* have no independent lawmaking powers: "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."<sup>16</sup> The narrower holding is consistent with the large body of post-*Erie* "specialized" federal common law that finds its ultimate authorization in the Constitution or in an act of Congress. This "specialized" federal common law, unlike *Swift*-ian general federal common law, has the force of federal law within the meaning of the Supremacy Clause.<sup>17</sup> When we refer to "*Erie's* holding" we shall mean the narrower reading.

Consider next legal positivism. Legal positivism is a thesis about the nature of law. It is a view about what makes a norm a legal norm. Natural law and related theories, in their simple forms, hold that law depends on conformity to moral principle.<sup>18</sup> Positivism, by

<sup>12</sup> Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 *Tex. L. Rev.* 512, 520-24 (1938); *Recent Cases*, 22 *Minn. L. Rev.* 876, 887 (1938); *Recent Decisions*, 7 *Fordham L. Rev.* 436, 440-41 (1938).

<sup>13</sup> 304 U.S. at 78 ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.").

<sup>14</sup> Chief Justice Stone, who joined Brandeis's opinion, did not read *Erie* so broadly. In a letter to Frankfurter soon after the decision Stone remarked:

Beyond [federal courts' unconstitutional assumption of powers] it was unnecessary to go. I should have liked to have said that, and that it was unnecessary to say how far or to what extent Congress might legislate, but I thought enough was written without my risking the final result by putting in my oar.

Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 480-81 (1956) (quoting Letter from Harlan Stone to Felix Frankfurter (Apr. 29, 1938)). Later, Stone wrote: "[I] do not think it is at all clear that Congress could not apply (enact) substantive rules to be applied by federal courts. I think that *Erie Railroad Co. v. Tompkins* did not settle that question, notwithstanding some unfortunate dicta in the opinion." *Id.* at 480 (quoting Letter from Harlan Stone to Owen J. Roberts (Jan. 3, 1941)).

<sup>15</sup> See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. Chi. L. Rev.* 1, 14-16 (1985); Rutherglen, *supra* note 7, at 288.

<sup>16</sup> 304 U.S. at 78.

<sup>17</sup> See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 *N.Y.U. L. Rev.* 383, 407 (1964).

<sup>18</sup> For recent versions of the position, see John Finnis, *Natural Law and Natural Rights* (1980); Ronald A. Dworkin, "Natural" Law Revisited, 34 *U. Fla. L. Rev.* 165

contrast, holds that law depends on social practices of one sort or another. Versions of legal positivism differ according to the features of social practices made central to the thesis or to the extent of law's dependence on social practices. *Erie*, following Holmes's earlier dissents, adopted an unexceptional Austinian version of legal positivism. Law, according to Austin, is the coercive order of a sovereign.<sup>19</sup> In his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,<sup>20</sup> Holmes added the realist gloss that state court decisions count as law.<sup>21</sup> Brandeis's opinion in *Erie*, by quoting approvingly the pertinent part of Holmes's dissent, adopts both an Austinian version of legal positivism and Holmes's realist gloss on it.

Austinian positivism maintains a relatively narrow conception of the type of social practice on which law depends. Modern formulations of legal positivism broaden this conception. These modern formulations divide between what are called "hard" and "soft" positivist positions. "Hard" positivism makes the existence and content of law depend only on social practices; "soft" positivism allows the identification of law to depend on matters independent of social practices as well. For instance, unlike "hard" positivism, "soft" positivism allows the possibility that the identification of law depends to some extent on conformity with substantive moral principles. Hartian positivism, a version of "soft" legal positivism, considers the convergent behavior of the relevant officials as central: a social practice that specifies the conditions that must be satisfied for a norm to be law in the community.<sup>22</sup> Because the social

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(1982); Neil MacCormick, *Natural Law Reconsidered*, 1 *Oxford J. Legal Stud.* 99 (1981); Michael S. Moore, *Moral Reality Revisited*, 90 *Mich. L. Rev.* 2424 (1992). The arguments below apply to positions that require that law depends on features of social practices and thus apply to versions of natural law that allow for dependence on social practice. See Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *The Autonomy of Law: Essays on Legal Positivism* 1, 1-29 (Robert P. George ed., 1996) (suggesting that most modern natural law theories are consistent with weak forms of legal positivism). The metaphilosophical question of the importance of the difference between positivism and versions of natural law is a separate issue, unaddressed in this Essay.

<sup>19</sup> See John Austin, *Lecture 1*, in *The Province of Jurisprudence Determined* 18 (Wilfrid E. Rumble ed., 1995). For a good historical summary of positivism, see Anthony J. Sebok, *Misunderstanding Positivism*, 93 *Mich. L. Rev.* 2054 (1995).

<sup>20</sup> 276 U.S. 518 (1928).

<sup>21</sup> *Id.* at 532-36 (Holmes, J., dissenting).

<sup>22</sup> See, e.g., H.L.A. Hart, *The Concept of Law* (2d ed. 1994); Jules L. Coleman,

practice can have recourse to substantive moral principles, the identification of law need not depend only on features of a social practice. Razian positivism, by contrast, takes (unspecified) social facts to be exclusive: law depends only on its social source, not its content or morality.<sup>23</sup> Raz's is a version of "hard" positivism.

To ease exposition, we shall identify legal positivism with "hard" positivism. Hence, except where otherwise flagged, we take legal positivism to be committed to the claim that law depends only on features of a social practice or, more generally, social facts. Throughout the analysis, however, we take care not to let the label "legal positivism" obscure the appropriate, and often varying, underlying substantive position at issue. For example, in connection with the historical claim, our working definition of legal positivism is somewhat anachronistic. Most positivists in the late nineteenth and early twentieth century understood positivism in its narrow, Austinian version. Positions which based law on features of a social practice other than a sovereign's coercive orders were not considered positivist. So, for example, understanding law to rest on the "life" of a community or its prevailing customs and practices might not be seen to be a species of positivism.<sup>24</sup> Worse, legal participants who were not self-described positivists sometimes accepted positivism in everything but name.<sup>25</sup> The historical connection asserts that Austinian positivism with a Holmesian gloss, a particular brand of hard legal positivism, influenced *Erie's* holding. In assessing the validity of the historical connection, we analyze the relationship between this understanding of hard legal positivism and *Erie*.

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Negative and Positive Positivism, 11 J. Legal Stud. 139 (1982); cf. W.J. Waluchow, *Inclusive Legal Positivism* (1994) (describing commitments of soft or inclusive positivism).

<sup>23</sup> See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* 47-48 (1979); Joseph Raz, *Authority, Law, and Morality*, in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 194, 194-221 (1994).

<sup>24</sup> For example, the general common law applied by *Swift* was justified in the opinion and by later commentators as a species of customary law, see, e.g., Lessig, *Erie-Effects*, supra note 7, at 1789-92, but was nonetheless criticized by positivists because it was not backed by a sovereign command, see *Black & White Taxicab*, 276 U.S. at 534-35 (Holmes, J., dissenting).

<sup>25</sup> The author of *Swift*, Joseph Story, is a possible example. See Herbert Hovenkamp, *Federalism Revised*, 34 *Hastings L.J.* 201, 224-25 (1982) (book review) ("[O]ne must appreciate that Story himself had a positivistic view of the rule of law . . . . The rule created by *Swift v. Tyson* was a rule of the United States as sovereign.").

A word of caution is also in order about the relationship between our operational definition of legal positivism as hard positivism and our claim that legal positivism is conceptually and normatively irrelevant to *Erie's* holding. Although we focus on hard positivism, our claim that legal positivism is conceptually and normatively irrelevant to *Erie's* holding does not rely on any particular version of legal positivism. It does not turn on whether law depends on conformity with substantive moral principles (Hart) or is constituted exclusively by the coercive orders of a sovereign (Austin) or other social facts (Raz). Our claim is that legal positivism in any of its formulations is conceptually and normatively irrelevant to *Erie's* holding.

Finally, we should clarify what we mean when we say that the Constitution or constitutional considerations alone explain or justify *Erie's* holding. By itself this claim begs questions about the proper sources of constitutional interpretation. We have no need to engage the perennial debate about whether, and to what extent, text, history, structure, policy, and other factors inform constitutional interpretation. Nor do we need to specify the precise constitutional basis for *Erie's* holding, which is notoriously elusive.<sup>26</sup> When we say that theories about the nature of law are irrelevant to *Erie's* holding and that constitutional considerations alone matter, we mean simply to exclude theories about the nature of law from the basket of considerations that inform *Erie's* constitutional analysis.

## II. HISTORICAL CONNECTIONS

Commentators put the historical connection between a belief in legal positivism and *Erie's* holding in different ways. They claim that legal positivism "led to" the *Erie* holding,<sup>27</sup> or was a "factor" in, or "contributed" to, the holding in *Erie*,<sup>28</sup> or they describe *Erie* as a product of positivist beliefs.<sup>29</sup> Sometimes they claim the Court

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<sup>26</sup> See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974); Kramer, *supra* note 7, at 263-65.

<sup>27</sup> See Marshall, *supra* note 7, at 1391-92.

<sup>28</sup> See Freyer, *supra* note 7, at 121-22; cf. *id.* at 96-97 (discussing schools of thought that helped to undermine the *Swift* doctrine).

<sup>29</sup> See Borchers, *supra* note 7, at 115-16 ("[T]he change that finally brought about *Erie* . . . was a revolution in legal philosophy.").

would not have reached its result in *Erie* if it had not believed in the truth of positivism.<sup>30</sup> The phrases, although different, all describe the association as one of historical connection. It is probably impossible to demonstrate whether and to what extent constitutional, policy, social, and other considerations besides legal positivism caused the Court to adopt its holding in *Erie*. Our goal is more modest and selective: to present evidence that casts serious doubt on the often-asserted and little-analyzed causal role of legal positivism.

One problem with the historical connection is its lack of specificity. Commentators asserting the connection are unclear about whether a belief in legal positivism is a cause, an important cause, or merely a causal condition of the Court's decision in *Erie*. When causal claims cannot be assessed by experimental replication or manipulation of variables, they typically can be established in either of two ways: by finding cases which are factually similar in all respects but one, in which the outcome of the cases with the new variable is different; or by reasoning counterfactually, asking what would have occurred had an event not taken place. Establishing causation requires care in specifying the similarity between cases with different outcomes or the counterfactual being offered.<sup>31</sup> Commentators urging a causal connection between belief in legal positivism and *Erie* have provided neither the necessary similarity among cases nor a specific counterfactual.

But this standard is probably too exacting. Intellectual historians often operate with a less demanding notion of causal support. According to it, if a set of beliefs is held at the time an event occurs and the justifications given for the event bear some trace of those beliefs, a claimed causal connection between the beliefs and the event is supported, at least provisionally.<sup>32</sup> Under this standard,

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<sup>30</sup> See Casto, *supra* note 7, at 911-12.

<sup>31</sup> Cf. Edgar Kiser & Margaret Levi, Using Counterfactuals in Historical Analysis: Theories of Revolution, in *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives* 187, 190 (Philip E. Tetlock & Aaron Belkin eds., 1996) (arguing that the plausibility of causal claims rests on quality of supporting counterfactuals); Peter D. McClelland, Causal Explanation and Model Building in History, Economics, and the New Economic History 152-68 (1975) (arguing that the assessment of causal importance depends on probabilistic counterfactuals).

<sup>32</sup> G.E. White has suggested to us this formulation of the standard. For a recent

commentators present the following evidence in support of the claimed historical connection between legal positivism and *Erie's* holding.<sup>33</sup> They begin with the view that *Swift* rested on a commitment to some non-positivistic notion of natural law or, at the very least, of law not tied to any particular sovereign authority. They then point to the rise of legal positivism in the nineteenth century and to late nineteenth and early twentieth century legal positivist critiques of *Swift*.<sup>34</sup> Like Holmes, they suggest that legal positivism undermined *Swift's* commitment to a preexisting, self-executing, and objectively discoverable law, and revealed the federal court practice of applying general law to be an unconstitutional intrusion on state sovereignty. Finally, the commentators cite the language in the *Erie* opinion itself that declared that *Swift's* anti-positivistic approach was wrong and tied its constitutional holding to an embrace of Holmesian positivism.

Every step of this argument is questionable. It is doubtful that *Swift* represented a commitment to or belief in the "brooding omnipresence" theory later attributed to it by Holmes and *Erie*.<sup>35</sup> Moreover, one is hard-pressed to find a subsequent defense or explanation of *Swift* that embraces the "brooding omnipresence" conception of law. Indeed, soon after *Swift* and throughout the

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survey of general approaches to intellectual history, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *Stan. L. Rev.* 1065 (1997).

<sup>33</sup> Two comprehensive accounts in recent times are Casto, *supra* note 7, at 921-48, and Lessig, *Understanding Changed Readings*, *supra* note 7, at 426-38.

<sup>34</sup> See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (Holmes, J., dissenting); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting); *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 399 (1893) (Field, J., dissenting); Letter from Oliver Wendell Holmes to Harold Laski (Jan. 29, 1926), in 2 *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, at 815, 822-24 (Mark DeWolfe Howe ed., 1953); William M. Meigs, *Shall the State Courts Adopt the Federal Doctrine of "General Principles of Jurisprudence?"*, 29 *Cent. L.J.* 465, 487 (1889).

<sup>35</sup> See Grant Gilmore, *The Ages of American Law 33-35* (1977); Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 16-30, 245-52 (1977); Hovenkamp, *supra* note 25, at 224-25; cf. Lessig, *Erie-Effects*, *supra* note 7, at 1793 n.50 ("Justice Holmes was consistently quite unfair to *Swift*, writing as if the doctrine he was attacking was the doctrine that *Swift* had created. This is blaming the parent for the sins of the child.") (citations omitted). One can criticize Holmes's description of *Swift* without committing oneself to the broader and perhaps more questionable claims made by Horwitz and others about the extent to which Americans had rejected the natural law and even customary law basis of the common law in the 1780-1820 period. See Horwitz, *supra*.

nineteenth and early twentieth centuries, the Supreme Court and commentators justified the *Swift* regime primarily on constitutional grounds.<sup>36</sup> They consistently argued that Article III's purpose to provide a neutral forum protecting nonresidents from discrimination justified *Swift* and its progeny.<sup>37</sup> Whatever one thinks of the merits of this constitutional argument, it does not rest on a denial of the truth of legal positivism.

More broadly, at the turn of the century, the practicing bar and legal academy widely embraced legal positivism, usually in its Austinian version.<sup>38</sup> Indeed, *Swift*'s many supporters in this period can accurately be described as legal positivists.<sup>39</sup> Chamberlain expressly grounded his defense of *Swift* in the authority of Article III.<sup>40</sup> He also emphasized that "no fascinating theories of natural right and justice, nor brilliant philosophical speculations upon the nature of society and government, but . . . a profound knowledge and appreciation of the familiar, home-bred, hard-won, slowly-maturing results of . . . political life and experience" justified *Swift*

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<sup>36</sup> See Freyer, *supra* note 7, at 46, 53-56, 71-74.

<sup>37</sup> For Supreme Court decisions to this effect soon after *Swift*, see, e.g., *Watson v. Tarpley*, 59 U.S. (18 How.) 517, 520-21 (1855); *Rowan v. Runnels*, 46 U.S. (5 How.) 134, 139 (1847). For decisions later in the century, see, e.g., *Baugh*, 149 U.S. at 371-73; *Burgess v. Seligman*, 107 U.S. 20, 34-38 (1883). For a sampling of this constitutional defense of *Swift* among commentators, see Daniel H. Chamberlain, *The State Judiciary: Its Place in the American Constitutional System*, in *Constitutional History of the United States as Seen in the Development of American Law* 237, 274-82 (1889); Henry Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 Ill. L. Rev. 533, 537-38 (1910). See generally Freyer, *supra* note 7, at 45-100 (discussing the Supreme Court's incorporation of the *Swift* doctrine into constitutional theory).

<sup>38</sup> See Freyer, *supra* note 7, at 96-97; see also Greenawalt, *supra* note 18, at 3 (asserting that positivism was "strongly entrenched" in the United States from the middle of the nineteenth century); cf. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 8-30 (1975) (demonstrating the prevalence of legal positivism in bench and bar in antebellum debates over slavery). See generally Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand. L. Rev. 1387 (1997) (summarizing and analyzing various accounts of the rise of legal positivism in the nineteenth century).

<sup>39</sup> As Freyer puts the point: "So pervasive were notions concerning the source of law as either the command of the sovereign or community custom by the 1880s and 1890s, that it does not seem surprising that supporters and critics used them in their analysis of the *Swift* principle." Freyer, *supra* note 7, at 97. Freyer adds that "twentieth-century defenders of *Swift v. Tyson* used reasoning derived from legal positivism, as did the critics of the doctrine." *Id.* at 152.

<sup>40</sup> Chamberlain, *supra* note 37, at 260-78.

and its supporting constitutional and statutory apparatus.<sup>41</sup> Green, Schofield, and Eliot all embraced legal positivism in the sense that they rejected the notion of a third source of law not tied to state and federal law.<sup>42</sup> They argued nonetheless that *Swift* was essentially correct in counseling courts to make an independent judgment about the content of state law.<sup>43</sup>

Corbin later took a similar tack.<sup>44</sup> He agreed with Holmes's dissent in *Black & White Taxicab* that there is "no 'transcendental body of law,' no system of 'common law' outside of a particular state," and that law must have "definite authority behind it."<sup>45</sup> But he thought that federal courts should draw on the same sources as state courts in discerning what state law requires.<sup>46</sup> For Corbin these sources included "the state constitution and statutes, former opinions of the state courts of every rank, opinions of the courts of other states, the Restatements of the American Law Institute, the works of juristic writers, [and] the mores and practices of the community,"<sup>47</sup> as well as "life history" and the "living stream of dispute and conflict," otherwise known as the pattern of case outcomes and standards immanent in it.<sup>48</sup> Corbin also pointed out that when a

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<sup>41</sup> Id. at 283.

<sup>42</sup> Edward C. Eliot, *The Common Law of the Federal Courts*, 36 Am. L. Rev. 498 (1902); Frederick Green, *The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts*, 19 Ill. L. Rev. 217 (1924); Schofield, *supra* note 37.

<sup>43</sup> Eliot, *supra* note 42, at 521-23; Green, *supra* note 42, at 218-25; Schofield, *supra* note 37, at 538, 541, 543; see also Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. Pa. L. Rev. 179, 189-91 (1929) (making similar point).

<sup>44</sup> See Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 Iowa L. Rev. 19, 25 (1929) [hereinafter Corbin, *Restatement of the Common Law*]. Corbin also wrote two articles after *Erie* that exemplify a commitment both to legal positivism and a defense of *Swift*. See Arthur L. Corbin, *The Common Law of the United States*, 47 Yale L.J. 1351, 1351-53 (1938) [hereinafter Corbin, *The Common Law of the United States*]; Arthur L. Corbin, *The Laws of The Several States*, 50 Yale L.J. 762, 764-65 (1941) [hereinafter Corbin, *The Laws of the Several States*].

<sup>45</sup> Corbin, *Restatement of the Common Law*, *supra* note 44, at 24-25; see also Corbin, *The Common Law of the United States*, *supra* note 44, at 1351-52; Corbin, *The Laws of the Several States*, *supra* note 44, at 763-65.

<sup>46</sup> See Corbin, *Restatement of the Common Law*, *supra* note 44, at 24-26; see also Corbin, *The Common Law of the United States*, *supra* note 44, at 1352-53; Corbin, *The Laws of the Several States*, *supra* note 44, at 771.

<sup>47</sup> Corbin, *The Laws of the Several States*, *supra* note 44, at 771.

<sup>48</sup> Corbin, *The Common Law of the United States*, *supra* note 44, at 1352; see also Corbin, *Restatement of the Common Law*, *supra* note 44, at 25.

federal court exercises an independent judgment to “declare[] and appl[y] the common law” of a particular state, the law so declared and applied had the “definite authority behind it” of a federal court.<sup>49</sup> Like Chamberlain, Green, and Schofield, Corbin both embraced legal positivism and defended *Swift*.<sup>50</sup> Even the *Swift* supporters, who believed the general common law applied by federal courts was not a species of state law, thought that it was judge-made, national common law authorized by the Constitution and analogous to, with similar sources as, state common law.<sup>51</sup> They too were legal positivists.

It is, of course, also true that in the late nineteenth and early twentieth century, some of the attacks on *Swift* were directed to its ostensible embrace of an antipositivistic conception of law. Field’s dissent in *Baltimore & Ohio Railroad Co. v. Baugh*<sup>52</sup> attacked the conception: “I cannot assent to the doctrine that there is an atmosphere of general law floating about all the States, not belonging to any of them . . . .”<sup>53</sup> Meigs identified as *Swift*’s “essential fallacy” its “assumption of the existence of [a] body of general principles,” which are “nowhere to be found laid down with authority; no law-giver has ever enacted them.”<sup>54</sup> And of course Holmes later made

<sup>49</sup> Corbin, *Restatement of the Common Law*, supra note 44, at 25.

<sup>50</sup> Judge Parker is another example of someone who embraced legal positivism and *Swift*. Parker read *Swift*’s recognition of general common law to refer to the common law of the state until changed by state statute. See *Hewlett v. Schadel*, 68 F.2d 502, 504 (4th Cir. 1934) (Parker, J.). His (oblique) defense of *Swift* is similar to Corbin’s. Parker grounded the authority of federal courts to exercise an independent judgment about state common law in Article III. See *Hewlett*, 68 F.2d at 504; John J. Parker, *Erie v. Tompkins* In Retrospect: An Analysis of its Proper Area and Limits, 35 A.B.A. J. 19, 21 (1949). As to the nature of law, Parker acknowledged that it is “not ‘a brooding omnipresence in the sky.’” Parker, supra, at 21. On the issue of how federal courts are to determine state law, Parker thought that they were to use all data bearing on state law, including decisions by state courts. See *Hewlett*, 68 F.2d at 504; Parker, supra, at 20. So, to put the point anachronistically, Parker counts as a positivist who thought *Erie* wrongly decided.

<sup>51</sup> See, e.g., *Murray v. Chicago & N.W. Ry. Co.*, 62 F. 24, 26-42 (C.C.N.D. Iowa 1894), aff’d, 92 F. 868 (8th Cir. 1899); Alton B. Parker, *The Common Law Jurisdiction of the United States Courts*, 17 Yale L.J. 1 (1907); Percy Werner, *National Common Law: On the Introduction and Modification of the Common Law in the United States*, 8 S. L. Rev. 414 (1882).

<sup>52</sup> 149 U.S. 368 (1893).

<sup>53</sup> Id. at 399 (Field, J., dissenting); cf. id. at 394 (“[T]here is no unwritten general or common law of the United States on any subject.”).

<sup>54</sup> See Meigs, supra note 34; see also William M. Meigs, *Decisions of the Federal*

similar points.<sup>55</sup> None of these critics cites an example of *Swift's* commitment to antipositivism, however. This raises doubts about the accuracy of their characterization, especially since *Swift's* many defenders so clearly embraced legal positivism. In addition, except for Holmes, none of these critics made the "brooding omnipresence" point central to their analysis. Instead, these and other late nineteenth and early twentieth century critics of *Swift* developed new constitutional arguments against the *Swift* regime.<sup>56</sup> They countered the Article III and related arguments made in its support by arguing that Article III did not authorize the development of general common law, and that constitutional structure affirmatively prohibited it. They also argued that vertical uniformity, which protected state interests, was of greater constitutional value than horizontal uniformity, which protected nonresidents. The constitutional arguments were not tied to legal positivism.

Even Holmes made the connection between the truth of legal positivism and a constitutional conclusion late in the day and laconically. His first positivist thrust at *Swift* in his *Kuhn v. Fairmont Coal Co.*<sup>57</sup> dissent raised constitutional objections (if at all) only weakly and indirectly.<sup>58</sup> He did not call for the overruling of *Swift*, but rather asserted that his "reasoning . . . justifies" only that *Swift* not be applied in cases that "by nature and necessity [are] peculiarly local."<sup>59</sup> In his early correspondence with Pollock and Laski he attacked the "fallacy" of *Swift* but never tied this attack to a

Courts on Questions of State Law, 45 Am. L. Rev. 47, 56 (1911) ("There did not exist in [Marshall's] day a general commercial law, apart from a sovereignty to create it, floating in the air, intangible.").

<sup>55</sup> See sources cited supra note 34.

<sup>56</sup> In addition to Meigs's work and Field's dissent, early constitutional arguments against *Swift* can be found in 1 J.I. Clark Hare, American Constitutional Law 1117 (1889); J.B. Heiskell, Conflict Between Federal and State Decisions, 16 Am. L. Rev. 743 (1882); William B. Hornblower, Conflict Between Federal and State Decisions, 14 Am. L. Rev. 211 (1880); William H. Rand, Jr., *Swift v. Tyson* versus *Gelpcke v. Dubuque*, 8 Harv. L. Rev. 328 (1895).

<sup>57</sup> 215 U.S. 349 (1910).

<sup>58</sup> Holmes might have been alluding to a constitutional objection in his *Kuhn* dissent when he stated that "I never yet have heard a statement of any reason justifying the power [of federal courts applying general common law], and I find it hard to imagine one." 215 U.S. at 371 (Holmes, J., dissenting). But see G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self 389 (1993) (Holmes's "first mention of a constitutional objection had come in the *Taxicab* case. . .").

<sup>59</sup> *Kuhn*, 215 U.S. at 372 (Holmes, J., dissenting).

constitutional conclusion.<sup>60</sup> When Holmes finally asserted in 1927 that the “fallacy has resulted in an unconstitutional assumption of powers,”<sup>61</sup> he was obscure about the constitutional infirmity and silent about the connection between this infirmity and the truth of legal positivism.<sup>62</sup> In addition, he once again indicated, with little explanation, that he would “leave *Swift v. Tyson* undisturbed.”<sup>63</sup> Finally, Holmes never addressed the then-widespread positivist argument that Article III authorized the *Swift* regime.

This analysis casts doubt on the historical connection between legal positivism and *Erie*'s holding. In the late nineteenth century legal positivism was not considered a shocking thesis, and its advocacy was small beer. The claimed historical connection fails to explain why there was a large temporal gap between the general acceptance of legal positivism and the decision in *Erie*. By itself, this gap makes a causal role for positivism seem doubtful. This doubt is heightened when one recalls that both sides of the debate embraced legal positivism and justified their positions by reference to different understandings of the Constitution. It is hard to see how the acceptance of legal positivism can play a significant causal role when the position was essentially embraced by both sides of the debate. Arguments about *Swift* did not turn on whether law must have authority behind it or be grounded in some social fact.

Doubts about the causal significance of legal positivism increase when one considers the competing causal explanations for *Swift*'s demise. One such factor was the problem of nonuniformity. Between *Swift* and the end of the nineteenth century, the categories of general law had expanded from the law of negotiable instruments to include dozens of other private law doctrines.<sup>64</sup> According to the

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<sup>60</sup> White, *supra* note 58, at 389.

<sup>61</sup> *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).

<sup>62</sup> See *id.* at 533-35 (Holmes, J., dissenting); see also White, *supra* note 58, at 389 (“It is hard to know on what grounds Holmes thought unconstitutional the practice of federal courts declining to be bound by the substantive common law rules of states in which they sat.”). After his *Black & White Taxicab* dissent, Holmes in a letter to Pollock described the federal court practice of applying general common law as “usurpation” and “arrogant assumption,” but he never explained either the content of his constitutional objection or the relationship between legal positivism and that objection. White, *supra* note 58, at 389.

<sup>63</sup> *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting). Holmes of course might have had any number of reasons for not proposing to overrule *Swift*.

<sup>64</sup> See Freyer, *supra* note 7, at 56-58, 71 (providing examples such as tort liability,

critics of *Swift*, this led to a broad divergence between the substantive law applied in state and federal courts.<sup>65</sup> Although *Swift*'s defenders argued that these claims were overstated,<sup>66</sup> the evidence of nonuniformity appeared overwhelming in the years before *Erie*. This made *Swift*'s goal of a uniform law as an aid to national development appear chimerical. It also fed arguments that the *Swift* regime promoted forum shopping and, more broadly, encouraged abusive litigation tactics.<sup>67</sup>

The forum shopping concern was exacerbated by the identity of the shoppers: primarily corporations looking for favorable law in federal court. The law available in federal court consistently favored creditors over debtors, and more generally displayed a significant pro-corporate bias.<sup>68</sup> The apparent unfairness of this bias, the attendant worry that the federal forum shopping promoted by this bias led to an overcrowded and inefficient judicial system, and the related concern that federal courts favored eastern over southern and western interests, formed the primary criticisms of *Swift* in the last half of the nineteenth century. These factors led Congress seriously to consider limiting diversity jurisdiction as early as 1875.<sup>69</sup> Criticisms of both *Swift* and diversity jurisdiction grew in the early twentieth century when "corporations developed the practice of reorganizing in states with loose incorporation laws, solely for purposes of creating diversity of citizenship between themselves and local residents . . . [in order] to avoid state law when it was against them."<sup>70</sup> The most notorious example of this practice was at issue in the 1928 Supreme Court decision of *Black & White Taxicab*.

The decision in *Black & White Taxicab* caused an enormous outcry in Congress and the academy and led many, including Brandeis, to make serious attempts to eliminate diversity jurisdic-

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municipal bonds, property use, and employer-employee relations).

<sup>65</sup> See, e.g., George C. Holt, *The Concurrent Jurisdiction of the Federal and State Courts* (1888); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Cornell L.Q.* 499, 524-30 (1928).

<sup>66</sup> See, e.g., Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 *U. Pa. L. Rev.* 869, 881-86 & n.23 (1931).

<sup>67</sup> See Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958*, at 224-30 (1992).

<sup>68</sup> See Freyer, *supra* note 7, at 76-77, 102-05; Purcell, *supra* note 67, at 226.

<sup>69</sup> See Freyer, *supra* note 7, at 78-82.

<sup>70</sup> *Id.* at 102.

tion.<sup>71</sup> The controversy following *Black & White Taxicab* is significant. It occurred between roughly 1928 and 1932, the year in which three different bills were introduced in Congress restricting or eliminating diversity jurisdiction.<sup>72</sup> Because the controversy erupted during the decade before *Erie* and was largely in response to the *Swift* regime as applied in *Black & White Taxicab*, the terms of the debate suggest *Erie*'s immediate causal antecedents.<sup>73</sup> The considerations invoked were either the Constitution or policy, not jurisprudential theories.<sup>74</sup> Policy considerations included nonuniformity in law, forum shopping, pro-corporate bias, and overcrowded federal courts.<sup>75</sup> Constitutional considerations ranged from Article III's language and purpose to concerns about the ef-

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<sup>71</sup> See *id.* at 109-11; see also *Erie*, 304 U.S. at 77 nn.20 & 21 (collecting congressional bills and hearings related to the proposed elimination of diversity jurisdiction or abrogation of *Swift*).

<sup>72</sup> See H.R. 4526, 72d Cong. (1932); H.R. 11508, 72d Cong. (1932); H.R. 10594, 72d Cong. (1932).

<sup>73</sup> For good summaries of the debate, see Hessel E. Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A. J. 71 (1933); Yntema & Jaffin, *supra* note 66, at 879-89.

<sup>74</sup> The many law review articles critical of *Black & White Taxicab* focused on policy and constitutional considerations, not jurisprudential theories. See George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356, 362-64 (1933); Charles N. Campbell, *Is Swift v. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction?*, 18 A.B.A. J. 809, 810-11 (1932); Charles I. Dawson, *Conflict of Decisions Between State and Federal Courts in Kentucky, and the Remedy*, 20 Ky. L.J. 3, 4-5 (1931); Armistead M. Dobie, *Seven Implications of Swift v. Tyson*, 16 Va. L. Rev. 225, 229-36 (1930); J.B. Fordham, *Note, The Federal Courts and the Construction of Uniform State Laws*, 7 N.C. L. Rev. 423, 428-29 (1929); Jeff B. Fordham, *Swift v. Tyson and the Construction of State Statutes*, 41 W. Va. L.Q. 131, 134 (1935); Frankfurter, *supra* note 65, at 524-30; Raymond T. Johnson, *State Law and the Federal Courts*, 17 Ky. L.J. 355, 358-65 (1929); Thomas W. Shelton, *Concurrent Jurisdiction—Its Necessity and Its Dangers*, 15 Va. L. Rev. 137, 146-50 (1928). A few of these articles quoted from Holmes's *Black & White Taxicab* dissent, see Dawson, *supra*, at 5-6; Dobie, *supra*, at 232-33; Frankfurter, *supra* note 65, at 527-28; Johnson, *supra*, at 362-63, but none of these articles except Dobie's pursued the jurisprudential theme, see Dobie, *supra*, at 232-36 (noting jurisprudential differences between *Swift* and Holmes's dissent in *Black & White Taxicab*), and none of them (including Dobie's) made a connection between *Swift*'s jurisprudential commitment and its constitutional implications.

<sup>75</sup> See articles cited, *supra* note 74; *Limiting Jurisdiction of Federal Courts: Hearing on H.R. 10594, H.R. 4526, H.R. 11508 Before the House Comm. on the Judiciary, 72d Cong. 1-104 (1932)* [hereinafter *House Hearing*]; *Limiting Jurisdiction of Federal Courts: Hearings on S. 937, S. 939, and S. 3243 Before a Subcomm. of the Senate Comm. on the Judiciary, 72d Cong. 1-139 (1932)* [hereinafter *Senate Hearings*].

fect of diversity jurisdiction on due process.<sup>76</sup> Frankfurter, by his own account, saw the matter as one of "wise expediency," not of "principle."<sup>77</sup> His objection to *Swift*, stated in 1928 and repeated in a report to a congressional committee in 1932, was that it created a pernicious nonuniformity between the law applied in state and federal courts.<sup>78</sup> Along with others, he also doubted whether state courts were biased against nonresident defendants.<sup>79</sup> Warren's objection to diversity jurisdiction was based on his denial of a bias against nonresident defendants, backed by historical research about the origins of Article III's grant of diversity jurisdiction.<sup>80</sup> The participants' own reasons for opposing *Swift* therefore were based on policy or constitutional considerations, not jurisprudential concerns.

Nor did jurisprudential concerns likely move the author of *Erie*. The policy concerns of nonuniformity in law, forum shopping, a pro-corporate bias, and overcrowded federal dockets are what Brandeis had in mind when he says in *Erie* that the "benefits expected to flow from the [*Swift*] rule did not accrue," and when he notes *Swift*'s "defects, political and social" and its "mischievous re-

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<sup>76</sup> For the Article III arguments, see the sources cited, *supra* notes 74-75. On the latter point about due process, see House Hearing, *supra* note 75, at 64-65 (statement of Washington Bowie, representative of Fidelity & Deposit Co., to the effect that diversity jurisdiction is a matter of fundamental constitutional right); S. Rep. No. 72-530, at 7 (1932) (Senator Norris's argument that diversity jurisdiction protects property rights more than personal liberty).

<sup>77</sup> Frankfurter, *supra* note 65, at 506. Frankfurter would, of course, later suggest that rejection of *Swift* was premised on a change in legal theory. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) (*Erie* "overruled a particular way of looking at law . . .").

<sup>78</sup> See Frankfurter, *supra* note 65, at 528; House Hearing, *supra* note 75, at 100.

<sup>79</sup> See Frankfurter, *supra* note 65, at 526; House Hearing, *supra* note 75, at 103 (memorandum of Felix Frankfurter); see also S. Rep. No. 72-530, at 13 (asserting that state court prejudice no longer exists); House Hearing, *supra* note 75, at 97 (letter of Charles Warren) (stating that prejudice against nonresidents is "seldom" the reason for bringing suit in federal court); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 492-97 (1928) (proposing that no historical evidence of state judge prejudice against citizens of another state can be found); Charles Warren, *Corporations and Diversity of Citizenship*, 19 Va. L. Rev. 661, 685 (1933) (arguing the possibility of prejudice against out-of-state citizens has "largely disappeared"); cf. Senate Hearings, *supra* note 75, at 12-13 (statement of Attorney General Mitchell to the effect that prejudice against foreign corporations is implausible); *id.* at 36-37 (memorandum of Dean Clark stating that prejudice is not "proven").

<sup>80</sup> Warren, *supra* note 79; House Hearing, *supra* note 75, at 97.

sults."<sup>81</sup> To be sure, Brandeis joined in Holmes's dissent in *Black & White Taxicab* and quoted its statement that *Swift* offended hard legal positivism in *Erie*.<sup>82</sup> And Brandeis apparently read academic criticisms of *Swift*, including some based on positivism, in the course of drafting the *Erie* opinion.<sup>83</sup> But other biographical data suggests that his objection to *Swift* was to its social and political consequences, not its jurisprudential assumptions.

For one thing, a jurisprudential concern would have been out of character. Brandeis consistently subjected legal rules to cost-benefit analysis and rejected philosophical abstractions.<sup>84</sup> For Brandeis, judicial decisionmaking was not a process of "reasoning from abstract conception," but rather one of "reasoning from life" and taking "notice of . . . facts."<sup>85</sup> This supports suggestions that Brandeis was moved by his longstanding policy objections to diversity jurisdiction,<sup>86</sup> including the vices of forum shopping by corporate defendants and *Swift's* effect of reducing effective state sovereignty.<sup>87</sup> Brandeis's efforts to have Frankfurter press the case for

<sup>81</sup> *Erie*, 304 U.S. at 74-75.

<sup>82</sup> In assessing why Brandeis included quotations from Holmes's *Black & White Taxicab* dissent in *Erie*, it should be recalled that "in quite personal terms, *Erie* allowed Brandeis to pay public homage to Holmes, his departed friend and colleague, who for more than a quarter-century had been recognized as the major intellectual and constitutional antagonist of *Swift* and the federal common law." Purcell, *supra* note 67, at 225.

<sup>83</sup> See Freyer, *supra* note 7, at 132-33.

<sup>84</sup> See, e.g., G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* 163-64 (expanded ed. 1988).

<sup>85</sup> Louis D. Brandeis, *The Living Law*, 10 Ill. L. Rev. 461, 465 (1916).

<sup>86</sup> See Charles W. Eliot, Moorfield Story, Louis D. Brandeis, Adolph J. Rodenbeck, & Roscoe Pound, *Preliminary Report on Efficiency in the Administration of Justice* 28 (1914):

In those parts of the country in which resort to the federal courts in case of diversity of citizenship is common the concurrent jurisdiction of state and federal courts on the ground of diverse citizenship often causes much delay, expense, and uncertainty . . . Moreover, the differences in the view which state and federal courts respectively take as to the law applicable to the same case result in irritation which has somewhat impaired the usefulness of the federal courts in some localities.

*Id.*; see also Philippa Strum, *Louis D. Brandeis: Justice for the People* 378-79 (1984) (noting Brandeis's longstanding objections to diversity jurisdiction).

<sup>87</sup> One of Brandeis's biographers summarizes Brandeis's attitude as follows:

Brandeis was outraged by [the result in *Black & White Taxicab*]. It not only reflected an unfair discrimination in the implementation of the law; it also meant that the state could not control its own affairs. It confirmed his view that the

eliminating diversity jurisdiction further support the point.<sup>88</sup> Since Frankfurter's objections to *Swift* at this time were ones of policy, it is a fair inference that Brandeis's objections were too.

For all of these reasons, we think the historical connection between the truth of legal positivism and *Erie's* holding is doubtful. Lawrence Lessig's recent attempts to draw more complicated historical connections do not meet these concerns. Lessig describes a pattern which he calls the "*Erie-effect*."<sup>89</sup> This pattern has two parts. First, a changed conception of law occurs which makes a previous conception controversial. Second, the controversial nature of a previous conception of law renders the existing allocation of institutional authority illegitimate.<sup>90</sup> In order to minimize the costs of the resulting illegitimacy, Lessig argues, courts reallocate legal authority. Legal positivism figures in the first part of the "*Erie-effect*." According to Lessig, the rise of positivism made controversial a notion of common law as existing independently of social practices of one sort or another, including the decisions of state courts. Previously thought legitimate, the authority of federal courts to create common law became open to question. The Court in *Erie* reduced the costs of illegitimacy by requiring federal courts to follow the rules created by the decisions of state courts. Lessig concludes that beliefs about legal positivism occasioned a constitutional issue of judicial authority which *Erie* resolved.<sup>91</sup>

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jurisdiction of federal courts had to be reduced. So he joined Holmes's vigorous dissent [in *Black & White Taxicab*].

Lewis J. Paper, Brandeis 382 (1983); see also Philippa Strum, Brandeis: Beyond Progressivism 88-89 (1993) (explaining *Erie* as driven by Brandeis's fear of corporate power and his commitment to federalism and state experimentation).

<sup>88</sup> See Letter from Brandeis to Frankfurter (Apr. 21, 1928), in "Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter 330, 330-31 (Melvin I. Urofsky & David W. Levy eds., 1991) [hereinafter "Half Brother, Half Son"]; cf. Letter from Brandeis to Frankfurter (May 3, 1938), in "Half Brother, Half Son," supra, at 612, 613 ("With *Swift v. Tyson* removed, won't it be possible now to go further in limiting diversity citizenship jurisdiction?") (footnotes omitted).

<sup>89</sup> See Lessig, *Erie-Effects*, supra note 7, at 1787-95; Lawrence Lessig, Fidelity and Constraint, 65 Fordham L. Rev. 1365, 1410-11 (1997) [hereinafter Lessig, Fidelity and Constraint]; Lessig, Understanding Changed Readings, supra note 7, at 433-38.

<sup>90</sup> See Lessig, Fidelity and Constraint, supra note 89, at 1410.

<sup>91</sup> Lessig, *Erie-Effects*, supra note 7, at 1787-95; Lessig, Fidelity and Constraint, supra note 89, at 1400-11; Lessig, Understanding Changed Readings, supra note 7, at 426-37. As we mentioned above, see supra note 11, Lessig does not clearly distinguish the historical, the conceptual, and the normative connections between legal positivism and *Erie's* holding. And sometimes Lessig hedges on the historical con-

Understood as a causal explanation, the “*Erie*-effect” argument has significant problems. It does not explain the temporal gap between the reception of legal positivism and the decision in *Erie*. It does not explain the significance of the other competing causal factors or how positivism related to these factors. And it does not explain how a theory of law embraced by all parties to the debate and not ostensibly central to it nonetheless played a dispositive causal role. In addition, there are difficulties of detail. Central to the “*Erie*-effect” is a link between the reception of legal positivism and an increase in institutional costs associated with *Swift*. Showing that *Swift*’s application made the lawmaking authority of federal courts increasingly controversial and that *Erie* made it less so, by itself, says nothing about the role of legal positivism.<sup>92</sup> For the same can be said of many Supreme Court decisions that reduce institutional costs by fashioning constitutional doctrine to make legislative or judicial lawmaking less controversial. To support the “*Erie*-effect,” Lessig therefore must show that legal positivism caused the increase in institutional costs associated with *Swift*’s application. In particular, he must provide evidence indicating that legal positivism brought into doubt the legitimacy of federal courts making general federal common law. Otherwise, the causal link between a changed conception of law and *Erie* contains a gap. Lessig provides no such evidence.

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nection, acknowledging that *Erie* resulted from a variety of factors (one of which was legal positivism) of uncertain causal efficacy. See, e.g., Lessig, Fidelity and Constraint, *supra* note 89, at 1409 n.130; Lessig, Understanding Changed Readings, *supra* note 7, at 430.

<sup>92</sup> Although the institutional costs associated with *Swift* are well known, Lessig does not explain the mechanism that reduces illegitimacy costs by institutional reallocation. Reallocation to minimize illegitimacy costs assumes that all such costs are felt by the same actor, so that the actor allocates authority in such a way as to raise the fewest qualms about its political propriety. Otherwise, here as elsewhere, the actor’s decision can only reduce illegitimacy costs for itself, and is not guaranteed to minimize overall illegitimacy costs. The Supreme Court, lower federal courts, and Congress are different actors who felt different illegitimacy costs associated with *Swift*. The lower federal courts adopted common law rules which increasingly diverged from state law. Congress failed to remove or limit the original jurisdiction of federal courts in diversity cases or displace common law by statute. And the Supreme Court itself failed to overrule *Swift*. Because none of these institutions felt all the illegitimacy costs of *Swift*, *Erie* cannot be easily described as a case in which the Court was induced to minimize illegitimacy costs. The diffusion of illegitimacy costs combined with *Swift*’s longevity and precedential weight requires postulation of a mechanism connecting the illegitimacy costs and the Court’s decision in *Erie*.

It is worth repeating our point so far. We do not deny that there might be a historical link between beliefs about legal positivism and *Erie's* holding. The link appears initially plausible because it is suggested by the language in the *Erie* opinion. But the often-asserted historical connection rests on very little affirmative evidence and ignores considerable countervailing evidence. Legal positivism was embraced by both critics and supporters of *Swift*, it was not central to the debate about *Swift*, and few if any ever defended *Swift* on anti-positivist terms. In addition, there were powerful independent causal factors at work that were much more central to legal and political debates about the validity of the *Swift* regime. Finally, Holmes asserted a connection between legal positivism and a constitutional deficiency with little explanation, and theories about the nature of law almost certainly were not the primary influence on Brandeis. For these reasons, we find the historical connection implausible. Even if there is such a historical connection, however, it would not affect our claims that there are no conceptual or normative connections between legal positivism and *Erie's* holding. We now turn to these claims.

### III. CONCEPTUAL CONNECTIONS

Unlike the historical connection, which asserts a causal relation between courts' beliefs about legal positivism's truth and *Erie's* holding, a conceptual connection asserts a logical relation between legal positivism's truth and *Erie's* holding.<sup>93</sup> On this view, legal positivism is a premise in an argument whose conclusion is one of constitutional constraint on federal courts. Legal positivism might be sufficient for the *Erie* holding. Alternatively, it might be necessary. Or, most strongly, legal positivism might be necessary *and* sufficient for *Erie's* holding. Our contention is that *Erie's* commitment to legal positivism is conceptually independent of its constitutional holding. In other words, we claim that legal positivism is neither necessary nor sufficient for *Erie's* holding.

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<sup>93</sup> For possible assertions of a conceptual connection between *Erie* and legal positivism, see Lessig, *Understanding Changed Readings*, supra note 7, at 431 ("Change one idea in philosophy, transform in some small way a bit of legal language, and this century-old doctrine of *Swift* quickly falls away."); Casto, supra note 7, at 907-08 (*Erie's* embrace of positivism "virtually dictated the overruling of *Swift v. Tyson* and the creation of the *Erie* doctrine.") (footnotes omitted).

The argument for the claim is straightforward. Suppose legal positivism is true. Suppose, that is, that everything we call law must be traced to a sovereign source or otherwise be grounded in a social practice. The *Erie* holding still could be wrong. For the truth of legal positivism is consistent with any number of conceptions of the constitutional role of federal courts. It is consistent with the view that the sovereign in the form of the Constitution's Article III authorizes federal courts to make an independent judgment about the content of state law. (This is how some judges and commentators viewed *Swift*.<sup>94</sup>) It is consistent with the view that the sovereign requires federal courts to develop a national common law that is based on similar sources as state common law but that is neither state law nor federal law within the meaning of Article VI. (This is how others viewed *Swift*.<sup>95</sup>) And it is consistent with *Erie*'s holding that the Constitution requires federal courts in non-federal question cases to apply state law as interpreted by state courts. The differences between these views turn on differences of constitutional understanding. All three views are consistent with legal positivism's requirement that law be grounded in a sovereign source or social fact. Positivism alone says nothing about which roles are appropriate for federal courts.<sup>96</sup>

The point generalizes. *Erie*'s holding describes a constitutional constraint on the lawmaking powers of federal courts. Legal positivism states conditions for norms being law: namely, that they depend on features of a social practice. The conditions tell us what counts as law, but they do not tell us whether courts must apply law, or how the sovereign requires law to be identified, or how lawmaking authority is allocated. Legal positivism leaves these questions unanswered. The questions must be answered by particular constitutional systems. Whether United States federal courts have certain lawmaking power depends on whether they are sovereign or whether lawmaking power has been delegated to them

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<sup>94</sup> See supra notes 36-37 and accompanying text.

<sup>95</sup> See supra note 51 and accompanying text.

<sup>96</sup> Pro-*Swift* positivists argued that the *Swift* regime was correct because Article III authorized federal courts to make an independent and neutral judgment about the content of state law. See supra note 43. These commentators were not conceptually confused; their arguments were not illogical. If their arguments were wrong, they were wrong because they were bad readings of Article III, not because they were inconsistent with legal positivism.

by a sovereign via constitutional provision. Article I, Article III, and the Ninth and Tenth Amendments perhaps work to restrict the lawmaking power of federal courts. The truth of legal positivism alone does not. This shows that legal positivism is not a sufficient condition for *Erie's* holding.

Suppose now that legal positivism is false. The *Erie* holding still could be correct. This is because legal positivism defines an entirely general theory that holds for legal norms in all possible legal systems. Legal positivism, therefore, is false if there exists at least one possible legal system in which some legal norms do not depend on social practices.<sup>77</sup> *Erie's* holding, on the other hand, is limited. It describes a constraint on federal courts imposed by constitutional provisions within a particular legal system. Because the holding is constitutional, it does not extend past the particular legal system in which the relevant constitutional constraint operates. Hence, the only conditions on which *Erie's* holding depends are those obtaining in a particular legal system, not in all possible legal systems. Since the conditions need not (and likely do not) obtain in all possible legal systems, legal positivism might be false while *Erie's* holding is correct.

The former law of Louisiana illustrates the possibility. For a long time, section 21 of Louisiana's Civil Code required Louisiana courts to apply "natural law and reason, or received usages, where positive law is silent."<sup>78</sup> During this period Louisiana courts frequently applied natural law.<sup>79</sup> Louisiana thus took a different view

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<sup>77</sup> See Coleman, *supra* note 22, at 163; cf. Jules L. Coleman, *Rules and Social Facts*, 14 *Harv. J.L. & Pub. Pol'y* 703 (1991) (arguing that positivism is a conceptual claim to the effect that morality is not a condition of legality in all possible legal systems).

<sup>78</sup> La. Civ. Code Ann. art. 21 (West 1973). Louisiana's revision of the Civil Code in 1987 modified this provision to read: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." La. Civ. Code Ann. art. 4 (West 1993).

<sup>79</sup> See, e.g., *Spencer v. Children's Hospital*, 432 So. 2d 823, 825-26 (La. 1983) (relying on natural law and equitable principles to provide procedural devices where none exist under positive law); *Broussard v. Broussard*, 340 So. 2d 1309, 1311 (La. 1976) ("In the absence of express statutory language to the contrary, we chose to decide the case in accordance with the underlying principles upon which our community system is based, natural law and reason."); *West v. Ortego*, 325 So. 2d 242, 248 (La. 1975) (holding that, since no positive law governed distribution of settlement moneys, resort to natural law was "in order"); *Farris v. LaMont*, 425 So. 2d 970, 971 (La. Ct. App. 1983) (using natural law and equity in absence of positive law to forbid lawyer

of what counts as law than did Holmes and company. But *Erie's* holding did not in any way impugn the validity of Louisiana's legal system or counsel less respect for Louisiana law. *Erie* required federal courts sitting in diversity in Louisiana to apply natural law when there was no controlling positive Louisiana law.<sup>100</sup> This shows that *Erie's* holding rests on a constitutional command and not on the truth of legal positivism.

It is no response here to say that Louisiana's commitment to natural law was consistent with legal positivism because it was authorized by Louisiana's sovereign command in section 21 of the Civil Code. *Erie* would have required application of natural law even if Louisiana state courts applied natural law by judicial fiat rather than legislative authorization. Of course, a positivist could argue that in this circumstance, the sovereign authority was the state judge that incorporates natural law into the state's legal system. But this move is fatal to the conceptual connection. For under this view, even an extreme natural law interpretation of the *Swift* regime would be consistent with legal positivism because the sovereign voice of the United States Supreme Court applied the general common law. And this in turn shows that legal positivism is consistent with *Swift* and is not a sufficient condition of *Erie's* holding.

There is a plausible but defective strategy for preserving positivism's relevance to *Erie's* holding. One could say that it is by virtue of legal positivism's truth that constitutional constraints can insist on a federal or state authority for judicial lawmaking. Both federal and state authority ultimately rest on social practices of one sort or another—both are ultimately social sources of law. Unless federal and state authority are instances of law, constitutional constraints would not be constraints of law and would not operate. Constitutional constraints, on this view, are parasitic on the truth of legal positivism. Since *Erie's* holding depends on constitutional constraints, the holding depends on positivism being true. The point can be expressed in terms of Austinian positivism alone. Law must be grounded in a sovereign command. The sovereign sources

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from profiting from his own mistakes).

<sup>100</sup> See, e.g., *Williams v. Humble Oil & Refining Co.*, 432 F.2d 165, 167, 170 n.5 (5th Cir. 1970), cert. denied, 402 U.S. 934 (1971); *Grigsby v. Coastal Marine Serv.*, 412 F.2d 1011, 1025-28, 1038 (5th Cir. 1969); *Lee v. Hunt*, 483 F. Supp. 826, 841-42 (W.D. La. 1979), aff'd 631 F.2d 1171 (5th Cir. 1980).

in the United States are the state governments and the federal government. Positivism thus requires federal courts to apply either state or federal law. By recognizing the obvious dependence of *Erie's* holding on constitutional considerations while preserving legal positivism's relevance to them, this strategy insulates *Erie's* holding from the irrelevance claim.

This insulation strategy is defective.<sup>101</sup> It gets things almost exactly backwards. It is not in virtue of positivism that constitutional constraints require federal courts to look to federal or state authority for lawmaking. At most, constitutional constraints direct courts to endorse legal positivism, not the other way around. If the Constitution requires federal courts to apply federal or state law, it does so by virtue of constitutional text and a practice of regulating the exercise of political power by reference to that text, not legal positivism. Federal courts have no allegiance to legal positivism, or any other theory of law, unless the Constitution says so. In fact, it is conceivable that the Constitution could embrace a theory of law other than positivism. Imagine, for instance, that the Constitution provided that "law need not be grounded in a sovereign source or social fact, and federal courts can apply natural law." The truth of legal positivism then would not require courts to apply only law grounded in a sovereign source or social fact.<sup>102</sup> This possibility means that it is the Constitution that makes legal positivism relevant, if at all, and not vice versa.

The point can be put more generally as follows. Call the constitutional constraint on the power of federal courts to make general common law "C." If *Erie* is correct, the Constitution requires C.

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<sup>101</sup> One reason it is defective is that, as we argued above, *supra* pp. 123-24, even if legal positivism required federal courts to apply state or federal law, it would say nothing about what the appropriate sources of law were. It is perfectly consistent with legal positivism for the Constitution to require federal courts to make an independent judgment about the content of state law. Thus, even if legal positivism requires recourse to the Constitution as the sovereign source of lawmaking and law allocation in the United States, legal positivism says nothing about the actual allocation of lawmaking power under the Constitution.

<sup>102</sup> One might respond that the application of natural law is consistent with legal positivism here because the truth of legal positivism requires courts to follow the constitutional command. This response, like the similar response to Louisiana's application of natural law, proves too much and ultimately undermines the conceptual connection by making everything—including *Swift*—consistent with legal positivism. See *supra* p. 125.

C, however, need not state a constraint of law, as the insulation strategy wrongly supposes. For C's character as a constraint does not derive from its status as law. Rather, the constraint is the product of the Constitution and a practice of regulating the exercise of political power by reference to the Constitution. (The practice includes an oath of office to uphold the Constitution.) And whether the Constitution and the underlying practice are instances of law depends on what conditions of legality turn out to be. Because C's constraint derives from the Constitution and the Constitution may or may not be law, C may or may not state a legal constraint. Still, C's status as a constraint is unaffected. For if C is a legal constraint, then it states a legal restriction on the law-making authority of federal courts. If it is not a legal constraint, C still operates as a restriction, only now not as a legal constraint on the authority to make law. In both cases, C functions as a restriction, according to the *Erie* holding. C's status as constraint on the exercise of governmental power therefore is unrelated to its status as law. So C's restriction on the lawmaking power of federal courts does not depend on the truth of jurisprudential theses such as legal positivism.

Another strategy for preserving a conceptual connection is to alter the version of legal positivism at work. Instead of "hard" positivism, it might be thought that "soft" positivism could maintain the connection between positivism and *Erie*'s holding. "Soft" positivism, recall, allows social practices upon which the existence of law depends to incorporate moral principles. One might think that moral principles require that common lawmaking authority not be lodged in federal courts. The strategy fails for at least three reasons. First, "soft" positivism's truth does not entail that social practices *must* resort to moral principles. This is a contingent matter, true in a particular legal system. "Soft" positivism, by allowing law to incorporate moral principle, does not require it. Second, it is a stretch from the possibility that social practice incorporates resort to moral or political principle to the particular moral or political principle needed to make the *Erie* holding correct. *Erie*'s holding requires a principle about the morally prescribed allocation of common lawmaking authority among branches of government. Even if such a moral principle exists—and it's doubtful—the principle is a matter of substantive moral theory, not of

the conceptual requirements of law. Third, even if "soft" positivism included a moral principle prohibiting federal common law-making power, it would not match up with *Erie's* holding. This is because "soft" positivism is a perfectly general thesis, and, as a conceptual truth, holds for all possible legal systems and decision-makers. Therefore, the moral principle supposedly prohibiting federal common lawmaking also would prohibit common lawmaking by state courts. *Erie's* holding recognizes a distinction among decisionmakers that "soft" positivism does not recognize. A less restrictive version of legal positivism does not therefore maintain a conceptual connection between positivism and *Erie's* result.

In sum, legal positivism's truth is neither necessary nor sufficient for *Erie's* holding. Legal positivism is thus conceptually irrelevant to *Erie*. To the extent that it suggests otherwise, the language of Brandeis's opinion is deceptive.

#### IV. NORMATIVE CONNECTIONS

A normative connection is another possible relation between legal positivism and *Erie's* holding. This connection is one of justification. It says that, whatever else might provide a good reason for *Erie's* holding, the truth of legal positivism provides additional support or authority for the holding. Articles I and III, the Ninth and Tenth Amendments, and constitutional principles of federalism and separation of powers might restrict the common lawmaking authority of federal courts. The normative connection views legal positivism's requirement that law depends on a sovereign command or social practices as a further reason for the same conclusion.

Arguments for the normative connection begin with the assumption that *Swift* commits itself to a belief in or application of law not grounded in a sovereign source or social practice. They then claim that legal positivism's requirement that law must be traced to the act of a sovereign or some social fact undermines *Swift* and provides a good reason for *Erie's* holding. At this point the normative connection has several versions. Some versions say that legal positivism limits courts to applying the sovereign's command, and the relevant sovereign command—the United States Constitution—requires federal courts to apply state or federal law. Other versions say that the Constitution obligates federal courts to apply state or federal law, and legal positivism requires this law to be

grounded in the sovereign commands of the state government or the federal government.

These claimed normative connections fail for many of the same reasons as the conceptual connection. If, as Holmes asserted, the *Swift* regime rested on a commitment to natural law (or a rejection of legal positivism), then the truth of legal positivism might be a reason to reject the *Swift* regime so understood. But even assuming the correctness of this probably-unfair characterization of the *Swift* regime,<sup>103</sup> it does not follow that the truth of legal positivism is a reason to embrace *Erie's* holding. As explained above, any number of constitutional arrangements are consistent with legal positivism, and legal positivism by itself does not provide a reason to pick and choose among them. Indeed, even though legal positivism might provide a reason to reject the extreme natural law interpretation of *Swift*, it does not provide a reason to reject the various other understandings of the identical *Swift* regime held by Corbin and company that are consistent with legal positivism. Legal positivism cannot begin to tell us which of many possible constitutional understandings about the allocation of state and federal power are correct. Only the Constitution can do so.

The argument by now should be familiar. Legal positivism, if true, is a truth about law, not an evaluation of the merits of federal courts creating general federal common law. *Erie's* holding, on the other hand, concerns the restrictions on federal courts' lawmaking powers. Because legal positivism is a position about what constitutes law while *Erie* concerns the proper role of federal courts in lawmaking, legal positivism has nothing to say about the latter. It is one thing for law to depend on social practices of various sorts. Whether it is a good thing, or constitutionally compelled, that federal courts not create general federal common law is another matter. The latter is a substantive moral or constitutional position that is the conclusion of a normative argument about the legitimacy of allocating lawmaking authority to federal courts. The former is a conceptual claim about law. Legal positivism only makes the conceptual claim and has nothing to say about the normative argument. The move from legal positivism's truth to the

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<sup>103</sup> See *supra* text accompanying notes 35-37.

normative (constitutional) position embedded in *Erie's* holding is a simple non sequitur.

One strategy to preserve a normative connection between legal positivism and *Erie's* holding is to alter the working notion of legal positivism. Legal positivism could be understood not as a conception of law but as a view about proper judicial decision. According to this understanding, sometimes called normative or adjudicatory positivism, judges should decide cases by invoking materials which derive their authority from a sovereign command or social facts.<sup>104</sup> Normative positivism permits decision by appeal to legal rules in force but prohibits case resolution by moral judgments. Normative positivism might appear to make some sense of *Erie*. The Constitution divides lawmaking authority between the federal political branches and the states. It does not allocate lawmaking authority to federal courts. The division is underwritten by the extra-constitutional practice of judicial recourse to the document's provisions. Therefore, constitutional provisions limit federal courts' common lawmaking powers. Normative positivism's prescription to decide cases by materials ultimately authorized by social facts supports this conclusion.

The argument has a lot going for it. It is directed at the authoritative sources of law under the Constitution and away from general conditions of legality. Normative positivism also might be historically and politically important to the result in *Erie*. *Erie* followed a series of cases in the first quarter of the twentieth century in which federal courts created law considered socially or politically regressive.<sup>105</sup> Progressive judicial lawmaking could occur more broadly at the state level if the common lawmaking powers of federal courts were restricted. Requiring that lawmaking have both a legislative source at a federal level and a legislative or decisional source at a

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<sup>104</sup> See Gerald J. Postema, Bentham and the Common Law Tradition 328-36 (1986); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991); Frederick Schauer, Rules and the Rule of Law, 14 Harv. J.L. & Pub. Pol'y 645, 677-78 (1991); Jeremy Waldron, Kant's Legal Positivism, 109 Harv. L. Rev. 1535, 1541 (1996); Jeremy Waldron, The Irrelevance of Moral Objectivity, in *Natural Law Theory: Contemporary Essays* 158, 161-62 (Robert P. George ed., 1992).

<sup>105</sup> See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910); *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905).

state level helps achieve this end. By having judicial decision rely on particular sorts of legal rules backed by social facts, the requirement is an application of normative positivism.

This is a plausible but unsuccessful attempt to save the normative connection. For one thing, the strategy succeeds by dropping a commitment to legal positivism and substituting normative positivism, a different thesis. Legal positivism is a claim about the conditions necessary for a norm to be a legal norm—conditions of legality. Normative positivism is a thesis about how judges should decide cases. A claim about the nature of legal norms does not entail an insistence that legal decision proceed from materials authorized by social facts. By dropping a commitment to legal positivism, the strategy asserts a different normative connection.

More important, on its own terms, the strategy fails. This is because normative positivism does not provide a good reason for *Erie's* holding either. *Erie* prohibits federal courts from making federal common law while leaving to states the authority to allow state courts to make common law. But normative positivism, if correct, places the same restriction on all judicial decisions, whether federal or state courts are involved. Normative positivism, after all, requires judicial decision to proceed from materials backed by a sovereign command or (unspecified) social facts, not just particular courts or issues. It cannot distinguish between federal and state courts. Hence what goes for federal courts goes for state courts as well: If positivism supports prohibiting federal courts from common lawmaking, it supports the same prohibition in the case of state courts. Since *Erie's* holding prohibits only common lawmaking by federal courts, normative positivism does not accurately describe the association between it and the holding in *Erie*.

## V. IMPLICATIONS

Our claim that legal positivism is conceptually and normatively irrelevant to *Erie's* holding has several implications.

1. The irrelevance claim bears indirectly on the claimed historical connection between the reception of positivism and *Erie's* holding. If *Erie's* holding is both conceptually and normatively independent of legal positivism, then the historical connection is less likely than otherwise. The historical connection attributes to the

Justices who decided *Erie* a belief that legal positivism had a conceptual or normative implication for *Erie's* constitutional holding. If our irrelevance claim is right, the Justices' beliefs were false. It is, of course, possible that the Justices held false jurisprudential beliefs. But it is unlikely, especially in light of the competing explanations for *Erie's* holding, as well as the fact that critics and proponents of *Swift* alike embraced positivism. Both sides were perfectly clear that their positions rested on views about the constitutional or policy basis for federal common lawmaking by federal courts. Given the irrelevance claim and the historical evidence, a historical connection between legal positivism and *Erie* is less likely than if the irrelevance claim were false.

2. The irrelevance claim bears on philosophical criticisms of the opinion in *Erie*. George Rutherglen, for instance, thinks *Erie's* holding relies on legal positivism. He says that positivism is the "linchpin" of the opinion in *Erie* and that positivism must be rejected.<sup>106</sup> Rutherglen thinks so because he believes that *Erie's* reliance on legal positivism creates a paradox, and that this paradox is a reason for rejecting the reliance. The paradox, as he presents it, goes as follows.<sup>107</sup> Positivism requires that law have a source in constitutional provisions, statutes, or prior decisions of officials having political power. *Erie* in turn requires that federal law have its source in state or federal law. Since both requirements are perfectly general, they also apply to the decision in *Erie* itself. But *Swift* had a source in federal law, authorizing federal courts to create general common law. It stated a rule of decision that federal courts recognized for almost a hundred years. *Erie*, on the other hand, overruled *Swift* but lacked the pedigree in federal law to do so. *Erie* therefore lacks the pedigree its positivism insists that all law must have. Hence Rutherglen's paradox: If *Erie* relies on legal positivism, its own result is incorrect. If the result in *Erie* is correct, *Erie* does not rely on legal positivism. Rutherglen concludes that the paradox created means that *Erie's* holding must reject positivism and rely on constitutional justifications alone.

Part of Rutherglen's conclusion is no doubt correct: *Erie's* holding can be defended on constitutional grounds alone. But his

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<sup>106</sup> Rutherglen, *supra* note 7, at 292-93.

<sup>107</sup> See *id.* at 291-92.

supporting argument is unconvincing. One difficulty is that the paradox he describes is apparent only, not genuine. Even if *Erie* relies on legal positivism's truth, its result may still be correct. This is because constitutional principles could be the source which withholds from federal courts the authority to make general federal common law. If so, *Erie* would have the pedigree that positivism insists all law contain. *Swift* and its progeny, on the other hand, could lack a pedigree in that the lawmaking powers allocated to federal courts by the Constitution did not allow them to make general federal common law. To put the point in Hart's terms, the rule of recognition then-existing in the United States could treat the rule announced by *Swift* as invalid. If so, federal courts were simply mistaken in relying on *Swift's* authority as a source of law.<sup>108</sup> Hence the decision in *Erie* may still be correct even if it relied on the truth of legal positivism. Rutherglen's paradox is created only because he assumes that *Erie* itself had no support in contemporary authoritative sources. The assumption is controversial and no part of a bare commitment to legal positivism. Because the assumption need not be made, the paradox generated by *Erie's* supposed reliance on positivism is merely apparent.

The more serious difficulty with Rutherglen's paradox is that *Erie's* holding does not rely on legal positivism in the first place. It relies only on constitutional principles, probably about the allocation of lawmaking powers between federal and state governments, and possibly within the federal government.<sup>109</sup> Rutherglen's paradox begins with the assumption that *Erie* relies on positivism and insists that positivism's strictures be applied to the decision in *Erie* itself. Since the irrelevance claim shows that this assumption is false, the truth or falsity of positivism does not embarrass *Erie's* holding.

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<sup>108</sup> Rutherglen might say that an item cannot be a source of law unless it is recognized as such by public officials. He might therefore conclude that because *Swift* was recognized as consistent with constitutional principles, *Erie* was unsupported by a source of law. This tack is implausible because it wrongly conflates a source of law and the identification of that source. As long as public officials sometimes can be mistaken as to the latter, the distinction remains. The distinction preserves the possibility that *Swift* in fact lacked, and *Erie* in fact was backed by, a source in constitutional principle.

<sup>109</sup> See Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 708-09 (1995); Allan R. Stein, *Erie* and Court Access, 100 Yale L.J. 1935, 1941-42 (1991).

3. The irrelevance claim also informs debates about the doctrinal implications of *Erie's* holding. These debates often assume that *Erie's* embrace of legal positivism is relevant to their resolution. The irrelevance claim suggests otherwise. Because legal positivism is conceptually and normatively irrelevant to *Erie's* holding, it has nothing to say about the doctrinal consequences of that holding. Disputes which turn on the implications for constitutional doctrine of *Erie's* supposed commitment to positivism are therefore misguided.

Consider, for example, the debate about what *Erie* requires federal courts to do when the state law they are supposed to apply is ambiguous or unclear. Settled law requires federal courts to predict how the state's highest court would rule on the matter.<sup>110</sup> Bradford Clark has recently suggested that this predictive approach is in tension with *Erie's* legal positivism.<sup>111</sup> Clark claims that "*Erie* employed a positivist conception of state law, under which such law consists exclusively of sovereign commands . . ." <sup>112</sup> He argues that *Erie's* embrace of legal positivism informed its constitutional principles of judicial federalism in a way that requires federal courts faced with ambiguous or undeveloped state law to either (a) rule against the party who bears the burden of persuasion or, preferably, (b) certify the question of law to the highest court of the state.<sup>113</sup>

We are unsure precisely what role is played by legal positivism and what part is played by the Constitution in Clark's scheme. But it is clear that legal positivism alone has no consequences for this debate. A predictive approach to ascertaining state law enjoins a federal court to discern state law in a particular manner—by prediction. Legal positivism is a thesis about the nature of law, not about how judges ought to go about discerning it. Hence legal positivism is perfectly consistent with a predictive approach to ascertaining state law. Because positivism has nothing to say about how law is to be discerned, it is also consistent with Clark's pre-

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<sup>110</sup> See Dorf, *supra* note 109, at 695.

<sup>111</sup> Clark, *supra* note 7, at 1462-64. Dorf, too, attacks predictivism in this context, although he expressly eschews reliance on *Erie's* supposed jurisprudential commitments. See Dorf, *supra* note 109, at 707-09.

<sup>112</sup> Clark, *supra* note 7, at 1462.

<sup>113</sup> *Id.* at 1535-64.

ferred highly deferential approach. In other words, both ascertaining state law by prediction and Clark's approach are compatible with the view that law is a command of a sovereign or, more generally, that law depends on social facts.<sup>114</sup>

Another context in which commentators have tried to gauge *Erie*'s practical consequences by reference to legal positivism concerns the domestic legal status of customary international law. Customary international law is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>115</sup> Prior to *Erie*, United States courts applied customary international law in the absence of domestic authorization as non-federal general common law of the sort applied in *Swift*.<sup>116</sup> *Erie* overruled *Swift* and declared that "[t]here is no federal general common law."<sup>117</sup> This raises the question about customary international law's domestic legal status after *Erie*. Can courts apply customary law as they did before *Erie* in the absence of domestic authorization? Or must there be some authorization in state or federal law for federal courts to apply customary international law?

This issue has been much mooted in recent years.<sup>118</sup> A. Mark Weisburd has argued that *Erie*'s commitment to legal positivism resolves the controversy.<sup>119</sup> He reasons as follows:

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<sup>114</sup> Clark's article can be read to recognize the irrelevance of legal positivism to this issue. Clark acknowledges that the "Supreme Court's embrace of legal positivism . . . is not sufficient to explain the Court's decision," and that the Court could have embraced legal positivism and reached different conclusions about the common law powers of federal courts. *Id.* at 1481-82. The Court rejected these other possibilities, according to Clark, because it was "compelled [to do so] by a basic feature of the constitutional structure—judicial federalism," *id.* at 1482, and for the rest of Clark's analysis it is this constitutional principle, and not legal positivism, that does the analytical work. Clark's supplementation of his argument based on *Erie*'s positivism with an argument based on judicial federalism thus might bring him in agreement with our point that legal positivism is not relevant—as constitutional and policy arguments are—to the question of how federal courts must identify state law.

<sup>115</sup> Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

<sup>116</sup> See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 822-26, 849-52 (1997).

<sup>117</sup> *Erie*, 304 U.S. at 78.

<sup>118</sup> Some courts and commentators rely on pre-*Erie* precedents applying customary international law as non-federal general common law for the proposition that customary international law is post-*Erie* federal common law. See, e.g., *Filartiga v.*

[T]he human authority that creates customary international law is the collective international community. That community makes law by employing mechanisms as positivistic as those the states employ. Thus, applying rules developed under the authority of the international community . . . incorporates the insight from *Erie*, that human agency creates law, and looks to the appropriate agency to determine a particular law's content.<sup>120</sup>

Weisburd argues here that the domestic application of customary international law in the absence of authorization by the state or federal government is consistent with *Erie's* holding because customary international law is consistent with legal positivism. But satisfaction of legal positivism does not satisfy *Erie's* holding. Otherwise, federal courts could apply any number of laws—the law of England, or of the American Arbitration Association, or of the Elks Club of Little Rock, Arkansas—in the absence of state or federal authorization to do so. More important, legal positivism says nothing about the allocation of legal authority within the United States or between international law and the United States. Weisburd's analysis thus begs the crucial question of when and why a court “looks to the appropriate agency to determine a particular law's content.”<sup>121</sup> *Erie's* constitutional holding says that state or federal law must supply the authorization for federal courts to apply customary international law.<sup>122</sup> It is irrelevant whether customary international law itself satisfies legal positivism.

Legal positivism is similarly irrelevant to the many other puzzles about the implications of *Erie's* holding. Does *Erie's* holding require federal diversity courts to apply state choice of law rules? The Court decided that it did because otherwise, “the accident of

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Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Jeffrey M. Blum & Ralph G. Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Pena-Irala*, 22 Harv. Int'l L.J. 53, 57-58 (1981). Others contend that courts apply customary international law as a species of the federal common law of foreign relations that is justified by the structure of the Constitution. See, e.g., Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After *Erie*, 66 Fordham L. Rev. 393 (1997). Yet others have questioned whether customary international law is federal common law in the absence of constitutional or statutory authorization. See Bradley & Goldsmith, *supra* note 116.

<sup>119</sup> A.M. Weisburd, State Courts, Federal Courts, and International Cases, 20 Yale J. Int'l L. 1, 41 (1995).

<sup>120</sup> *Id.* at 51.

<sup>121</sup> *Id.*

<sup>122</sup> See Bradley & Goldsmith, *supra* note 116, at 853-54.

diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."<sup>123</sup> Legal positivism would have had nothing to say to this issue; the application of state or federal choice-of-law rules would have been consistent with it. The same goes for the Court's test for distinguishing between substance and procedure for *Erie* purposes. The Court has resolved this problem differently over the years, first asking whether it "significantly affect[ed] the result of a litigation for a federal court to disregard a law of a State that would be controlling" in a state court action,<sup>124</sup> later engaging in a balancing of state and federal interests,<sup>125</sup> and finally settling on a "twin aims" test that considered "discouragement of forum shopping and avoidance of inequitable administration of the laws."<sup>126</sup> In these cases the Court never considered the relevance of legal positivism. And with good reason, since legal positivism does not speak to this issue.

These points generalize. *Erie's* holding raised many puzzles about the proper allocation of state and federal authority in our constitutional system. But legal positivism has nothing to say to these issues: It is a general theory of law that does not speak to the question about the allocation of lawmaking authority in the United States or any other legal system. Commentators who attempt to derive something about *Erie's* implications by recourse to legal positivism thus commit a sort of category mistake.

4. We have argued that *Erie's* holding has nothing to do with jurisprudential conceptions of law. This argument by itself says nothing about *Erie's* bearing on other jurisprudential questions, including the nature of judicial decision. But our analysis suggests that *Erie's* holding also is irrelevant to these matters. Many commentators, for example, contend that legal realism is relevant to *Erie's* holding.<sup>127</sup> Legal realism, in one of many understandings of

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<sup>123</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

<sup>124</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

<sup>125</sup> *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536-38 (1958).

<sup>126</sup> *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

<sup>127</sup> See, e.g., Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688, 695 (1989) (book review) (claiming that *Erie* was "influenced" by legal realism); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 512 (1954); Kramer, *supra* note 7; Lessig, *Understanding Changed Readings*, *supra* note 7; cf. Hovenkamp, *supra* note 25, at 224 (calling *Erie* a "product" of legal realism).

the term, assumes that judges decide cases by making public policy.<sup>128</sup> For many of the same reasons that we are skeptical about connections between legal positivism and *Erie's* holding, we are skeptical about connections between legal realism and *Erie's* holding. The historical connection between legal realism and *Erie* is plausible, although almost certainly overstated. Few proponents of *Swift* denied that federal courts *made* general common law. And as Holmes's 1910 dissent in *Kuhn* pointed out, the Supreme Court had expressly committed itself to the view that "decisions of state courts of last resort make law for the State"<sup>129</sup> at least since its 1864 decision in *Gelpcke v. Dubuque*.<sup>130</sup> The *Swift* debate was about whether the Constitution, federal statutes, and optimal policy required federal court deference to state decisions, not about the nature of legal decision. There also is no conceptual connection between legal realism and *Erie's* holding. As with legal positivism, it is quite easy for legal realism to be true and *Erie* false, and vice versa.

The normative connection between the truth of legal realism and *Erie's* holding is also doubtful. At the very least, the truth of legal realism does not provide a reason for *Erie's* holding as straightforwardly as many believe. This is because both *Erie's* holding and what it replaced are consistent with legal realism. For legal realism is a perfectly general theory of judicial decisionmaking that applies to all judicial decisions. It says that all judicial decisions, no matter what the source of law, constitute policymaking. Before *Erie* federal courts applied a non-federal general common law that did not require deference to state judicial decisions. In doing so, according to realism, the courts were making public policy. *Erie's* holding requires federal courts to apply state law, including state judicial decisions, in cases not governed by federal law. This holding alters the sources of law in non-federal question cases. But if

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<sup>128</sup> See William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, at 266, 266-84 (Michael J. Lacey & Knud Haakonssen eds., 1991); Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 169-92 (1992); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* 82-84 (1973).

<sup>129</sup> 215 U.S. at 371 (Holmes, J., dissenting).

<sup>130</sup> 68 U.S. (1 Wall.) 175 (1863).

legal realism is true, federal courts continue to make policy when they “apply” state precedents.<sup>131</sup> Since legal realism is consistent with both *Erie*’s holding and what it replaced, realism cannot be a reason for adopting the holding.

Another, more plausible way to preserve the normative connection between legal realism and *Erie*’s holding is through the Constitution and federal statute. If the Constitution and the Rules of Decision Act require federal courts in non-federal question cases to defer to state policy, the truth of legal realism might be a good reason for federal courts to defer to state common law in addition to state statutes. Legal realism, on this view, tells federal courts that the federal command to apply state law includes a requirement to apply state judge-made law. In this sense, one might argue that legal realism provides a good reason for *Erie*’s prohibition on federal courts making general common law. This tack is initially plausible. It assumes that the Constitution and the Rules of Decision Act make the truth of legal realism relevant to the allocation of power in the federal system. The strategy also employs legal realism as a reason for *Erie* without denying that federal courts in non-federal question cases make policy.

Nonetheless, this argument overstates the significance of legal realism to *Erie*’s holding. Ultimately, *Erie*’s requirement to apply state decisional law must come from state or federal law, not from legal realism. For if the state legislature directed that judicial decisions are not to count as a source of state law, presumably *Erie* would not require a federal court to apply state decisional law. The same would be true if the Rules of Decision Act expressly said that its obligation did not extend to state judicial decisions (assuming the limitation was constitutional). These possibilities tell us that *Erie*’s directive to apply state judicial decisions derives from constitutional or statutory sources, not from jurisprudential positions on the nature of judicial decisionmaking. There are doubtlessly readings of federal and state law that would make the truth of legal realism relevant to the allocation of lawmaking power in our federal system. Whether state and federal law now does so is a

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<sup>131</sup> This is a theoretical point that has proven to be true in practice. As any seasoned litigator knows, the substantive and choice-of-law rules available in a federal diversity court differ in important ways from the substantive and choice-of-law rules available in the courts of the state in which the federal court sits.

matter of contested interpretation. But even if state and federal law make legal realism relevant in this way, it is the law of a particular legal system that is doing the justificatory work, not the truth of legal realism.

## VI. CONCLUSION

Doubts about the jurisprudential relevance of *Erie's* holding began early. Writing shortly after the case was decided, Corbin made short shrift of Holmes's dictum, recited in Brandeis's opinion, to the effect that the common law was not a brooding omnipresence in the sky.<sup>132</sup> The question, Corbin said, was never whether federal courts applied common law without authority. It was always how this common law was identified.<sup>133</sup> Clark signaled his doubt politely, finding that Holmes's jurisprudential positions were "not enough" to justify *Erie's* result.<sup>134</sup> We have argued that the decision's holding is conceptually and normatively independent of the truth of legal positivism. If the irrelevance claim is right, jurisprudential debates about the nature of law have no bearing at all on *Erie*.

There is a broader lesson here about the dangers of attempting to derive constitutional conclusions from theories of law. Constitutional provisions no doubt presuppose some views about the possibility of authoritative sources of law. They may also presuppose a position on the possible content of those sources. The Ninth Amendment and the Due Process, Equal Protection, and Privileges or Immunities Clauses, for example, may allow morality to count as an authoritative source of law. But most of the Constitution's provisions concern the extent of the power of government over people and the allocation of power between state and federal governments and among the federal branches. Here, where the distribution and extent of authority is in question, general considerations about the authoritativeness of norms are unhelpful. They are unhelpful because they do not restrict or even inform the allocation or extent of legitimate lawmaking. What makes a norm a legal

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<sup>132</sup> See Corbin, *The Laws of the Several States*, *supra* note 44, at 764-66.

<sup>133</sup> *Id.* at 765.

<sup>134</sup> See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 *Yale L.J.* 267, 275 (1946).

norm is one thing. Restrictions on the power of federal courts to make common law is another matter, having to do only with law-making authority. The latter is a question of institutional design and political theory, not the nature of law. In these contexts, at least, constitutional conclusions cannot be drawn from jurisprudential premises about the nature of law.

