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[Footnotes omitted]

## The New General Common Law

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There is an intriguing new development in legal theory. We are witnessing the emergence of a new school of theorists improbably urging the revival of the general common law. By “the general common law” I mean the law that was applied in federal courts under the doctrine of *Swift v. Tyson*, the case overruled by *Erie v. Tompkins*. But I mean something more than that as well. It has long been understood that the general common law, at least in early times, was applied not only in federal courts, but in state courts as well. And this was as true before *Swift v. Tyson* as it was for many years thereafter. By 1875, however, the general common law had become almost exclusively available in federal courts. The resultant dual governance of issues of state common law became an acute intrastate problem of the dual court system. This was the problem *Erie* solved in 1938.

One might imagine that anyone proposing to restore the *status quo ante* 1938 would have a very heavy burden of justification. The proponents of this strange revival, led by Judge Fletcher, our co-panelist, are pointing out that when all courts were applying the general common law, they were working harmoniously together not only to refine it substantively, but to make it uniform. These writers argue that a fair level of intrastate uniformity was achieved ~ notwithstanding Justice Brandeis’s argument to the contrary in *Erie*. This level of success, they argue, has not been matched by the post-*Erie* regime. Displacements of state law are occurring at least as frequently and abrasively under post-*Erie* federal common law as under pre-*Erie* general common law. All courts have resisted the fashioning of federal common law, preferring to reach for state law when they can. The upshot, even in fields supposedly preempted by federal law, has been a patchwork of governance, with the attendant ills *Erie* was supposed to cure.

These charges are true enough, but I believe this rather startling nostalgia for *Swift v. Tyson* is really the latest attack on federal common law. It is only the latest entry in the great ongoing debate over the propriety and legitimacy of federal common law. The new critics, like their predecessors, distrust federal common law. Perhaps they think it too activist, even in the hands of an increasingly conservative judiciary, whether or not it is deployed to further conservative aims. But now their

distrust extends to *state* common law as well. Perhaps they think it too generous to plaintiffs, even in the hands of an increasingly conservative judiciary. They are saying, “A plague on both your houses.” They have discovered a third option ~ the general common law.

Ironically, the new critics of federal common law thus find themselves attacking *Erie v. Tompkins* ~ *their old friend*. That, after all, is the logic of their situation. If one’s aim is to get back to where we were before *Erie*, *Erie* will have to be shoved out of the way. *Erie* holds that the general common law is unconstitutional. It is true that there will always be some commentators who do not take Justice Brandeis’s word for the “unconstitutionality of the course pursued” under *Swift v. Tyson*. Others are willing to take Brandeis’s formulation at face value, but confess themselves confused about the basis for it. But I think most writers now do see, and Justice Brandeis was quite explicit about this, that the nation has no power to do what federal courts were doing under *Swift v. Tyson*. There was no national power to prescribe rules of general common law applicable in a state. The nation could displace state law only with *federal* law, applicable in the *nation*. And such law would have to be genuine federal law, uniform and supreme, binding upon the states in their own courts. As Brandeis said in *Erie*, *except* in matters governed by federal law, the only law is the law of the state.

Since, however, the constitutional basis of *Erie* remains unclear to them, the new critics are attacking *Erie*’s philosophical rather than its constitutional underpinnings. They are not simply challenging *Erie*’s ideal of evenhandedness, and not simply broaching the questions whether the supremacy and uniformity of federal law are good things, or achievable, or even *matter*, although they are indeed challenging all of those assumptions. But more particularly, these postmoderns are deconstructing the American legal positivism that *Erie* inscribes upon the Constitution. American legal positivism is the Austinian idea that all law, even case law, must emanate from some sovereign.. That is the idea at the heart of *Erie*. Case law can be the law of the nation, a state, some identifiable country ~ but in American courts it must be “the articulate voice of some sovereign that can be identified.” That core insight of those who protested against “the course pursued” under *Swift*, most notably Justice Holmes, became the central teaching of *Erie*.

The cream of the jest is that in attacking *Erie*’s American legal positivism, the new critics are acknowledging that their old critique of federal common law, which was based on *Erie*, was spurious. So they have to acknowledge at last that, just as *Erie* commands that state common law apply when it applies, *Erie*, with the Supremacy Clause, requires that federal common law apply when *it* applies. Far from discrediting or delegitimizing federal common law, *Erie* authorizes and establishes it. *Erie*’s American legal positivism is the intellectual foundation of the post-*Erie* emergence of genuine federal common law. The source of *federal* common law, as distinguished from the source of *general* common law, is not ambiguous, but is the identifiable voice of the national sovereign. And., retrospectively, *Erie* furnishes the intellectual foundation for earlier deployments of federal decisional law. In admiralty, to take a signal example, it seems to have been understood quite early that the general maritime law was federal common law. We see this early understanding

explained late in *The Lottawanna* in 1874, and crystallized in *Southern Pacific R. Co. v. Jensen* in 1917. But it was only with *Erie* in 1938 that *Jensen* stood on firm ground. *Erie* identified general common law to the *state* sovereign, and illumined the fact that *Jensen* had identified general maritime law to the *federal* sovereign. After *Erie* federal common law became the articulate voice of the identified national sovereign, when it applied, just as state common law became the articulate voice of a state sovereign when it applied.

It is a further irony, as the new critics are discovering, that if they want to trade state common law for general common law, they must argue, and thus acknowledge at last, that there is no principle of federalism, in *Erie* or anywhere else, that makes state law universally applicable. There never was any principle of federalism, in *Erie* or anywhere else, that made state law preferable federal when federal law applied. As Brandeis put this, the only law is the law of the state, *except* in matters governed by federal law.

Moreover, since today's critics are pushing common law of *some* sort, as did their predecessors, it should have been admitted long ago that there are no principles of separation of powers ~ no democratic or majoritarian values, in *Erie* or anywhere else, that require permission from Congress before the judicial department can say what federal law is. To the contrary, *Erie* holds, quite explicitly, that case law cannot be put at a discount. And it is no business of the enforcing court, says Justice Brandeis, whether the law emanate from the sovereign's legislature or its highest court.

The serious task now facing the new proponents of general common law will be to confront the *real* constitutional issues. When *Erie* held that the general common law was unconstitutional, it was holding that the Constitution requires American legal positivism. That holding is supported today by a congeries of related constitutional arguments that were not made at the time. Again, recall *Erie's* holding that the nation had no power to prescribe general common law. This means that after *Erie*, even Congress could not authorize the general common law. Today this impotence matters even more than it did at the time of *Erie*. The Rehnquist Court has been vigorously reminding us that we are a nation of limited Article I powers. Specifically, there is surely no national power to *receive* the general common law. As Chief Justice Rehnquist pointed out in *Lopez* in 1995, a consolidated national governance over all things great and small would undermine our federalism utterly. That has always been a bedrock item of national faith, that the nation would not administer a general law of tort and contract, wills and estates. That would be the national consolidation we have always feared and guarded against.

Even more fundamentally, if we have our American legal positivism right, the general common law is as unconstitutional in state courts as in federal. True, *Erie* speaks to *federal* courts only. And it speaks, specifically, of the positivistic nature of *state* common law. But today there are due process arguments that extend American legal positivism to both sets of courts and both sets of laws, and clarify the necessity of so doing.

The Due Process clauses require that all law applied in our courts have at least minimum rationality. Specifically, American courts must find reasons for the choices

they make of which law to apply to a given issue. It must be the law of some relevant sovereign. And the courts must identify what it is about the chosen law itself, substantively, that makes it relevant. The chosen law must reflect a legitimate governmental interest. The chosen law must vindicate a rational policy concern of the governing sovereign.

Regrettably, every once in a while the Supreme Court seems to lose its bearings among these understandings. Here and there we find cases in which the Court has been unmindful of the need for rational bases for law ~ both for the choosing and the fashioning of it. The federal common law the Court administers in admiralty cases has recently given us a particularly unfortunate example. I am thinking of the *East River Steamship* case in 1986, and its progeny, the case of *Saratoga Fishing*.

*East River* acknowledged that the law of products liability had become cognizable in admiralty in cases below. But in approving and fashioning an authoritative federal rule, the Court barred recoveries in tort for damage caused by a defective product when the damage was only to the product itself, even when fault could be shown. There are plausible reasons for this rule at common law, spelled out in the *Restatement (Second) of Torts*; and a good number of states have adopted it. As Justice Blackmun explained in *East River*, it is important to keep tort and contract separate. The purchaser of a defective product can sue the seller on the contract. Limiting the purchaser to its contract claim protects the seller from damages that can seem unreasonable when liability is strict, certainly in cases where fault cannot be shown. Justice Blackmun argued the importance of keeping damages limited.

Courts have tended to go further in this direction than the Restatement contemplates. But from my point of view what is wrong with Justice Blackmun's position is not that courts purporting to follow such rules can deny recoveries in tort even when the purchaser is not in privity with the particular defendant, and even where fault can be shown. *East River* is wrong whether or not courts understand the position. But let us assume Justice Blackmun is right about the propriety of keeping contract and tort separate, and of limiting buyers to the terms of the seller's warranty when harm is merely to the product itself. Admiralty, however, may be different. Justice Blackmun acknowledged that the majority of admiralty cases in the Courts of Appeals had gone the other way. But he failed to explore these cases. In a footnote in *East River*, Blackmun shrugged off the work of the experienced admiralty judges below as having been exhibited mostly in fishboat cases. *East River* was not a fishboat case, and did not implicate concerns about a fisherman's right to a share of the catch. Any such policy concern was irrelevant to *East River*. But Justice Blackmun did not try to identify *relevant* national policies.

I doubt that there is a legitimate national maritime interest in keeping contract and tort separate. Those are concerns of state common law. To be sure, such a separation may well help to limit damages. But I doubt that there is a legitimate national maritime interest in limiting damages in products cases in admiralty. What national interest can there be in restricting a shipowner, like some "disappointed user" to warrantees of repair or replacement? A ship's turbine is not a toaster. Certainly, at least when fault can be shown, and perhaps even when it cannot, there are national deterrent and compensatory interests, concerns for persons and cargo aboard a ship,

that over the centuries have required a ship to be the insurer of everyone aboard her. Under our law, a ship does so insure, to the limit of its own value, and it must also throw into the kitty even the value of its receivables pending at the time of the injury. There are also overriding interests in the completion of a merchant vessel's voyage. These concerns are set at slight value by the unconsidered rule of *East River Steamship*. The problem is made even more acute with the 1997 case of *Saratoga Fishing*, in which the Court, by Justice Breyer, laconically decided that very often "the product itself" will be the ship itself. That is, the "harm to the product itself," for which, under *East River*, there can be no recovery in tort, will be deemed to be "harm to the ship itself," and no recovery will be available in tort, even where fault can be shown.

I doubt that there is a national maritime policy of encouraging damage to ships. A ship is *really* not a toaster. I see little or no national interest in protecting those who put unseaworthy ships with defective ships' machinery into the stream of navigation. There is surely no national policy of encouraging negligence on the part of those who should have known of the defect, acknowledged it, and taken care of it. In *Boyle v. United Technologies Corp.*, for example, the Court, by Justice Scalia, declined to provide a defense to military contractors in that particular situation. That is what national policy is. It is also hard to discern any national interest in withholding a tort remedy for damage to a defective product like the turbine in *East River*, at least in cases in which the product might pose substantial *risks* of further harms, whether or not those harms actually occur. A defective product such as a ship's turbine might well present a danger to navigation, or risk interruption of the voyage, harm to the ship, injuries to crew and other persons, or similar harms to structures on land, or to other vessels.

In recent years, the Supreme Court increasingly has been limiting admiralty recoveries at the expense of policies of remediation and safety, the traditional concerns of maritime law. In a fine article on the nature of admiralty litigation in the colonial and founding periods, Professor Casto has reminded us that traditional maritime policies are not all that traditional. On the other hand, we do find excellent "reason-for-the-rule" analyses in old cases, some going back almost two centuries. Consider, for example, *The St. Iago de Cuba*, an 1824 opinion in the Marshall Court by its frequent dissenter, Justice Johnson. Johnson says that the "whole reason" for proceedings in rem with priority of payment to privileged creditors is "to furnish wings and legs to the forfeited hull, to get back [to sea] for the benefit of all concerned; that is, to complete her voyage." To my ear this is real admiralty talk. The Court here is identifying what is good maritime policy.

In *Miles v. Apex Marine*, a famous wrong turn, Justice O'Connor remarked that "[m]aritime policy is different today." This is an age of statutes, she pointed out, and it is Congress that sets national maritime policy. Professor Allen has described the explosion of maritime legislation recently in useful detail. But statutes do not obliterate underlying traditional policies. Legislation is interstitial, and must be read against the broad background of the common law. Otherwise, chronic mistakes of statutory interpretation will be the result. In admiralty, we saw this happening, for example, in *Mobil Oil v. Higginbotham*, another wrong turn, a 1978 case authored by

Justice Stevens. There, legislation ~ the Death on the High Seas Act ~ had been enacted to fill a gap in common-law remedies. Yet Justice Stevens read the fact of the statute's narrow coverage woodenly, as if it had been intended to limit maritime case-law remedies not covered by it, rather than to supplement them.

In announcing the new product liability rules in *East River*, the Court, as we have seen, avoided thinking about national policy altogether. The Court did not look to possibly analogous federal cases or other legal material. We have already seen that the Court failed to work with existing federal case law in products cases below. And yet the *East River* Court did not rely on any particular state law, either. Instead, the Court was guided by the Restatement of Torts, and referred to cases arising in different states. Let's face it, this was not federal common law. Nor was it state common law. The name of the beast is "general common law." New critics, take notice. Here, apparently, is a post-*Erie* precedent for you.