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Donald L. Doernberg

Elisabeth Haub School of Law at Pace University

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Recommended Citation

Donald L. Doernberg, Juridical Chameleons in the "New Erie" Canal, 1990 Utah L. Rev. 759 (1990), <http://digitalcommons.pace.edu/lawfaculty/46/>.

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Juridical Chameleons in the "New *Erie*" Canal

Donald L. Doernberg*

Federal law is no juridical chameleon, changing complexion . It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them.¹

I. INTRODUCTION

Justice Jackson's famous concurrence in *D'Oench, Duhme & Co. v. FDIC*² is well known to all students of the federal courts. In the aftermath of *Erie Railroad v. Tompkins*,³ the federal courts⁴ and commentators⁵ alike have struggled to understand *Erie*'s implications. The struggle continues today. As Professor George Brown noted, "something is afoot with *Erie*."⁶

Erie is traditionally viewed as based primarily on concepts of federalism, seeking to define the proper boundaries of state and

* Copyright © 1990, Donald L. Doernberg, Professor of Law, Pace University. B.A., 1966, Yale University; J.D., 1969, Columbia University. The author wishes to acknowledge the thoughtful comments of his wife Cynthia A. Pope and of Professors Jay C. Carlisle and Barbara C. Salken on earlier drafts of this article. The author also gratefully acknowledges the research and editing assistance of Jeffrey Hoerter and Samuel Mazon of the class of 1991, and Ann Marie Collins, Jill Devine, Richard Ferrante, and Amy Schneider of the class of 1992.

1. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 471-72 (1942)(Jackson, J., concurring).

2. *See id.* at 465-75.

3. 304 U.S. 64 (1938).

4. The Supreme Court later wrestled with *Erie*'s suggestion that in diversity cases, matters of substance would be governed by state law and matters of procedure by federal law. *See, e.g.*, *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)(for *Erie* purposes, statutes of limitations are substantive because they are outcome-determinative); *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525 (1958)(three-part test subsumed *Guaranty Trust*'s outcome-determinative test); *Hanna v. Plumer*, 380 U.S. 460 (1965)(matters specifically dealt with in Federal Rules of Civil Procedure are not subject to three-part test of *Byrd*).

5. According to Professor Brown: "The [*Erie*] decision has spawned an enormous literature and the '*Erie* doctrine' has been called 'the central concern of an entire generation of academic lawyers.'" Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 617 (1984)(quoting Western & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980)).

6. *Id.*

federal law in federal court actions.⁷ Recently, however, a new vision of the *Erie* doctrine has emerged, characterizing *Erie* as based not only on federalism, but also on the doctrine of separation of powers within the federal government. The "New *Erie*" doctrine compels a far more restricted role for the federal courts in making common law.⁸

In *Cannon v. University of Chicago*,⁹ Justice Powell's dissenting opinion sketched out a broad view of separation of powers based on *Erie* that effectively would prevent federal courts from implying rights of action in statutes. Justice Powell argued that the judicial branch should not "assume policymaking authority vested by the Constitution in the Legislative Branch."¹⁰ Other Justices have joined in this vision, which has come to stand for a very stark view of separation of powers that grants the federal courts little, if any, power to create common law.¹¹

The New *Erie* doctrine, however, has become a doctrine of convenience, inconsistently applied by conservative and liberal Justices alike. It is the antithesis of a "neutral principle" of constitutional adjudication.¹² To use Justice Jackson's term, the federal laws are not the "juridical chameleons"—the Justices are.¹³ Part II of this Article discusses the old and the New *Erie* doctrines as articulated by the United States Supreme Court. Part III demonstrates the difficulty of limiting the New *Erie* doctrine to the single area of implied rights of action and shows how the broad brush with which the doctrine's proponents paint necessarily touches other areas, including abstention, admiralty, antitrust, labor law and federal proprietary rights. Part IV catalogues how the Justices

7. C. WRIGHT, LAW OF FEDERAL COURTS § 55, at 355 (4th ed. 1983) (*Erie* "goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government.").

8. Some commentators refer to the separation of powers view of *Erie* as the "New *Erie*." See Brown, *supra* note 5, at 618. This Article follows that convention.

9. 441 U.S. 677 (1979).

10. *Id.* at 743 (Powell, J., dissenting). Justice Powell also noted that as a matter of policy federal courts should avoid implying rights of action in statutes because "[r]ather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide." *Id.*

11. At one time or another all of the United States Supreme Court's recent members, Chief Justice Rehnquist and Justices Blackmun, Brennan, Marshall, O'Connor, Powell, Scalia, Stevens and White, have articulated or subscribed to New *Erie* sentiments. See *infra* Part IV

12. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

13. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring).

have changed their colors by relying on the New *Erie* doctrine in some instances but not even acknowledging its existence in other cases that are analytically indistinct. The Article concludes with the suggestion that federal courts have considerable common law powers, which, rather than being inconsistent with separation of powers, actually function to make exercises of congressional power more effective. Separation of powers is not offended when federal courts create common law, provided that these efforts are constrained by expressions of policy in positive law, the Constitution and federal statutes. Part V of this Article, therefore, offers a sharply modified view of the New *Erie* aspect of the separation of powers doctrine and briefly discusses the ramifications of its consistent application.

Unfortunately, the members of the Court seem uninterested in doctrinal consistency when they resort to New *Erie* principles.¹⁴ When the Justices ignore decisional rules in order to reach desired results in particular cases, the law in general, and New *Erie* principles in particular suffer. Ultimately, the institutional legitimacy of the Court suffers.

II. THE EMERGENCE OF TWO *Erie* DOCTRINES

A. The "Old" *Erie*

To call *Erie Railroad v. Tompkins*¹⁵ a landmark case certainly is to belittle its effect.¹⁶ It provoked extensive scholarly comment at the time and the flood of commentary has not diminished in the half century since.¹⁷ *Erie* confronted anew the question of what law

14. See Beermann, *Bad Judicial Activism and Liberal Federal Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053 (1990). Professor Beermann asserts that "the Court itself does not seem to care about separation of powers except insofar as it serves the Court's substantive goals." *Id.* at 1056. Professor Beermann is correct in his somewhat cynical assertion. Indeed, his accuracy is ironic because according to the proponents of the New *Erie* doctrine, it is illegitimate for the Court even to have substantive goals. See *infra* notes 28-63 and accompanying text.

15. 304 U.S. 64 (1938).

16. See C. WRIGHT, *supra* note 7, § 55, at 355 ("It is impossible to overstate the importance of the *Erie* decision.").

17. Several commentators wrote on *Erie* directly following the decision. See, e.g., Dye, *Development of the Doctrine of Erie Railroad v. Tompkins*, 5 MO. L. REV. 193 (1940) (after *Erie*, the problem whether choice of law rules are part of state substantive law is still unanswered); Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT. L. 740 (1939) (the widespread interest in *Erie* compels examination of the new doctrine's applicability to international law); Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938) ("many a federal judge may writhe in pain at the prospect of having to follow 'the last breath' of state judges"); Zengel, *The Effect of Erie Railroad v. Tompkins*,

should apply in diversity cases.

Almost 100 years before *Erie*, in 1842, a unanimous Court held in *Swift v. Tyson*¹⁸ that the federal courts were bound to apply only state statutory law, not what Justice Brandeis characterized as “the unwritten law of the State as declared by its highest court.”¹⁹ With respect to the unwritten law, the *Swift* Court found that the federal courts “are free to exercise an independent judgment as to what the common law of the State is—or should be.”²⁰ In *Erie*, the Court rejected *Swift*’s expansive view of federal courts’ latitude to select the governing law in diversity cases and substituted a restricted function of federal courts in such cases:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. 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. And no clause in the

14 TUL. L. REV. 1 (1939)(constitutional aspect of *Erie* will cause wide repercussions).

Even today, *Erie* continues to prompt comment. See, e.g., Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263 (1989)(*Erie* raised doubts about power of federal courts to make common law but various forms of federal common law have developed and flourished since *Erie*); Brown, *supra* note 5, at 617 (the Powell-Rhenquist New *Erie* doctrine serves important institutional values); Chayes, *Some Further Last Words on Erie*, 87 HARV. L. REV. 741 (1974)(a New *Erie* has emerged as a potent counterforce to judicial activism in nonconstitutional domain); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974)(widely accepted view of *Erie* improperly treats as a single command the Constitution, Rules of Decision Act and Rules Enabling Act); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964)(Justice Brandeis blazed way for uniform federal common law on issues of national concern); Field, *Sources of Law: The Scope of Federal Common Law* (pt. 1), 99 HARV. L. REV. 883 (1986)(power to create federal common law is much broader than generally assumed, and despite *Erie*, state law rarely operates of its own force); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985)(there is much to be gained from viewing all federal judicial lawmaking as forms of federal common law); Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974)(distinctive constitutional limits on judicial power constitute the essential unity underlying *Erie*); Weinberg, *Federal Common Law*, 83 NW. U.L. REV. 805 (1989)(fifty-one years after *Erie* legitimacy and propriety of federal common law remain uncertain); Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U.L. REV. 860 (1989)(*Erie* did not take away federal courts’ common law powers); Amar, *Law Story* (Book Review), 102 HARVARD L. REV. 688, 694-700 (1989)(discussing separation-of-powers doctrine and *Erie*).

18. 41 U.S. (16 Pet.) 1 (1842).

19. *Erie*, 304 U.S. at 71 (citing *Swift*, 41 U.S. (16 Pet.) at 18).

20. *Id.* (citing *Swift*, 41 U.S. (16 Pet.) at 18).

Constitution purports to confer such a power upon the federal courts.²¹

Justice Brandeis' majority opinion emphasized that the United States Constitution compelled the Court to overturn *Swift*.²² *Erie*, therefore, created de facto a presumption that state law would govern in diversity cases unless displaced by constitutional command or congressional enactment in an area of federal competence.²³

The Court was unanimous in reversing the result below, but not in overturning the *Swift* doctrine. Justice Butler, joined by Justice McReynolds, concurred on the ground that the record compelled a finding that the plaintiff was contributorily negligent, thus barring recovery. He criticized the majority for rendering an unnecessary constitutional decision.²⁴ Justice Reed concurred both in the result and in overruling *Swift*, but argued that it should be accomplished by revising the Court's construction of the Rules of Decision Act to include state decisional law rather than by making what he, like Justice Butler, saw as an unnecessary constitutional decision.²⁵

The Court, nonetheless, decided *Erie* on constitutional grounds. The majority opinion is written in constitutional terms, and the concurrences by Justices Butler and Reed viewed the majority opinion as declaring constitutional principles. The exact scope of the constitutional aspect of the decision is, however, less clear than it might be and *Erie* has been criticized on that basis.²⁶

21. *Id.* at 78.

22. *See id.* at 79-80. Justice Brandeis wrote:

In disapproving [*Swift*] we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine [of *Swift*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Id.

23. The *Erie* Court treated the substantive area involved as entirely outside the power of the federal government. *See id.* at 78. *See also infra* notes 200-08 and accompanying text (*Erie* not decided on separation of powers basis).

24. *See Erie*, 304 U.S. at 88 (Butler, J., concurring). According to Justice Butler, "[t]here is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case." *Id.*

25. *See id.* at 90-91 (Reed, J., concurring).

26. For example, Professor Wright argues:

Perhaps no aspect of the *Erie* decision so perplexed the commentators for many years as [the statement of *Swift v. Tyson's* unconstitutionality]. Justice Brandeis is noted for his insistence that the Court refrain from deciding constitutional issues if any other means of disposing of the case is available. Yet in *Erie* he seemed to go out of his way to reach the constitutional issue

There are other remarkable features of the constitutional discussion in *Erie*.

The Court's language suggests that *Erie* is a "states' rights" decision based on the limitations of the substantive grants of power to the federal government in the Constitution and of the concomitant reservation to the states of all powers not specifically given to the federal government.²⁷ It appears that the *Erie* Court intended generally to prevent the federal courts from making substantive policy decisions that the Constitution left to the states. Some argue that *Erie* can be read even more broadly—as a decision concerned with the doctrine of separation of powers within the federal government.

B. The "New" *Erie*

While the "old" *Erie* was designed to keep the federal courts from intruding into areas committed to state concern, the New *Erie* demands that they not interfere with or make policy decisions committed by the Constitution to other branches of the federal government. Beginning in 1979, some Justices began to argue that *Erie* compels not merely appropriate federal judicial deference to state prerogatives, but also that federal courts refrain from making common law almost entirely.²⁸ Thus, for New *Erie* theorists, if the

[I]t was the Court's own conduct that was regarded as unconstitutional. Again the Court does not say which provision of the Constitution was violated by the doctrine of *Swift v. Tyson*. Presumably the reference is to the Tenth Amendment, but it is unusual to have a constitutional decision that avoids making specific reference to the constitutional provision involved. No authority is cited for the constitutional arguments in the decision except earlier dissents by Justices Field and Holmes, which are themselves quite cryptic as to why *Swift v. Tyson* is contrary to the Constitution. Finally Justice Brandeis fails to answer the argument of Justice Reed in his concurring opinion that the Judiciary Article of the Constitution and the Necessary and Proper Clause of Article I may indeed give Congress power to enact the substantive rules that are to be applied by the courts.

C. WRIGHT, *supra* note 7, § 56, at 359-60 (footnotes omitted).

Another commentator argues:

The rule of *Swift* was unconstitutional because it thrust the national government into an area not assigned to it—the making of general law. The Constitution sets up a national government of limited powers—essentially those enumerated in article I. The tenth amendment confirms this understanding, and Brandeis reaffirmed it when he declared that under *Swift* the federal courts had "invaded rights which in our opinion are reserved by the Constitution to the several States."

Brown, *supra* note 5, at 620 (footnote omitted).

27. See *supra* notes 21-22 and accompanying text (quoting Justice Brandeis' opinion in *Erie*).

28. In Professor Brown's view:

A substantial block of the Court—probably four Justices—views the common-law powers of federal courts as extremely limited and stresses the primacy of Congress in all matters of "lawmaking." This judicial perspective is referred to as the "new *Erie*

subject matter is left to the states, there is no federal legislative or judicial common law power of any sort.²⁹ In addition, if the subject matter is committed to the federal government, its inclusion in article I and not article III demonstrates that Congress, not the federal courts, should give meaning to the subject matter. Under this view, federal courts have little to do with federal law other than to apply congressional declarations of it.

The breadth of this summary must be tempered, however, with the recognition that primary supporters have discussed this doctrine in only one type of case: judicial implication of private causes of action under federal statutes³⁰ or constitutional provisions.³¹ But the New *Erie* doctrine cannot be limited conceptually to that area of federal common law. Implication of private rights of action is only one of four distinct methods by which the federal courts have created federal common law.³² The terms in which the doctrine's proponents have staked out their territory cannot easily be limited to implication of private remedies. Before examining the doctrine's full ramifications, however, its origins and theoretical underpinnings, in the terms chosen by its advocates, must be considered.

doctrine " *Erie* serves as a precedential touchstone for the proposition that federal courts, unlike their state counterparts, are not true common-law courts.

Brown, *supra* note 5, at 625.

29. An area is "left to the states" if it is not one of the enumerated areas that the federal government is explicitly given power by the Constitution. See U.S. CONST. art. I, § 8.

30. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982)(private cause of action implied under Commodity Exchange Act); *California v. Sierra Club*, 451 U.S. 287 (1981)(no private cause of action implied under Rivers and Harbors Appropriation Act of 1899); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981)(no private cause of action implied under Davis-Bacon Act); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)(private cause of action implied under Investment Advisor's Act of 1940); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)(no private cause of action implied under Securities Exchange Act of 1934); *Cort v. Ash*, 422 U.S. 66 (1975)(no private cause of action implied under 18 U.S.C. § 610, a criminal statute which prohibited corporations from making contributions in connection with any election to political office).

31. See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983)(when remedy is covered by comprehensive procedural and substantive provisions, it is inappropriate for courts to imply private cause of action under the Constitution); *Carlson v. Green*, 446 U.S. 14, 41-44 (1980)(Rehnquist, J., dissenting)(arguing no private cause of action may be implied from any constitutional provision).

32. See Friendly, *supra* note 17, at 421. Judge Friendly wrote:

[The Court] has employed a variety of techniques— spontaneous generation as in the case of government contracts or interstate controversies, implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices.

Id.

Justice Powell's dissent in *Cannon v. University of Chicago*³³ may be regarded as the judicial birth of the New *Erie* doctrine.³⁴ *Cannon* was one of a series of cases in which litigants asked federal courts to imply private rights of action under federal statutes that did not create them explicitly.³⁵ Federal courts have implied private actions in statutes for many years.³⁶ In 1975, *Cort v. Ash* redefined the criteria for implying such actions:³⁷

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?³⁸

In *Cannon*, Justice Powell argued that *Cort* opened the floodgates for federal court implication of private rights of action.³⁹ Other Justices, however, have viewed *Cort* as restricting such implications.⁴⁰ Regardless of whether *Cort* expanded or contracted judicial

33. 441 U.S. 677 (1979).

34. There are antecedents that might also serve as a starting point for the New *Erie* doctrine, but they do not cite the *Erie* decision as their source. For example, in *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), three Justices dissented on separation of powers grounds, finding the Court's opinion "an exercise of power that the Constitution does not give us," *id.* at 428 (Black, J., dissenting), and "judicial legislation," *id.* at 430 (Blackmun, J., dissenting). The Court has routinely condemned "judicial legislation." See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (courts should not weigh wisdom of statutes); *Kirschbaum v. Walling*, 316 U.S. 517, 522 (1942) (referring to "the stigma of judicial legislation").

35. See *supra* note 30. Requests for implication of private rights of action also arise, but less frequently, with respect to constitutional entitlements. See *supra* note 31.

36. See, e.g., *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916) (private cause of action implied under Safety Appliance Act); *Hayes v. Michigan Cent. R.R.*, 111 U.S. 228 (1884) (private cause of action implied under Chicago railroad safety ordinance); see also Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 676 (1987) ("After *Rigsby*, the federal courts often allowed or 'implied' remedies for violations of statutory duties when the statute did not explicitly authorize a private right of action.").

37. 422 U.S. 66 (1975).

38. *Id.* at 78 (citations omitted).

39. See *Cannon v. University of Chicago*, 441 U.S. 677, 740-41 (1979) (Powell, J., dissenting).

40. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-75 (1982). In *Merrill Lynch*, Justice Stevens joined by Justices Brennan, White, Marshall and Blackmun observed:

latitude, Justice Powell sounded a powerful call in *Cannon* for re-evaluation of the practice of implying private rights of action:

[A]s mounting evidence from the courts below suggests, and the decision of the Court today demonstrates, the mode of analysis we have applied in the recent past cannot be squared with the doctrine of the separation of powers. The time has come to reappraise our standards for the judicial implication of private causes of action.

In recent history, the Court has tended to stray from the Art. III and separation-of-powers principle of limited jurisdiction. The "four factor" analysis [of *Cort v. Ash*] is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.⁴¹

Although Justice Powell limited his specific demand to ending judicial creation of causes of action, the doctrine he articulated and the bases on which he founded it have much broader implications for the role of the federal courts.

Justice Powell based his objection to judicial implication of private rights of action on his view of separation of powers. He saw the existing implication doctrine as a judicial usurpation of Congress' policymaking authority and decried that development because of what he saw as its anti-democratic tendencies.⁴² Justice Powell thus embraced a very limited view of federal judicial power to create private causes of action where Congress has failed to provide explicitly for them. He did not, however, entirely rule out the

When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.

Id. (citation omitted). See also *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 636 (1983) (Stevens, J., dissenting) (implication is the rule, rather than the exception); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 25 (1981) (Stevens, J., concurring in part and dissenting in part) ("In 1975, in *Cort v. Ash*, the Court cut back on the simple common-law presumption by fashioning a four-factor formula."). Therefore, Justices Stevens, Brennan and Blackmun view *Cort* as restricting federal courts' implication powers.

41. *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting).

42. See *id.* at 743. Justice Powell wrote that by having the judiciary make policy decisions, "the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process." *Id.*

possibility of such implications.⁴³

Justice Rehnquist contributed to the development of the New *Erie* doctrine with his dissent in *Carlson v. Green*⁴⁴ and his majority opinion in *City of Milwaukee v. Illinois*.⁴⁵ In *Carlson*, the majority implied a federal cause of action in the eighth amendment on behalf of the heirs of a federal prisoner alleged to have been intentionally deprived of adequate medical care because of racial animus.⁴⁶ Dissenting, Justice Rehnquist argued that for the Court to imply a private civil damages remedy in the eighth amendment or any other constitutional provision, is “‘an exercise of power that the constitution does not give us’” The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority.”⁴⁷ Justice Rehnquist, thus, would not permit the implication of a private cause of action under a constitutional provision in any circumstances. In contrast, Justice Powell’s dissent in *Cannon* contemplated at least a limited possibility of implying a private cause of action under a federal statute.⁴⁸

In *Carlson*, Justice Rehnquist based his argument more directly on *Erie* than had Justice Powell in *Cannon*. According to Chief Justice Rehnquist, “*Erie* expressly rejected the view, previously adopted in *Swift v. Tyson*, . . . that federal courts may de-

43. For example, in *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983), although finding no implied right of action, Justice Powell explicitly recognized the possibility of doing so if congressional intent to have a remedial scheme were demonstrated. *See id.* at 609; *see also* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981)(key to the issue whether private right of action implicitly is created is intent of Congress); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)(Powell, J., concurring)(joining majority’s opinion finding an implied private right of action under Investment Advisors Act).

44. 446 U.S. 14 (1980).

45. 451 U.S. 304 (1981).

46. *See Carlson*, 446 U.S. at 18-19. Ironically, though Justice Powell disagreed with much of the Court’s language, he concurred in the judgment, thus finding it appropriate for the federal courts in some circumstances to imply rights of action under constitutional provisions. *See id.* at 28 (Powell, J., concurring).

47. *Id.* at 34 (Rehnquist, J., dissenting)(quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428 (1971)(Black, J., dissenting)).

48. *See Cannon v. University of Chicago*, 441 U.S. 677, 749 (1979)(Powell, J., dissenting). Justice Powell wrote, “Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist.” *Id.*

It is unclear whether Justice Rehnquist thought that Justice Powell’s *Cannon* dissent did not go far enough or if he viewed implication under constitutional provisions as analytically distinct from implication under statutory provisions. In his dissent in *Carlson*, Justice Rehnquist did not cite Justice Powell’s dissenting opinion in *Cannon*.

clare rules of general common law in civil fields.”⁴⁹ He concluded that unless Congress specifically has directed the courts to create remedies that Congress might otherwise have created, courts overstep their constitutional bounds by doing so.⁵⁰ In his view, separation of powers cannot countenance such judicial activism.

In *City of Milwaukee v. Illinois*,⁵¹ the views expressed in Justice Rehnquist’s *Carlson* dissent achieved majority support. The Court struck down a previously-created federal common-law cause of action under a federal water pollution statute because Congress had left no room for such implication in the extensive legislation.⁵² The Court applied Justice Rehnquist’s *Erie* reasoning from *Carlson* to reach that result. In so doing, the Court apparently united what could be viewed as separate branches of the New *Erie* doctrine set out in *Cannon*, a statutory implication case, and in *Carlson*, a constitutional implication case. In *Milwaukee*, Justice Rehnquist contrasted the federal courts with their state counterparts, concentrating on the limitations of the former as common law courts and explicitly crediting *Erie* with defining those limits.⁵³

49. *Carlson*, 446 U.S. at 37-38 (Rehnquist, J., dissenting). Justice Rehnquist also relied on an antecedent case denying federal courts the power to “create a common law of crimes.” *Id.* at 38 (citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)).

It is possible to view *Erie* in a more limited light. Strictly speaking, *Erie* addressed only the impropriety of federal courts making common law in areas committed by the Constitution to the states. *Erie* did not address the propriety of creating federal common law in areas where power is delegated by the Constitution to the federal government. The Court implicitly recognized this when it adopted state law as the appropriate federal rule for establishing the relative priority of federal loan program liens and private licenses in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979). The *Kimbell Foods* Court wrote that “in an area comprising issues substantively related to an established program of government operation” federal courts [are] to fill the interstices of federal legislation according to their own standards.” *Id.* at 727 (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Justice Rehnquist joined the *Kimbell Foods* unanimous decision.

50. See *Carlson*, 446 U.S. at 41-44 (Rehnquist, J., dissenting). Justice Rehnquist distinguished the implication of remedies at law from “[t]he broad power of federal courts to grant equitable relief for constitutional violations,” viewing that power as “long established.” *Id.* at 42 (emphasis added).

51. 451 U.S. 304 (1981).

52. See *id.* at 317.

53. See *id.* at 312-13. Chief Justice Rehnquist’s contrast was as follows: Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. *Erie* recognized as much in ruling that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdic-

Justice Rehnquist, however, acknowledged that the federal courts on some occasions create common law, but he ascribed such occasions as necessary in areas involving conflict between federal policy and state law.⁵⁴ Thus, by the end of 1981, the New *Erie* doctrine characterized the federal courts as having drastically limited common-law powers to imply private rights of action in either statutory or constitutional provisions. The doctrine's proponents, however, have explicated it in such broad terms that it cannot logically be confined to implied rights of action.

III. THE NEW *Erie*: BEYOND IMPLICATION

The proponents of the separation-of-powers view of *Erie* argue their vision in very broad terms. On its face, their theory denies the legitimacy of creating any federal common law on a principled basis. If separation-of-powers principles prohibit the federal courts from making policy decisions, then they must never make such decisions, Justice Rehnquist's view of necessity notwithstanding. Expediency is understandable, but it is not a constitutional underpinning. One can readily anticipate Justices Powell and Rehnquist, when faced with a request for implication of a necessary private right of action, replying that necessity is a matter for the policy-making branches of the government, primarily the Congress. It is not unrealistic to envision them penning the sentence, "necessity cannot confer powers on the federal courts that the Constitution does not."

Although the cases in which the New *Erie* has been expounded all involved implying private rights of action, Justice

tion, in the absence of an applicable Act of Congress.

Id. (citations omitted). The *Milwaukee* majority's reading of *Erie* is a much broader reading than the language of *Erie* supports. *Erie* treated the substantive area involved as one in which Congress had no power to legislate, it having been left by the Constitution to the states. See *supra* note 23. Rather than viewing congressional action as a condition precedent for the creation of common law, *Erie*, therefore, can be read to provide only that federal courts cannot create common law in the absence of federal substantive power in the particular subject area. Indeed, Justice Rehnquist asserted in *Milwaukee* that if Congress had acted, there would be no need for the creation of common law. See *Milwaukee*, 451 U.S. at 314. Between the asserted impropriety of federal common law in areas where Congress has not acted, and its superfluity when Congress has, the residual range for federal common law arguably is rather narrow.

54. See *Milwaukee*, 451 U.S. at 313. The *Milwaukee* majority did not, however, explain how judicial lawmaking forbidden by the doctrine of separation of powers becomes constitutionally permissible as a "necessary expedient" when Congress fails to act. *Id.* at 314 (quoting *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976)(*en banc*)).

Rehnquist's broad statements in *Milwaukee* about the limits of the federal judicial role cannot easily be confined to such cases. Federal common law, he wrote, "is resorted to '[i]n absence of an applicable Act of Congress' and because the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.'"⁵⁵ Although Justice Rehnquist was apparently unwilling to dispense entirely with the common-law role of the federal courts, he sharply limited their ambit in dealing with unsettled questions: "[I]t is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."⁵⁶ This doctrine dictates that the federal courts may not create common law except when absolutely necessary; otherwise they usurp the powers of Congress and fail to "respect . . . the central role of the legislature in the formulation of federal policy."⁵⁷

Justice Powell certainly would have agreed with that narrow view.⁵⁸ Although *Cannon v. University of Chicago*⁵⁹ concerned only implication of a private cause of action from a federal statute, Justice Powell spoke in much broader terms as he articulated his view of separation of powers. He quoted extensively from *Tennessee Valley Authority v. Hill*,⁶⁰ a case decided the year before *Cannon* that did not involve implication.

While "[i]t is emphatically the province and duty of the judicial department to say what the law is . . .," it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to

55. *Id.* at 314 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942)(Jackson, J., concurring)).

56. *Id.* at 317. It is possible that Justice Rehnquist would have been unable to maintain a majority if he had written the *Milwaukee* opinion so broadly as to rule out any possibility of federal court common-law policymaking. Justice Rehnquist's view may not, however, be severe enough. Theoretically, an absence of federal law in an area does not compel courts to supply that law. The Court might acknowledge the desirability of federal law relating to a particular point and take the position that its absence does not require judicial creation of it. Thus, a claimant who asserts that an implied right of action is necessary to the federal scheme might be told, as Justice Powell would have done in *Cannon*, to take the matter up with the legislature. Similarly, a litigant requesting the creation of federal common law to establish a defense might be found liable while being admonished to refer the question to the political branches, as Justice Brennan would have done in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

57. P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART & WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 860 (3d ed. 1988)[hereinafter HART & WECHSLER].

58. See *supra* note 10 and accompanying text.

59. 441 U.S. 677 (1979).

60. 437 U.S. 153 (1978).

establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.⁶¹

Justice Powell's broad expression is not limited, either literally or conceptually, to the narrow question of whether federal courts may imply private rights of action in statutes.

Scholars supporting Justice Powell similarly do not advocate the New *Erie* in terms that would apply only to the implication of private rights of action. For example, Professor Brown, though limiting the bulk of his discussion to implied rights, also argues the New *Erie* vision in broader terms: "[T]he Powell-Rehnquist retreat from judicial activism serves important institutional values, especially the primacy of Congress as the policy-making branch of the national government."⁶² Significantly, Professor Brown characterizes the Justices' approach in similarly sweeping terms,⁶³ and he is not alone in his view. Professor Redish, though not characterizing himself as a New *Erie* expositor, forcefully advances Justice Powell's underlying thesis, arguing that "[s]hort of a finding of constitutional invalidity, it is democratically illegitimate for an unrepresentative judiciary to overrule, circumvent, or ignore policy choices made by the majoritarian branches."⁶⁴ Thus, the New *Erie* doctrine, as construed by the Justices who have embraced it and the scholars who have explored it, is based on a compartmentalized

61. *Cannon*, 441 U.S. at 744-45 (Powell, J., dissenting)(quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978)).

62. Brown, *supra* note 5, at 618.

63. See *supra* note 28.

64. See Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U.L. Rev. 761, 764 (1989). Professor Radish concludes that:

[I]ssues not controlled by the Constitution—including those nonconstitutional issues involving judicial jurisdiction—are to be resolved on the basis of judicial policy assessment only to the extent the representative branches have not already made that policy choice through legislative action. The political theory underlying the institutionalist perspective, however, morally and logically dictates that judicial use of such a practice be the last resort.

Id. at 768-69.

view of the branches of the federal government. Policy choices, it seems, are the exclusive province of the democratic branches—the legislature and executive—not of the courts, which were designed by the framers as institutions free from majoritarian pressures.⁶⁵

One would expect to see adherents of the New *Erie* steadfastly refusing to create common law, particularly where Congress has addressed the area of concern, and to see the doctrine's judicial detractors arguing that the creation of common law is not an usurpation of legislative power. The Court's members, however, do not always characterize, or perhaps recognize, problems facing the Court in New *Erie* terms. Although judicial discussion of the doctrine has focused primarily on implied rights of action, Congress expresses policy decisions in many ways other than by creating or declining to create new causes of action. To evaluate the Justices' consistency vis-à-vis the New *Erie*, it is necessary to consider some of the other areas in which the doctrine, if it is legitimate, must be applied.

A. *Jurisdiction and Abstention*

The Court's assumption of policy-making authority in the area of jurisdiction and abstention directly conflicts with New *Erie* principles. The Court's activism is particularly noteworthy here because it is led by the same Justices who argue the New *Erie* doctrine most strongly. The jurisdiction of the inferior federal courts is established, within the limits of the Constitution, by Congress.⁶⁶

65. See THE FEDERALIST No. 78, at 521 (A. Hamilton)(J. Cooke ed. 1961); see also *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981)(federal judiciary purposefully insulated from democratic pressures); *Furman v. Georgia*, 408 U.S. 238, 466 (1972)(Rehnquist, J., dissenting)(members of federal judiciary are constitutionally insulated from responsiveness to popular will). For more discussion on the independence of the judiciary from policy deliberations, see C. BEARD, THE ENDURING FEDERALIST 330 (1959); W. BERNS, TAKING THE CONSTITUTION SERIOUSLY 200-04 (1987); L. TRIBE, CONSTITUTIONAL CHOICES 48-50, 84 (1985).

66. Article III, § 2 sets the outer limits of federal jurisdiction:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate

Despite the clarity of those jurisdictional grants in abstention contexts,⁶⁷ for nearly half a century the Supreme Court has led the federal courts in refusing to accept jurisdiction in some categories of cases, based on the Court's perception of policies that make the exercise of federal jurisdiction inadvisable.

The Court has created several categories of federal abstention.⁶⁸ Each abstention doctrine is based on the Court's perception of policy *desiderata* that have somehow escaped the attention of Congress. For example, *Younger* abstention ostensibly promotes the values of federalism: "[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."⁶⁹ Yet, the *Younger* Court did not discuss what provisions of the Constitution allocated that "endeavor" to the federal judiciary.

For the New *Erie* theorist, abstention poses a severe problem.⁷⁰ *Younger* abstention is perhaps the most troublesome because Congress has directly dealt with the subject matter ordinarily involved in *Younger* abstention cases: state violations of federal constitutional rights.⁷¹ Congress has addressed the subject

Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2. Congress has implemented the constitutional grants in, *inter alia*, 28 U.S.C. §§ 1330-38, 1343, 1345 (1988).

67. It is not suggested that federal jurisdictional grants are clear as a general matter; litigation and scholarship over the years demonstrate that they are not. In cases presenting abstention questions, however, jurisdiction is almost invariably easy to establish.

68. The abstention categories are: *Pullman*, *Burford*, *Thibodaux*, *Younger*, and *Colorado River*. Each is associated with the name of the case that brought it to prominence. See *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Younger v. Harris*, 401 U.S. 37 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The abstention doctrine now associated with *Younger* actually originated in *In re Sawyer*, 124 U.S. 200 (1888). See Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 270-71 & n.23 (1976).

69. *Younger*, 401 U.S. at 44.

70. Professor Redish, though not articulating his thesis as the New *Erie*, suggested that the problem is insoluble. See Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). In fact, he sees abstention as particularly egregious from the New *Erie* perspective: "To the extent that there are differences between judge-made abstention and judicial creation of federal common law, the former will usually constitute a greater departure from accepted separation-of-powers principles." *Id.* at 84.

71. Doernberg, "You Can Lead a Horse to Water" — The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress, 40 CASE W. RES. L. REV. 999 (1990); Redish, *supra* note 70, at 71 ("[T]he abstention doctrines have most often

in two ways: first, by providing for special federal jurisdiction in civil rights cases; and, second, by making the basic civil rights statute's cause of action an exception to the congressionally-mandated abstention doctrine embodied in the Anti-Injunction Act.⁷² Because Congress has addressed the problem of federal court abstention in several statutes, one might ask New *Erie* proponents why it is proper for the judicial branch to assume policymaking authority vested by the Constitution in the legislative branch. Perhaps the question can be answered, but it surely must be asked.

Other abstention doctrines may be analyzed similarly for New *Erie* purposes; they differ only in the particular policies that the Court declares. *Pullman* abstention, for example, seeks to serve three goals: the obligation of federal courts to decide cases within their jurisdiction, the avoidance of constitutional decisions when possible, and the limitation of conflict between the federal and state systems.⁷³ *Burford* abstention seeks "to avoid needless conflict with the administration by a state of its own affairs."⁷⁴ The *Thibodaux* doctrine admonishes the federal courts to avoid adjudicating matters "of a special and peculiar nature intimately involved with sovereign prerogative."⁷⁵ Finally, *Colorado River* abstention disdains parallel federal and state proceedings "to avoid possible harassment or the duplication of effort."⁷⁶ Irrespective of their goals, the abstention doctrines⁷⁷ pose a common problem for

been applied in cases invoking only the federal courts' civil rights jurisdiction.").

72. See 28 U.S.C. § 1343 (1988)(jurisdiction for civil rights cases); 42 U.S.C. § 1983 (1988)(private cause of action); 28 U.S.C. § 2283 (1988)(exception to abstention); see also *Mitchum v. Foster*, 407 U.S. 225, 225 (1972)(declaring § 1983 actions fall under "expressly authorized by Act of Congress" exception to Congress' general policy of non-interference with state actions as expressed in Anti-Injunction Act).

73. See C. WRIGHT, *supra* note 7, § 52, at 303-07.

74. *Id.* § 52, at 307.

75. *Louisiana Light & Power Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

76. M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 298 (2d ed. 1990).

77. Separation of powers questions similar to those surrounding abstention are raised by the Court's creation of the political question doctrine. See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939)(state ratification of constitutional amendment held nonjusticiable); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)(refusal to adjudicate case brought under guaranty clause, U.S. CONST. art. IV, § 4); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)(legality of Nixon Administration's decision to bomb Cambodia during Vietnam war held nonjusticiable). Separation of powers issues also arise regarding courts' various "prudential" bases for denying standing to sue. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984)(requiring plaintiff's interest to fall within the "zone of interests" intended to be protected by law involved); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)(requiring plaintiffs to show that injury suffered would be remedied by favorable decision); *Warth v. Seldin*, 422 U.S. 490 (1975)(requiring plaintiffs' claims to be based on their

New *Erie* purposes: whether Congress or the judiciary is the appropriate institution to set and pursue those policy goals.⁷⁸

B. Statutes of Limitation

Statutes of limitation also exemplify the creation of federal common law, and New *Erie* proponents have endorsed this exercise of judicial lawmaking. Federal causes of action frequently lack legislatively prescribed statutes of limitation, and the federal courts have taken up the burden of providing them. In *DelCostello v. International Brotherhood of Teamsters*,⁷⁹ Justice Brennan reviewed this practice:

[W]e do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to "borrow" the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.

[W]e do so as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the *Erie* doctrine requires it.⁸⁰

The legitimacy of the federal courts' practice is perhaps not as clear-cut as Justice Brennan implies. Justices Stevens and O'Connor dissented in *DelCostello*, arguing that *Erie* and the Rules of Decision Act did require the use of state limitations periods and forbade creation of a federal time limit.⁸¹ The members of

own legal interests, not those of third parties). Both the Supreme Court's political question doctrine and its prudential limitations on standing may be viewed as forms of abstention, though they are not discussed in those terms. In both situations, the Court decides for policy reasons not to entertain cases over which it clearly has jurisdiction. Thus, the Court emerges as a policymaker.

78. This is the "legal process" approach. See Amar, *supra* note 17, at 691. Amar writes, "[T]he legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made." *Id.* The legal process approach underlies the New *Erie* doctrine.

79. 462 U.S. 151 (1983).

80. *Id.* at 158, 159 n.13 (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 394-95 (1946)).

81. See *id.* at 173-74 (Stevens, J., dissenting); *id.* at 174-75 (O'Connor, J., dissenting). Justices Stevens and O'Connor presented both New *Erie* and old *Erie* concerns. First, they argued that the Rules of Decision Act compelled application of state law unless that law was displaced. See *id.* at 173 (Stevens, J., dissenting); *id.* at 174 (O'Connor, J., dissenting). Because it is grounded in notions of federalism, this is an old *Erie* (federalism) argument. Second, they argued that if displacement were to occur, Congress was the appropriate body to effect it. See *id.* at 174 (Stevens, J., dissenting); *id.* at 175 (O'Connor, J., dissenting). That is a New *Erie*, or separation of powers, argument.

the Court, therefore, have demonstrated that there are *Erie* concerns in this area, and that the debate concerning their resolution is still underway.⁸² The debate is appropriate because, as the Court itself has recognized, "statutes of limitations represent a public policy decision about the privilege to litigate."⁸³

C. Preemption

Despite the apparent command of *Erie*, federal courts frequently refuse to apply state law on the ground that the substantive area is preempted by federal law.⁸⁴ The courts' willingness to find preemption raises New *Erie* problems because of Congress' occasional practice of making preemption explicit.⁸⁵ This raises the question whether, as with statutes of limitations,⁸⁶ the absence of explicit congressional preemption signifies an implicit rejection of it.⁸⁷ Regardless whether the inference is accurate in any particular

82. See, e.g., *Reed v. United Transp. Union*, 488 U.S. 319 (1989)(claims under Labor-Management Reporting and Disclosure Act of 1959 governed by state general or residual personal injury statutes of limitation); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986)(under Catawba Indian Tribe Division of Assets Act, state statutes of limitation apply).

83. *Honda Motor Co., Ltd. v. Coons*, 469 U.S. 1123, 1126 (1985)(Rehnquist, J., dissenting from denial of certiorari)(citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982)).

One commentator writes, "[T]he statutes embody an important policy of giving repose to human affairs." The periods enacted are arbitrary ones. They represent what the Legislature deems to be a sufficient period in a particular kind of case." D. SIEGEL, *NEW YORK PRACTICE* § 33, at 34 (1978)(quoting *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969)); see also *Tessier v. United States*, 269 F.2d 305, 310 (1st Cir. 1959)(acknowledging policy of repose in statutes of limitation); *Nolte v. Hudson Nav. Co.*, 297 F. 758, 764 (2d Cir.)("[Statutes of limitation] are founded upon public policy."), *cert. denied*, 264 U.S. 590 (1924).

84. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). According to the *Rice* court:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it [T]he object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose.

Id. at 230.

85. See, e.g., *Employee Retirement Income Security Act*, 29 U.S.C. § 1144 (1988)(explicitly preempting state regulation of ERISA covered employee benefit plans); *Cigarette Labeling and Advertising Act*, 15 U.S.C. § 1334 (1988)(explicitly preempting state law cigarette labeling requirements and other state law requirements "with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter").

86. See *supra* notes 79-83 and accompanying text.

87. Justice Brennan recently catalogued the three circumstances in which the federal courts would find preemption; explicit preemption, preemption by congressional occupation of the field and preemption by conflict between state and federal law:

case, the preemption issue involves substantial policy considerations. The New *Erie* doctrine asks, and potentially answers, the question of which branch of the federal government should make such policy judgments: Congress.

D. Established Areas of Federal Common Law

The federal courts have created common law in many substantive areas, in addition to the procedural areas—abstention, statutes of limitations and preemption. Federal common law now exists in, among others, admiralty, antitrust, labor law and what Professor Hill terms “proprietary interests.”⁸⁸ The existence of this federal common law inevitably raises New *Erie* questions.

The constitutional grant of federal court jurisdiction over admiralty cases⁸⁹ has been regarded traditionally as justifying federal courts’ creation of common law.⁹⁰ Though the courts are empowered to create a federal common law of admiralty, much of the law they have created has no constitutional or statutory basis.⁹¹ But apart from tradition, what is the textual justification from a New *Erie* standpoint of the federal courts undertaking such an appar-

In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

Northwest Cent. Pipeline Corp. v. State Corp. Comm’n, 109 S. Ct. 1262, 1273 (1989)(citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)); see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-7, at 481 n.14 (2d ed. 1988)(citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983)(discussing Supreme Court’s three categories of preemption: express preemption, implied preemption and conflict preemption)).

88. Hill, *The Lawmaking Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967).

89. See U.S. CONST. art. III, § 2, cl. 1.

90. See M. REDISH, *supra* note 76, at 138-40; Hughes & Kelsey, *Toxic and Environmental Torts Within Admiralty*, 62 TUL. L. REV. 405 (1988). Hughes and Kelsey assert that “[t]he grant of admiralty jurisdiction in article III section 2 of the Constitution has been construed historically as a constitutional acquiescence to judicial lawmaking.” *Id.* at 418.

91. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 1-16, at 45 (2d ed. 1975). Gilmore and Black write:

The Constitution extends the *judicial* power to admiralty cases, but is silent as to the substantive law to be applied to such cases. Federal statutes have set forth law that partially covers some important fields, but a vast amount of the maritime law applied today has no statutory or obvious constitutional warrant.

Id.

ently legislative role? If separation of powers commands that the federal courts not be policy-makers, this enclave of judicial legislation is difficult to justify.⁹²

In *Textile Workers Union v. Lincoln Mills*,⁹³ the Supreme Court interpreted the jurisdictional grant of the Labor Management Relations Act⁹⁴ as a command to create federal common law to regulate labor relations.⁹⁵ The command was anything but explicit. Nonetheless, the federal courts have continued to fashion common law in this area, and have been lauded for doing so.⁹⁶ The

92. On the other hand, Congress' authority to legislate in admiralty is not clear either. Hart and Wechsler argue:

Perhaps the most dramatic of [the assumptions of law-making power by the federal courts on the basis of a jurisdictional grant] is the power to create federal admiralty law implied by Article III's grant of admiralty jurisdiction—dramatic because the implication is the source not only of power to create judge-made law but also of Congress' power to legislate on admiralty matters.

HART & WECHSLER, *supra* note 57, at 883-84. Perhaps the explanation must be that the constitutional plan implicitly adopted not only the common law of admiralty that existed in 1787, but also the legitimacy of the courts to create such law. Because there is no reason to distinguish courts' involvement in the law of admiralty from their involvement in other substantive areas, this explanation has important implications for the role of federal courts generally as contemplated by the Framers. See *infra* notes 211-32 and accompanying text (discussing Framers' intent).

93. 353 U.S. 448 (1957).

94. 29 U.S.C. § 185(a) (1988).

95. Professor Redish has asserted that "section 301(a) of the Labor Management Relations Act, as construed, vests unlimited authority in the hands of the federal judiciary to fashion a common law of labor agreements. Such cases will look, smell, and taste like common law decisions, but may nevertheless be appropriately characterized as statutory interpretation." Redish, *supra* note 64, at 789. Professor Redish's distinction is unsound. One may argue that statutory interpretation is analytically distinct from the creation of common law. See HART & WECHSLER, *supra* note 57, at 863; Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980). To call the Court's actions in the labor-law field "interpretation," however, is to stretch the word beyond all meaning. In *Lincoln Mills*, the court relied on a section of the Labor Management Relations Act that has no substantive content. Federal courts have implied, not inferred, content in this section based on their perceptions of Congress' underlying policy. This process is legitimate and is a far cry from what ordinarily would be recognized as statutory interpretation: extracting meaning from statutes rather than inserting meaning into them. As Professor Field asserts, "as long as the authorizing enactment does not suggest the substance of the rule, it is properly considered a federal common law rule." Field, *supra* note 17, at 893 n.46.

96. See, e.g., Friendly, *supra* note 17, at 419 (footnote omitted). Judge Friendly commented:

One of the beauties of the *Lincoln Mills* doctrine for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam.

potential for New *Erie* problems is clear.

Federal court law-making also occurs on a broad scale in the antitrust area. "It is widely accepted today that the language of [section 1 of the Sherman Act] was intentionally drawn broadly, so that the judiciary could mold federal antitrust policy in ways it deemed advisable."⁹⁷ Professors Merrill and Redish consider this a clear form of judicial lawmaking delegated by Congress to the federal courts.⁹⁸ Regardless how one characterizes it, the federal courts perform a considerable legislative role in this area. For a New *Erie* purist, this must be troublesome.

Perhaps the oldest area of federal common law concerns "proprietary interests."⁹⁹ The Supreme Court's decision in *Clearfield Trust Co. v. United States*¹⁰⁰ exemplifies this category. A government check was cashed on a forged endorsement. The United States, after substantial delay in giving notice of the forgery, sought to recover from Clearfield Trust, a guaranteeing endorser. The issue was whether federal or state law would govern the effect of the government's delay in notification. The Court held that the government's rights and duties with respect to commercial paper that it had issued should be governed by federal law and that *Erie* was inapplicable.¹⁰¹ There being no federal statutory standard, the Court applied federal common law.¹⁰²

Clearfield often is viewed as the genesis of the "uniquely federal interest" rationale for creating federal common law. This rationale was described by the Court in *Boyle v. United Technologies Corporation*.¹⁰³ "[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed to federal control that state law is pre-empted and replaced, where necessary, by

Id.

97. Redish, *supra* note 64, at 789 (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 69-70 (1911)); see also 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 106, at 15 (1978)(quoting *Appalachian Coals v. United States*, 288 U.S. 344, 359-60 (1933))(The Sherman Act was written with a "generality and adaptability comparable to that found to be desirable in constitutional provisions.").

98. See Merrill, *supra* note 17, at 44; Redish, *supra* note 64, at 789. Professor Merrill views *Lincoln Mills* as establishing the legitimacy of congressional delegation of law-making power to the judiciary in anti-trust cases. See Merrill, *supra* note 17, at 1025.

99. Hill, *supra* note 88, at 1025.

100. 318 U.S. 363 (1943). The facts are taken from the Court's opinion in *Clearfield Trust*, 318 U.S. at 365-66.

101. See *id.* at 366.

102. See *id.* at 367. The Court "applied" rather than "created" federal common law because a federal common law rule had been developed before 1938 under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). See *id.*

103. 487 U.S. 500 (1988).

federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’”¹⁰⁴ In *Boyle*, the Court used this rationale to justify creating a federal common law defense to a state wrongful death action.¹⁰⁵ The survivor of a serviceman killed in a helicopter crash sued the manufacturer of the helicopter. The Court, citing the “‘uniquely federal interests’” involved, created a defense for government contractors that nullified the state cause of action.¹⁰⁶ The majority commented at length on the “Federal Government’s interest in the procurement of equipment.”¹⁰⁷ The Court held that the “‘significant conflict’ . . . between an identifiable ‘federal policy or interest and the [operation] of state law’” compelled federal judicial displacement of state law.¹⁰⁸

The majority failed to mention that on six occasions Congress had considered and rejected similar protection for government contractors.¹⁰⁹ Apparently, congress viewed the federal policy concerns differently than did the Court. One can disagree with the Court’s policy choices,¹¹⁰ just as one can accept or reject the separation-of-powers premise of the New *Erie* doctrine; but, irrespective of the policy decision, the approach by the *Boyle* majority undeniably raises the precise separation-of-powers concern at which the New *Erie* doctrine is directed.

In the areas where the Court has created common law, the common thread is the assertion of the peculiar need for federal

104. *Id.* at 504 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (creating federal “act of state” doctrine).

105. See *Boyle*, 487 U.S. at 512.

106. See *id.* at 504, 512-13.

107. *Id.* at 506.

108. *Id.* at 507 (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

109. The *Boyle* dissent made note of Congress’ actions. See *id.* at 515-16 (Brennan, J., dissenting); see also *infra* text accompanying note 118 (Justice Brennan’s language).

110. Professor Redish cautions against permitting the extent of agreement with policy decisions to obscure the more fundamental issues:

[B]oth scholars and jurists have criticized the efficacy and wisdom of the various abstention doctrines. But they have left largely untouched the important question of the federal judiciary’s authority to ignore the dictates of valid jurisdictional and civil rights statutes.

[N]either total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers, wholly apart from the practical advisability of either form of the doctrine.

Redish, *supra* note 70, at 71-74 (footnotes omitted).

common law, whether because of a “uniquely federal interest” or because of a perception of strong federal policy in the area. As the next part of this Article demonstrates, however, the individual Justices have been inconsistent in their approach to areas affecting New *Erie* concerns.

IV THE JUSTICES’ CHANGING COLORS

Most recent members of the Court have acted inconsistently in the New *Erie* area, both in the reasoning of their own opinions and in their voting patterns.¹¹¹ A curious phenomenon emerges when one studies their opinions: the Justices deal with the New *Erie* doctrine explicitly only when it supports the decision they desire; otherwise, they ignore it. Justices Brennan, Powell, Scalia and Stevens exemplify how the Justices vacillate in their fidelity to and application of the separation-of-powers principle purportedly embodied in New *Erie*. This section briefly sets out how each of these Justices has taken both pro-and anti-New *Erie* positions. The juxtaposition of each Justice’s inconsistent views on the proper role of the federal courts and their entitlement to create common law reveals how difficult the Justices find it rigorously to follow New *Erie* principles.

A. Justice Brennan

1. Pro-New *Erie*

Justice Brennan advocated New *Erie* principles in his dissent in *Boyle v. United Technologies Corp.*¹¹² In *Boyle*, the survivor of a serviceman killed in a helicopter crash sued the corporation who built the helicopter for the United States government.¹¹³ The court considered whether the defendants should have a “government contractors defense” amounting to immunity from private suit.¹¹⁴ The majority created the defense as federal common law.¹¹⁵ Justice

111. See *supra* notes 44-54 and accompanying text (Justice Rehnquist); *infra* notes 113-37 and accompanying text (Justice Brennan); *infra* notes 138-59 and accompanying text (Justice Powell); *infra* notes 160-76 and accompanying text (Justice Scalia); *infra* notes 177-95 and accompanying text (Justice Stevens); *infra* note 196 and accompanying text (Justices Rehnquist, Marshall, Blackmun, O'Connor and White). Justices Kennedy and Souter are excepted, however, because they have not been on the Court long enough to be exposed to the variety of New *Erie* problems.

112. 487 U.S. 500 (1988).

113. See *id.* at 502.

114. See *id.* at 503-14.

115. See *id.* at 514; *supra* notes 104-11 and accompanying text; *infra* notes 175-77 and

Brennan, joined by Justice Blackmun, vigorously dissented, arguing that the Court's action violated separation-of-powers principles because the Court created a government contractor defense where Congress previously had refused to do so.¹¹⁶ Justice Brennan explicitly tied his disagreement with the majority's action to *Erie*.¹¹⁷ Indeed, he viewed *Erie* as implicated in two ways. First, Justice Brennan argued that *Erie* controlled as a matter of federalism, requiring that state law not be displaced except "by the people through their elected representatives in Congress."¹¹⁸ Second, he argued that judicial creation of a defense rejected by Congress offended separation of powers: "Whatever the merits of the policy' the Court wishes to implement, 'its conversion into law is a proper subject for congressional action, not for any creative power of ours.' . . . We are judges, not, legislators, and the vote is not ours to cast."¹¹⁹

2. *Anti-New Erie*

Most of Justice Brennan's writing is inconsistent with the New *Erie* view. In *Reed v. United Transportation Union*,¹²⁰ for exam-

accompanying text.

116. See *Boyle*, 487 U.S. at 515-16 (Brennan, J., dissenting). Justice Brennan argued:

If respondent's immunity "bore the legitimacy of having been prescribed by the people's elected representatives," we would be duty bound to implement their will, whether or not we approved. Congress, however, has remained silent—and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some defense. The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate

Id. (footnote omitted) (quoting *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting)). Justice Brennan catalogued Congress' rejection of the government contractors immunity defense and its rejection of an indemnity for contractors' civil liability. He found the following six instances of congressional refusal to supersede contractors' liability imposed by state law:

H.R. 4765, 99th Cong., 2d Sess. (1986) (limitations on civil liability of Government contractors); S. 2441, 2378, 100th Cong., 1st Sess. (1987) (indemnification of civil liability for Government contractors); H.R. 5883, 98th Cong., 2d Sess. (1984) (same); H.R. 1504, 97th Cong., 1st Sess. (1981) (same); H.R. 5351, 96th Cong., 1st Sess. (1979) (same).

Id. at 515 n.1.

117. See *id.* at 517-18.

118. *Id.* at 518 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981)).

119. *Id.* at 530-31 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947)). For opinions based on the New *Erie* doctrine that Justice Brennan joined, see *University of Pennsylvania v. EEOC*, 110 S. Ct. 577 (1990) and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981). See also *infra* note 198 and accompanying text (discussing *University of Pennsylvania*); *infra* note 181 and accompanying text (discussing *Northwest Airlines*).

120. 488 U.S. 319 (1989).

ple, Justice Brennan's majority opinion created a federal limitations period for a union member's federal action against the union that alleged denial of free speech by borrowing a state limitations period.¹²¹ Justice Brennan noted that the Court usually concludes from congressional silence that Congress intends courts to apply state limitations periods for federal claims, partly because of the Rules of Decision Act,¹²² and partly because of presumed congressional awareness that state law is used in such circumstances.¹²³ Nonetheless, he recognized the federal courts' duty "to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."¹²⁴ Justice Brennan later qualified this sweeping statement, however, by claiming that where a state limitations period appears in conflict with federal policy, the assumption is that Congress would not want the state law to be used.¹²⁵

In *DelCostello v. International Brotherhood of Teamsters*,¹²⁶ Justice Brennan had explicitly rejected the argument that either *Erie* or the Rules of Decision Act compelled the use of state limitations periods for federal causes of action.¹²⁷ He wrote, "[I]n some circumstances state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law."¹²⁸

121. See *id.* at 323.

122. 28 U.S.C. § 1652 (1988).

123. See *Reed*, 480 U.S. at 323-24.

124. *Id.* (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)).

125. See *id.* The *Reed* Court's majority, of course, could have used the same logic as that used in *Boyle* and found that the uniqueness of the federal interest involved allows the creation of federal common law. See *supra* notes 104-11 and accompanying text. Indeed, this inconsistency is the difficulty with the New *Erie* doctrine; polar views on either side go too far.

126. 462 U.S. 151 (1983).

127. See *id.* at 161 n.13. The *DelCostello* Court wrote, "[N]either *Erie* nor the Rules of Decision Act can now be taken as establishing a mandatory rule that we apply state law in federal interstices." *Id.*

128. *Id.* at 161. For New *Erie* purposes this statement begs the question whether it is the Court or the Congress that should make the judgment of when state rules are "at odds" with federal programs. One could argue, for example, that Congress is familiar with the concept of limitations periods and provides for them on occasion. See, e.g., 29 U.S.C. § 160(b) (1988)(six month limitation on claims of unfair labor practices to be filed with National Labor Relations Board); 42 U.S.C. § 5412(b) (1988)(three-year limitation on actions for failure of home manufacturer to conform to federal standards); 47 U.S.C. § 415(a) (1988)(two-year limitation on actions by common carriers for recovery of charges). Under this reasoning, Congress' failure to provide a limitation period for particular legislation is

Justice Brennan also favored the creation of federal common law in the area of implied rights of action.¹²⁹ In *Massachusetts Mutual Life Insurance Co. v. Russell*,¹³⁰ a majority of the Court refused to imply a private right of action under the Employees Retirement Income Security Act¹³¹ on the ground that Congress had provided its own remedial scheme.¹³² Although Justice Brennan concurred in the judgment, he separately wrote to emphasize his view that Congress intended federal courts to develop common law in fashioning "appropriate equitable relief."¹³³ Prior to *Russell*, Justice Brennan had written the Court's opinion in *Cort v. Ash*,¹³⁴ in which the Court refused to imply a private right of action though it specifically recognized the propriety of the procedure generally.¹³⁵ Consistent with his general position in *Cort*, Justice Brennan joined the Courts' majorities in implying private rights of action in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*¹³⁶ and *Cannon v. University of Chicago*.¹³⁷

B. Justice Powell

1. Pro-New Erie

Justice Powell's New *Erie* writings are voluminous. He first articulated the doctrine in his dissent in *Cannon v. University of Chicago*;¹³⁸ it marked the beginning of Justice Powell's effort to persuade the other Justices to accept a New *Erie* stance. In his

either an indication of intent that there be none or that state law provide the relevant measuring period.

129. In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 515-31 (1988) (Brennan, J., dissenting), Justice Brennan sought to distinguish implying private federal rights of action from creating a federal defense to a state claim. He argued that only the latter displaced state law and thus raised constitutional problems. See *id.* at 517 n.2. The distinction is not supportable, however, for two reasons. First, implying a federal cause of action where no state claim exists may displace a state's decision not to create a cause of action. Second, and more important, Justice Brennan's distinction deals only with the federalism concerns raised when federal courts create law. It is an old *Erie* view. It does not address the New *Erie* separation of powers concerns that Justice Brennan himself eloquently articulated in his *Boyle* dissent.

130. 473 U.S. 134 (1985).

131. 29 U.S.C. §§ 1001-1461 (1988).

132. See *Russell*, 473 U.S. at 147-48.

133. *Id.* at 149 (Brennan, J., concurring) (quoting 29 U.S.C. § 1132(a)(3) (1988)).

134. 422 U.S. 66 (1975).

135. See *id.* at 78.

136. 456 U.S. 353 (1982).

137. 441 U.S. 677 (1979).

138. 441 U.S. 677, 730 (1979) (Powell, J., dissenting); see also *supra* notes 33-43 and accompanying text (discussing Justice Powell's *Cannon* dissent).

concurrence in *Transamerica Mortgage Advisors, Inc. v. Lewis*,¹³⁹ Justice Powell noted that the Court's refusal to imply a private right of action in the absence of clear congressional intent was consistent with his *Cannon* dissent.¹⁴⁰

In *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,¹⁴¹ Justice Powell dissented, arguing that the Court had violated the separation of powers by implying a private right of action under the Commodity Exchange Act.¹⁴² The *Curran* majority found that Congress had intended a private right of action to exist because, in its 1974 amendments to the Act, Congress failed to overturn lower federal court decisions finding such a right.¹⁴³ Justice Powell believed this theory was "incompatible with our constitutional separation of powers."¹⁴⁴ He argued that lawmaking power in the judiciary cannot be justified on the theory that the legislature can always correct errors¹⁴⁵ and concluded by reiterating his view in *Cannon* that a private right of action only should be implied when there is "'compelling evidence that Congress in fact intended such an action to exist.'"¹⁴⁶

Justice Powell has also articulated a New *Erie* position in the statutes-of-limitations area. In *County of Oneida v. Oneida Indian Nation*,¹⁴⁷ the Oneida tribes brought an action against two New

139. 444 U.S. 11 (1979).

140. See *id.* at 25 (Powell, J., concurring).

141. 456 U.S. 353 (1982).

142. See *id.* at 395; 7 U.S.C. §§ 1-26 (1988).

143. See *Curran*, 456 U.S. at 378-79.

144. *Id.* at 395 (Powell, J., dissenting).

145. See *id.* at 408. Justice Powell wrote:

Today's decision also is disquieting because of its implicit view of the judicial role in the creation of federal law. The Court propounds a test that taxes the legislative branch with a duty to respond to opinions of the lower federal courts. The penalty for silence is the risk of having those erroneous judicial opinions imputed to Congress itself. Despite the Court's allusion to the lawmaking powers of courts at common law, this view is inconsistent with the theory and structure of our constitutional government.

Id. (emphasis added).

146. *Id.* (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 749 (1979) (Powell, J., dissenting)). One must wonder, of course, whether Justice Powell's reasoning becomes enmeshed in a dilemma of his own making. His *Cannon* dissent essentially posed the problem of why, if congressional intent to have a private right of action was so clear, the cause of action did not appear in the statute. Yet, one might argue the clearer the intent, the more significant the omission from the statute and the stronger the indication that something overcame Congress' original inclination to have a private right of action. Thus, accepting Justice Powell's rationale, it may never be permissible to imply a private right of action, despite the Justice's reservation of the theoretical possibility.

147. 470 U.S. 226 (1985).

York counties to recover land conveyed to New York in 1795 in violation of a federal statute. The Tribes commenced the action in 1970.¹⁴⁸ The counties argued that the limitations period had run.¹⁴⁹ Justice Powell's majority opinion held that although federal courts normally borrow state limitations periods, the history of congressional action with respect to Indian land claims demonstrated that Congress intended no limitations period on such claims.¹⁵⁰ "It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances."¹⁵¹ Following his New *Erie* principles, Justice Powell thus argued that legislative primacy connoted the impropriety of judicial lawmaking.¹⁵²

2. *Anti-New Erie*

Justice Powell's approach to the legitimacy of judicial lawmaking was inconsistent, despite his strong expressions of the policies that prohibit it. He regularly joined the Court's majority in directing *Younger* abstention.¹⁵³ In *Pennzoil Co. v. Texaco, Inc.*,¹⁵⁴ Justice Powell wrote the majority opinion and substantially expanded the *Younger* doctrine.¹⁵⁵ Emphasizing his concern for "a

148. See *id.* at 229.

149. See *id.* at 233. The counties argued that there was no private right of action. The Court disagreed and found that a common law right of action existed which antedated the Constitution. See *id.* at 233-36. The Court also rejected defenses based on preemption, laches, abatement, ratification and nonjusticiability. See *id.* at 233-50.

150. See *id.* at 240-41 (citing *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977); *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975)).

151. *Id.* at 244.

152. Justice Powell also adopted new *Erie* positions in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (joined majority opinion denying implied right of action under ERISA) and *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (Powell, J., concurring) (concurred in judgment denying private right of action for compensatory relief under Title VI of Civil Rights Act of 1964).

153. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (where state proceeding is pending, federal court should abstain from deciding first amendment defense in sex discrimination action); *Moore v. Sims*, 442 U.S. 415 (1979) (in pending state child abuse action federal court should abstain from deciding habeas corpus action); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (in state attachment of property action, federal court should abstain from deciding due process defense); *Hicks v. Miranda*, 422 U.S. 332 (1975) (in pending state criminal proceeding federal court should abstain from hearing federal criminal action); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (in pending state nuisance action federal court should abstain from deciding first amendment violation).

154. 481 U.S. 1 (1987).

155. Before *Pennzoil*, the *Younger* doctrine had not been applied to wholly private civil litigation; all preceding *Younger* cases had involved the state or its officers.

proper respect for state functions,"¹⁵⁶ Justice Powell asserted that *Younger* abstention is appropriate "not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."¹⁵⁷ Thus, Justice Powell led the Court in an evaluation of when federal judicial power should extend to cases that touch state interests.¹⁵⁸ Apparently, Justice Powell did not see the New *Erie* problems presented by the fact that Congress, presumably also concerned about the relationship between state and federal governments, expressly granted jurisdiction that entitled Texaco to seek relief in the federal courts.¹⁵⁹ Under Justice Powell's leadership in *Pennzoil*, the Court effectively substituted its policy judgment for that of Congress' regarding the proper scope of federal jurisdiction.

C. Justice Scalia

1. Pro-New Erie

Justice Scalia has been a strong supporter of Justice Powell's vision of the limited role of the federal courts. With respect to implied rights of action, Justice Scalia's concurrence in *Thompson v. Thompson*¹⁶⁰ quoted Justice Powell's *Cannon* dissent and urged that the federal courts "get out of the business of implied private rights of action altogether."¹⁶¹ In the statutes-of-limitations area, Justice Scalia has argued that the Constitution, as interpreted in *Erie*, requires federal courts to apply state law unless Congress has affirmatively displaced it. For example, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,¹⁶² Justice Scalia argued that the federal courts lacked the power to create a limitations period and, therefore, if the applicable state limitations period was inconsistent with federal policy, there could be no limitation on the federal

156. *Pennzoil*, 481 U.S. at 10 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

157. *Id.* at 11.

158. The irony of the *Pennzoil* majority's position is that "[t]he State of Texas—not a party in this appeal—expressly represented to the Court of Appeals that it 'has no interest in the [underlying action,]' except in fair adjudication." *Id.* at 19 (Brennan, J., concurring)(quoting *Pennzoil Co. v. Texaco, Inc.*, 784 F.2d 1133, 1150 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987)).

159. See 28 U.S.C. §§ 1331, 1343 (1988).

160. 484 U.S. 174 (1988).

161. *Id.* at 192 (Scalia, J., concurring).

162. 483 U.S. 143 (1987).

claim.¹⁶³ In *Stewart Organization, Inc. v. Ricoh Corp.*,¹⁶⁴ Justice Scalia dissented from the Court's holding that the validity of a forum-selection clause in an antitrust case is governed by federal law. He argued that "[i]n general, while interpreting and applying substantive law is the essence of the 'judicial Power' created under Article III of the Constitution, that power does not encompass the making of substantive law."¹⁶⁵

2. *Anti-New Erie*

Justice Scalia has not, however, adhered consistently to his strong pronouncements about the limited lawmaking power of federal courts; his is a jurisprudence at war with itself. In *Pennsylvania v. Union Gas Co.*,¹⁶⁶ he adopted a broader view of the judicial role. At issue was whether two federal environmental statutes authorized private actions against states.¹⁶⁷ Justice Scalia concurred with the majority that the statutes permitted private actions.¹⁶⁸ In

163. See *id.* at 161-64 (Scalia, J., concurring). In *Malley-Duff*, Justice Scalia wrote: First, state statutes of limitations whose terms appear to cover federal statutory causes of action apply as a matter of state law to such claims, even though the state legislature that enacted the statutes did not have those claims in mind. Second, imposition of limitations periods on federal causes of action is within the States' powers, if not pre-empted by Congress. Third, the obligation to apply state statutes of limitations does not spring from Congress' intent in enacting the federal statute; rather, that intent is relevant only to the question whether the state limitations period has been pre-empted by Congress' failure to provide one. Fourth, congressional silence on the limitations issue is ordinarily insufficient to pre-empt state statutes; "special provision" by Congress is required to do that. Fifth, the federal statute—its substantive provisions rather than its mere silence—may be sufficient to pre-empt a state statute that discriminates against federal rights or is too short to permit the federal right to be vindicated.

We need not embark on a quest for an "appropriate" statute of limitations except to the limited extent that making those determinations may entail judgments as to which statute the State would believe "appropriate" and as to whether federal policy nevertheless makes that statute "inappropriate." Finally, if we determine that the state limitations period that would apply under state law is pre-empted because it is inconsistent with the federal statute, that is the end of the matter, and there is no limitation on the federal cause of action.

Id. (citations omitted). Accord *Reed v. United Transp. Union*, 109 S. Ct. 621, 630 (1989) (Scalia, J., concurring) ("[T]he Court should apply the appropriate state statute when a federal statute lacks an explicit limitations period.").

164. 487 U.S. 22 (1988).

165. *Id.* at 38 (Scalia, J., dissenting).

166. 491 U.S. 1 (1989).

167. See *id.* at 5.

168. See *id.* at 29 (Scalia, J., concurring in part, dissenting in part). Justice Scalia, however, believed that the authorization was unconstitutional under the eleventh amendment. See *id.* at 35-42.

the course of his opinion, Justice Scalia elaborated on his view of the judicial role in interpreting statutes.¹⁶⁹ Referring to the exhaustive analyses of congressional intent by Justices Brennan and White, Justice Scalia observed:

That methodology is appropriate if one assumes that the task of a court of law is to plumb the intent of the particular Congress that enacted a particular provision. That methodology is not mine nor, I think, the one that courts have traditionally followed. It is our task, not to enter the minds of the Members of Congress, but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.¹⁷⁰

Thus, Justice Scalia would empower courts with considerable discretion to decide cases based on the overall statutory structure rather than strictly on the specific intent of Congress. Ironically, the majority in *Cannon* employed Justice Scalia's approach to imply a private right of action for gender discrimination under Title IX of the Education Amendments of 1972.¹⁷¹

Justice Scalia engaged in significant judicial legislation in *Boyle v. United Technologies Corp.*¹⁷² In that case, Justice Scalia created a federal government-contractor's defense to a state cause of action for wrongful death.¹⁷³ Writing for the majority, Justice Scalia determined that the Court should create law where " 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' . . . or [where] the application of state law would 'frustrate specific objectives' of federal legislation." ¹⁷⁴ He considered protection of federal policy interests to be an appropriate judicial function, not one exclusively for the legislature.¹⁷⁵ Justice Scalia's position in *Boyle* is particularly noteworthy because Congress had considered the defense before the Court on six different occasions and had decided not to enact it.¹⁷⁶

169. See *id.* at 24-30.

170. *Id.* at 35.

171. See *Cannon v. University of Chicago*, 441 U.S. 677, 693-94 (1979). Title IX prohibits gender-based discrimination in education programs receiving federal financial assistance. See 20 U.S.C. §§ 1681-88 (1988).

172. 487 U.S. 500 (1988). See *supra* notes 104-07 and accompanying text (facts of *Boyle*).

173. See *id.* at 512.

174. *Id.* at 507 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)).

175. See *id.* at 504.

176. See *id.* at 515-16 (Brennan, J., dissenting); see also *supra* note 118 and accompa-

D. Justice Stevens

1. Pro-New Erie

On several occasions, Justice Stevens has taken New *Erie* positions. In *Massachusetts Mutual Life Insurance Co. v. Russell*,¹⁷⁷ he wrote for the Court and refused to imply a private right of action under ERISA.¹⁷⁸ “The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.”¹⁷⁹ For Justice Stevens, congressional intent was the touchstone for implying a private right of action.¹⁸⁰ Justice Stevens’ position makes implication at least unlikely, and it is based on New *Erie* separation of powers doctrine.¹⁸¹

In *Boyle v. United Technologies Corp.*,¹⁸² Justice Stevens dissented, on New *Erie* grounds, from the Court’s creation of a government-contractors immunity defense:

When judges are asked to embark on a lawmaking venture, I

nying text (Justice Brennan’s discussion of Congress’ failure to enact a federal contractor’s defense).

177. 473 U.S. 134 (1985).

178. Pub. L. No. 93-406, 88 Stat. 829 (1974)(codified as amended in scattered sections of 29 U.S.C.).

179. *Russell*, 437 U.S. at 145 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)).

180. Justice Powell left a small exception to his “no implication” rule, recognizing that if there is persuasive evidence of specific congressional intent that a private right of action exists, then the federal courts may properly imply one. *See supra* notes 43, 146 and accompanying text.

Previously, Justice Stevens had adopted the same exception as had Justice Powell. In *Northwest Airlines Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), writing for the majority, Justice Stevens declined to imply a private right of action for contribution, although he recognized that such an implication would be permissible if Congress’ intent to have such a remedy could fairly be inferred. *See id.* at 90.

181. Justice Stevens occasionally forgets his reliance on congressional intent. In *California v. Sierra Club*, 451 U.S. 287 (1981), he concurred in the Court’s refusal to imply a private right of action even though he specifically found the requisite congressional intent. Justice Stevens wrote:

At the time the statute was enacted, I believe the lawyers in Congress simply assumed that private parties would have a remedy for any injury suffered by reason of a violation of the new federal statute. For at that time the implication of private causes of action was a well-known practice at common law and in American courts. Therefore, in my view, the Members of Congress merely assumed that the federal courts would follow the ancient maxim “*ubi jus, ibi remedium*” and imply a private right of action. Accordingly, if I were writing on a clean slate, I would hold that an implied remedy is available to respondents under this statute.

Id. at 299-300 (Stevens, J., concurring)(citation omitted). Justice Stevens found that analysis under the rubric of *Cort v. Ash* led to the opposite result and, moreover, fidelity to the analytical method was more important than fidelity to congressional intent. *See id.* at 301.

182. 487 U.S. 500 (1988).

believe they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand. There are instances of so-called interstitial lawmaking that inevitably become part of the judicial process. But when we are asked to create an entirely new doctrine—to answer “questions of policy on which Congress has not spoken,” we have a special duty to identify the proper decisionmaker before trying to make the proper decision.

When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual

I feel very deeply that we should defer to the expertise of the Congress.¹⁸³

Like Justice Brennan, Justice Stevens found that the New *Erie* doctrine prohibits the federal judicial lawmaking exemplified by *Boyle*.¹⁸⁴

2. *Anti-New Erie*

Justice Stevens also has been inconsistent in his New *Erie* views. In *Briscoe v. LaHue*,¹⁸⁵ plaintiff sought damages under 42 U.S.C. section 1983 against a police officer for giving perjured testimony at the defendant’s criminal trial. Justice Stevens refused to carve out an exception to the common-law immunity of witnesses from civil suit.¹⁸⁶ Significantly, however, he rejected the exception not on separation-of-powers grounds, but because it would be bad policy.¹⁸⁷ Thus, the Court unabashedly made a policy decision, implicitly asserting the propriety of doing so.

Despite his pro-New *Erie* opinions,¹⁸⁸ Justice Stevens occasionally favors broader powers of implication than the Court’s primary New *Erie* theorists, Justice Powell and Chief Justice Rehnquist, are willing to countenance. In *Guardians Association v. Civil Service Commission*,¹⁸⁹ Justice Stevens dissented from the major-

183. *Id.* at 531-32 (Stevens, J., dissenting) (quoting *United States v. Gilman*, 347 U.S. 507, 511 (1954)). Justice Stevens included another significant reference to *Gilman*: “The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.” *Id.* at 532 (quoting *Gilman*, 347 U.S. at 511-13).

184. *See supra* notes 104-07 and accompanying text (discussing *Boyle*).

185. 460 U.S. 325 (1983).

186. *See id.* at 336-41.

187. *See id.* at 341-42.

188. *See supra* notes 177-84 and accompanying text.

189. 463 U.S. 582 (1983).

ity's denial of a private right of action under Title VI, finding enough evidence of congressional intent to support the action.¹⁹⁰ Similarly, he wrote the majority opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*,¹⁹¹ implying a private right of action under the Commodity Exchange Act¹⁹² in the face of a vigorous dissent by Justice Powell.¹⁹³ Indeed, Justice Stevens disputed Justice Powell's thesis directly, arguing that separation of powers does not counsel against judicial implication of private rights of action:

"Courts are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations."¹⁹⁴

Justice Stevens' opinion in *Merrill Lynch* demonstrates that the Court's recent restriction on implying private rights of action is a policy decision rather than a constitutional compulsion under the separation-of-powers doctrine. Finally, Justice Stevens wrote the majority opinion in *Cannon*, the case that prompted Justice Powell's first exposition of the New *Erie* doctrine.¹⁹⁵

*E. The New Erie Principle: Now You See It;
Now You Don't*

As the foregoing survey demonstrates, Justices Brennan, Pow-

190. See *id.* at 639-42 (Stevens, J., dissenting).

191. 456 U.S. 353 (1982).

192. 7 U.S.C. §§ 1-26 (1988).

193. See *Curran*, 456 U.S. at 395-409 (Powell, J., dissenting); see also *supra* notes 143-46 and accompanying text (discussing *Curran*).

194. *Merrill Lynch*, 456 U.S. at 376 (citations omitted)(quoting *Montana-Dakota Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261-62 (1951)(Frankfurter, J., dissenting)). Justice Stevens also took issue with Justice Powell's hands-off approach in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). In *Oneida*, Justice Powell, writing for the Court, decided that Congress' failure to provide a limitations period precluded the Court from creating one. See *id.* at 244; see also *supra* notes 147-52 and accompanying text (discussing *Oneida*). Justice Stevens, joined by Chief Justice Burger and Justices White and Rehnquist, argued that the Court should have created a federal limitations period. See *Oneida*, 470 U.S. at 256-62 (Stevens, J., dissenting).

195. See *supra* notes 33-39 and accompanying text (discussing Justice Powell's New *Erie* doctrine in *Cannon*).

ell, Scalia and Stevens have not adhered consistently to the New *Erie* doctrine. Other members of the Court, Chief Justice Rehnquist and Justices Blackmun, Marshall, O'Connor and White, have been equally selective in adhering to New *Erie* principles.¹⁹⁶ The

196. A review of the statements made by the remaining members of the Court demonstrates that they do not apply or reject the New *Erie* theory with any greater consistency than Justices Brennan, Powell, Scalia and Stevens. For example, in *University of Pennsylvania v. EEOC*, 110 S. Ct. 577 (1990), Justice Blackmun stated: "We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. The balancing of conflicting interests of this type is particularly a legislative function." *Id.* at 582. In *Mistretta v. United States*, 488 U.S. 301 (1989), however, Justice Blackmun wrote that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Id.* at 380.

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), Justice Rehnquist wrote: "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Id.* at 312. In *Miree v. DeKalb County*, 433 U.S. 25 (1977), however, Justice Rehnquist recognized that the existence of a significant federal interest permits federal courts to make common law. *See id.* at 31.

Although Justice Marshall has not written an opinion based on New *Erie* principles, he joined Justice Brennan's strong dissent in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), that argued the New *Erie* view of separation of powers. *See id.* at 515 (Brennan, J., dissenting). He has expressed support, however, for creating federal common law. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (Marshall J., dissenting). In *Guardians*, Justice Marshall noted that where overall legislative purpose is clear, federal courts should fashion appropriate remedies "though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of the legislation." *Id.* at 625 (quoting *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960)). Moreover, Justice Marshall joined opinions favoring implication of private rights of action on a broader basis than that endorsed by the Court's New *Erie* supporters. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (joining majority in implying private right of action); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (joining Justice White's dissent from the majority's refusal to imply a private right of action); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (joining majority in implying a private right of action).

Similarly, Justice O'Connor has not written in the New *Erie* vein, but has joined majority opinions relying in whole or in part on the doctrine. In *University of Pennsylvania v. EEOC*, 110 S. Ct. 577 (1990), Justice O'Connor joined the Court's unanimous refusal to extend a common-law qualified disclosure privilege. *See id.* at 582. Also, in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), Justice O'Connor joined Justice Stevens' majority opinion refusing to imply a private cause of action under ERISA for contractual damages. *See id.* at 148. Conversely, Justice O'Connor led the Court in making policy judgments that ignore state law in favor of federal common law in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987). Justice O'Connor wrote: "In some limited circumstances, however, our characterization of a federal claim has led the Court to conclude that 'state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law.'" *Id.* at 147 (quoting *DelCostello v. International Bd. of Teamsters*, 462 U.S. 151, 161 (1983)).

Justice White endorsed new *Erie* principles in *Malley v. Briggs*, 475 U.S. 335 (1986), writing: "We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition." *Id.* at 342. In *Guardians Ass'n v. Civil Serv.*

idea that the federal courts lack the power to create common law has been used as a tool of convenience by both the liberal and conservative members of the Court. Although the proponents of the New *Erie* doctrine support it with the idea that the courts should not participate in making federal policy, they do not shrink from making federal policy in some areas. Specifically, the Court has made law based on policies of the federal government's need to protect those with whom it does business and of the need for federal-court deference to state courts. The Court has done so even when there is persuasive evidence that the "proper" policy-making branches of the federal government have already considered the matter.¹⁹⁷ At the same time, those Justices who generally do not subscribe to the New *Erie* doctrine in its full scope nonetheless turn to it in times of need.

Whether neutral principles¹⁹⁸ can ever be achieved is questionable, but it is difficult to quibble with their desirability. When doctrines like New *Erie* are used as justifications for reaching desired results in particular cases, rather than as tools of principled analysis, both the law and the Court suffer. Each Justice needs to develop a consistent vision of the New *Erie* doctrine. Although the Justices collectively may not agree on what that vision should be, they should at least, from case to case, be consistent in their own views. Part V suggests one possible vision.

V HOW BROAD IS THE NEW *Erie* DOCTRINE?

A. *Does the New Erie Flow from Erie?*

One of the ironies of the New *Erie* doctrine is that *Erie Rail-*

Comm'n, 463 U.S. 582 (1983), Justice White wrote the Court's opinion refusing to imply of a private right of action because Congress had not specifically intended one to exist. *See id.* at 597. Justice White, however, has been an active participant in the extension of the Court-made *Younger* abstention doctrine. *See Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975).

Former Chief Justice Burger was equally inconsistent in his approach to the new *Erie* doctrine. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), he stated that "regardless of the merits of the conflicting arguments, [a federal common law private right to contribution] is a matter for Congress, not the courts, to resolve." *Id.* at 646. In *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), however, he wrote: "There will often be no specific federal legislation governing a particular transaction to which the United States is a party. But silence on that score in federal legislation is no reason for limiting the reach of federal law." *Id.* at 593.

197. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *Boyle* is discussed *supra* notes 103-10 and accompanying text; *see also supra* notes 66-78 and accompanying text (discussing jurisdiction and abstention).

198. *See generally* Wechsler, *supra* note 12 (discussing neutral principles theory).

road v. *Tompkins*¹⁹⁹ provides so little support for it. *Erie* was not a separation of powers case. Justice Brandeis asserted that there was no federal competence, either congressional or judicial, to develop substantive law that provided a standard for adjudicating the case.²⁰⁰ One might quarrel with that conclusion as a matter of substantive law.²⁰¹ Indeed, commentators argue that even in *Erie*'s time, "Congress would have been seen as having power to prescribe a substantive rule of liability for the specific accident in *Erie*."²⁰² The divergence between what the commentators hypothesized and what the *Erie* Court said is significant for New *Erie* purposes.

First, if the *Erie* Court had taken the position that Congress could have prescribed a substantive rule covering the liability of common carriers, then the Court's insistence that there was no judicial power to formulate such a rule would have had enormous separation-of-power implications. The case then would have presented a clear situation of legislative competence without correlative judicial competence. If the judiciary had sought to prescribe such a rule, arguably it would have usurped the prerogatives of the legislature and thus violated separation-of-powers principles.

The Court, however, did not recognize congressional compe-

199. 304 U.S. 64 (1938).

200. See *id.* at 78-79.

201. In the year before *Erie*, the Court appeared to broaden substantially the reach of the commerce clause. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court extended the clause to reach activities that were previously seen as local and thus beyond the scope of interstate commerce. The Court stated, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37.

Control of the liability of interstate carriers may not be "essential" to protect interstate commerce, but it is appropriate. Years earlier, the Court foreshadowed that position. See *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 38 (1916) (Federal legislation under the commerce clause applies to "all cars used on any railway that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not.").

202. Mishkin, *supra* note 17, at 1684 n.10. Professor Ely has reached the same conclusion: "Congressional legislation based upon the commerce clause certainly could have covered the specific question at issue in *Erie*." See Ely, *supra* note 17, at 703 n.62. Professor Field agrees:

[A]lthough the [*Erie*] Court talks about courts making "rules of decision which Congress was confessedly without power to enact as statutes," it is hard to believe that the substantive rule at issue in *Erie* was beyond congressional competence. Surely Congress has power to regulate interstate railroads' liability to trespassers, if it wishes to do so.

Field, *supra* note 17, at 926 (emphasis in original).

tence—it did just the opposite. Justice Brandeis assumed that there was no federal legislative competence in the substantive area.²⁰³ He wrote: “Congress has no power to declare substantive rules of common law applicable in a State.”²⁰⁴ This statement would not have been mere dictum, but severely misleading dictum had the Court intended to craft an argument based on separation of powers. That the Court did not so intend is perhaps made clearest by the concluding sentence of Justice Brandeis’ constitutional discussion: “We declare that in applying the doctrine [of *Swift v. Tyson*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”²⁰⁵ The rights the Court identified as having been invaded were not within the prerogatives of Congress, but rather belonged to the states. As Judge Friendly observed, “A court’s stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.”²⁰⁶ He concluded that “the lack of law-making power by Congress was a principal underpinning to the conclusion of *Erie* as to the want of such power by federal judges.”²⁰⁷ *Erie Railroad v. Tompkins*, therefore, does not support the New *Erie* doctrine.²⁰⁸

B. Does the New Erie Derive from the Framers and the Constitution?

It is quite difficult to find direct textual justification in the Constitution for the New *Erie* doctrine. Professor Pierce observes:

If the Framers decided to incorporate a requirement of separation of powers in the Constitution, that decision was implicit rather than explicit. Articles I, II, and III establish three branches of government, but they say little about the powers of each. There is no defi-

203. See *Erie*, 304 U.S. at 78-80.

204. *Id.* at 78.

205. *Id.* at 80.

206. Friendly, *supra* note 17, at 385-86 (footnote omitted).

207. *Id.* at 404.

208. Accordingly, the term “New *Erie*” is a misnomer. Nonetheless, it is a misnomer that has some staying power.

Professor Field argues that “*Erie* is ambiguous as to whether courts can make rules as broadly as Congress or whether the Constitution incapacitates courts even in areas within congressional competence.” Field, *supra* note 17, at 927. She bases that assertion on a perception that the commerce power would have extended to the facts of *Erie*. See *supra* note 202 and accompanying text. While this perception may be accurate, it does not make the case ambiguous. Because the Court did not view the commerce power in that way, the ambiguity is avoided. See *supra* notes 203-07 and accompanying text.

inition of "executive" or "legislative" powers, and the only definition of "judicial" power is ambiguous and negative; judicial power extends only to the resolution of cases or controversies. Conspicuously absent from the text of the Constitution is any language requiring separation of powers.²⁰⁹

The Constitution's implications for separation of powers come from the introductory language of the first three articles.²¹⁰ Professor Downs accepts that language on its face, arguing that "[n]othing in the Constitution remotely suggests that judges shall participate in [the] law-making process."²¹¹ Thus, he claims that any judicial lawmaking violates the separation of powers.²¹²

The constitutional language, however, begs the question of what the Framers understood and intended by the terms "legislative power" and "judicial power."²¹³ One author has noted that "neither the Constitution nor the statutes relevant to judicial powers answer any of the important questions [dealing with the extent

209. *Pierce, Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1, 7. Professor Pierce points out that Justice Scalia finds support for his vision of the separation doctrine in the separation-of-powers language of the Massachusetts Constitution of 1780. *See id.* at 7. Pierce correctly argues, however, that Justice Scalia's evidence cuts the wrong way "[s]ince the Framers twice rejected language virtually identical to that contained in the Massachusetts provision." *Id.* Professor Beermann also agrees: "The federal Constitution, unlike many state constitutions, has no separation of powers clause that might take on independent doctrinal meaning." *See Beermann, supra* note 14, at 1058 n.20.

210. Article I states in part: "All legislative Powers herein granted shall be vested in a Congress." U.S. CONST. art. I, § 1. Article II states in part: "The executive Power shall be vested in a President." U.S. CONST. art. II, § 1, cl. 1. Finally, Article III states in part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1.

211. Downs, *Judges, Law-making and the Constitution: A Response to Professor White*, 63 JUDICATURE 444, 450 (1980). Professor Downs urges that democratic theory compels this result, because to allow the judiciary to legislate commits that function to an unrepresentative branch. *See id.* at 451-52; *see also* R. BORK, *THE TEMPTING OF AMERICA* 4 (1990) ("There is no faintest hint in the Constitution that the judiciary shares any of the legislative or executive power."). One can, of course, agree with those sentiments in the abstract without necessarily agreeing on what constitutes legislation and what constitutes judicial interpretation and enforcement of legislative policy.

212. *Downs, supra* note 211 at 450.

213. Professor Beerman raised this question in criticizing the positions that Professor Redish and the author took on the Court's refusal to accept some jurisdictional grants: "[N]either paper makes a serious attempt to present an image of the judicial and legislative powers." Beerman, *supra* note 14, at 1060. This criticism is well taken. The author here attempts to present an image of judicial power. The author does not, however, retreat from the substantive arguments made in his prior article that the Court has violated separation of powers by directly refusing to implement congressional grants of jurisdiction. *See Doernberg, supra* note 71.

of the federal courts' lawmaking power]."²¹⁴ Professor Eskridge is more emphatic: "Nowhere does the Constitution say that Congress shall have all lawmaking power. The commonly accepted meaning of 'legislative Powers'—in 1789 as well as today—is the power to enact statutes, which can override the common law that is part of the 'judicial Power.'"²¹⁵ Even Professor Brown, a staunch advocate of the New *Erie* doctrine, acknowledges that the Constitution's text provides no answer and that the original understanding of the grant of judicial power was broader than the New *Erie* doctrine will allow.²¹⁶ Professor Brown wrote, "[I]t seems reasonable to assume that the Framers had in mind those courts with which they were familiar, notably Anglo-American common-law courts."²¹⁷

Although the record is not strikingly clear, there are some suggestions of the Framers' understanding. Professor White argues that the Framers believed both that abstract natural rights limited government power and that citizens had to be protected from the state by the elites, one of which was the judiciary.²¹⁸ Certainly, colonial America was accustomed to the English common-law system, even to the point that colonial magistrates were reluctant to create a great body of written law because it would restrain their discretion.²¹⁹ James Madison recognized that separation of powers did not require complete separation of the three branches; rather it required only that no branch exercise the whole power of another.²²⁰ Professor Wills observes that both Madison and Hamilton were willing to depart from the pure doctrine of separation of powers if efficiency or convenience demanded.²²¹ Indeed, Wills takes the position that the Framers' twin concepts of checks and balances and

214. Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1513 (1969).

215. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1499 (1987). Professor Eskridge also notes that "the structure of the Constitution, the apparent expectations of the Framers, and two hundred years of Supreme Court practice establish the authority of federal courts to make law, subject to legislative override. Nor does this undercut the constitutional precept of 'separation of powers.'" *Id.* at 1500.

216. See generally Brown, *supra* note 5 (discussing New *Erie* doctrine).

217. *Id.* at 623 (footnote omitted).

218. See White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the 'Lessons' of History*, 63 JUDICATURE 162, 170-71 (1979).

219. See P. REICH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 12 (1970).

220. See THE FEDERALIST No. 47, at 325-26 (J. Madison)(J. Cooke ed. 1961). Similarly, Professor Eskridge argues, "Historical scholarship suggests that our constitutional system of government was not meant to be one of rigid separation of powers or pure majoritarianism." Eskridge, *supra* note 215, at 1498.

221. See G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 110 (1981).

of separation of powers are at odds with each other because effective checks are not possible under a system of complete separation.²²²

Alexander Hamilton regarded the judiciary as more than a forum through which the legislature speaks: "Laws are a dead letter without courts to expound and define their true meaning and operation."²²³ Hamilton's use of "define" is inexplicable if he saw the role of the courts as no more than restating, in the context of particular cases, the nation's statutes. Hamilton, however, cautioned that the judicial power, because of its weakness, had to be kept separate from the legislative and executive powers.²²⁴ At the same time, he recognized that there was room for judicial judgment about the meaning and operation of statutes and argued that it was appropriate for courts to make policy choices when confronted with conflicting laws.²²⁵

Hamilton's thesis is inconsistent with the argument that the judiciary should do no more than give effect to legislative intent, express or implied. Although one could create Hamilton's rule of interpretation on the basis of implied legislative intent, that is not the basis he chose. He described the rule as judicial decision-making, not judicial compulsion under the doctrine of separation of powers. For Hamilton the judiciary was not limited to speaking the legislative mind. Indeed, discussing judicial independence, Hamilton expected the judiciary on occasion to oppose the will of the

222. See *id.* at 119.

223. THE FEDERALIST No. 22, at 143 (A. Hamilton)(J. Cooke ed. 1961).

224. See THE FEDERALIST No. 78, at 522-24 (A. Hamilton)(J. Cooke ed. 1961). Hamilton viewed the judiciary as the "least dangerous" branch of government because it had neither the power of the purse nor of the sword. See *id.* at 522-23.

225. See *id.* at 525-26. Hamilton argued:

It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.

Id.

legislature.²²⁶

When the Constitution was being considered for adoption, most discussion about the judiciary did not deal with the legitimacy and scope of federal judges' interaction with legislation. Louis Boudin explained: "[T]he subject of the Judiciary as a whole was discussed very little in [the Constitutional] Convention. And whenever it was discussed, the discussion related to . . . the structure of the Judiciary, the question of inferior federal courts, the tenure of office of federal judges, and similar matters."²²⁷ The Federalist essays support that focus of discussion.²²⁸ On balance, "[h]istorical evidence is too scanty for one to infer that . . . the Constitution restricts the scope of the federal common law."²²⁹

The courts known to the Framers were common law courts. Therefore, as one author writes:

Before the creation of the federal union, the term "judicial Power" could only have referred to the kind of power that state courts and foreign national courts possessed. These courts were supposed to create common law; in 1789, this was their prime function. This function was not even thought to involve the "making" of law but merely its exposition, and thus it lay at the heart of the role of the judiciary . . . [A] good starting point for the study of the federal common law might be the premise that in delegating to the federal courts a judicial power, the Constitution delegated the same type of power that state courts possess.²³⁰

Moreover, the prevalence of common law courts supports an inference that the Framers and the members of the first Congress intended federal courts to function similarly. As the Supreme Court

226. Hamilton explained this position:

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they mediate, to qualify their attempts.

Id. at 528.

227. L. BOUDIN, *GOVERNMENT BY JUDICIARY* 88 (1932).

228. See, e.g., *THE FEDERALIST* Nos. 80-82, at 534-57 (A. Hamilton)(J. Cooke ed. 1961)(discussing liberal role of judiciary in tripartite system of government).

229. Note, *supra* note 214, at 1515.

230. *Id.* at 1515-16 (footnotes omitted).

has instructed in other contexts, one does not lightly infer radical change from enduring practice.²³¹ In the absence of a specific, clearly expressed intention to change the established order, change should not be inferred. Thus, the New *Erie* doctrine finds little support in American political thought of the late eighteenth century

C. Reconciling the New Erie and Article III "Judicial Power"

Separation of powers as manifested in the New *Erie* doctrine and federal common-law power can co-exist. One may agree with Justice Powell's and Chief Justice Rehnquist's views without abandoning the historical role of the courts as partners with the legislative branch in the lawmaking process. Legislative primacy does not connote judicial impotence.

New *Erie* theorists are correct when they assert that this country's constitutional system contemplates that policy-making authority be vested in the legislative and executive branches. To assert that the representative branches establish policy is not, however, to say that the judiciary has no power to create rules of law. It simply must do so within the policy framework that Congress and the President have established. There is no legitimate separation-of-powers objection to judicial creation of a rule that furthers policies as reflected in the various sources of positive law—the Constitution and federal statutes. Further, there is nothing counter-majoritarian about courts acting harmoniously with the policies of the representative branches.

In some sense, any "decision," as opposed to a purely ministerial act, may involve policy considerations. If a court applies a statute, it re-affirms the policy underlying that statute. If a court finds a statute inapplicable, it implicitly circumscribes the reach of the policy. To view policy in that way, however, robs the word of meaning. Rather, policy is "[t]he general principles by which a government is guided in its management of public affairs, or the

231. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 341 (1979)("[W]e simply are unwilling to believe, on the basis of such slender 'evidence,' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States."); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)("We cannot believe that Congress would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 630 (1875)(refusal to infer expansion of Supreme Court's appellate jurisdiction to include questions of state law from repeal of sentence limiting scope of review).

legislature in its measures.”²³² To evaluate the federal courts’ proper role, this definition needs to be more specific. For this purpose, policy is the general principle that informs a particular piece of positive law or statutory scheme.²³³ Policy is defined in the goals of the representative branches; it is the ends, not the means.

Justice Powell’s insistence that the judiciary should not make policy is correct, but his and the other New *Erie* theorists’ application of that principle is indiscriminate and overblown.²³⁴ To forbid federal courts to create public policy is appropriate, but to forbid them to assist in the implementation of legislative policy takes the doctrine too far.²³⁵ One of the Court’s most emphatic statements about the limitations of judicial power supports this distinction:

[I]t is the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them.²³⁶

Justice Powell took an extremely broad view of what constitutes policymaking in *Cannon v. University of Chicago*.²³⁷ In his view, judicial recognition of any right, defense or mode of procedure not provided specifically by the legislature constitutes policymaking.²³⁸ Thus, if the legislature did not provide that a specific event should occur, judicial action causing the event is illegitimate.²³⁹

While the New *Erie* advocates’ assertion that the judiciary should not create policy is correct, the subtle mutation of that sep-

232. BLACK’S LAW DICTIONARY 603 (5th ed. 1983).

233. For example, the legislative policy underlying Title IX is to avoid or eradicate discrimination in education programs on the basis of gender. See 20 U.S.C. § 1681 (1990).

234. See *supra* note 43 and accompanying text.

235. Judicial lethargy in the face of clearly expressed congressional policy may itself be an evisceration of the intent of legislation, thus violating separation of powers.

236. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Justice Powell explicitly subscribed to this statement. See *Cannon v. University of Chicago*, 441 U.S. 677, 744-45 (1979) (Powell, J., dissenting) (quoting *Tennessee Valley Auth.*, 437 U.S. at 194).

237. 441 U.S. 677 (1979).

238. See *id.* at 730-49 (Powell, J., dissenting).

239. Justice Powell is singled out here only because he was the first Justice to articulate the New *Erie* doctrine. He certainly is not the only member of the Court to have expressed such views. See *supra* notes 44-54 and accompanying text (Justice Rehnquist); *supra* notes 113-37 and accompanying text (Justice Brennan); *supra* notes 160-76 and accompanying text (Justice Scalia); *supra* notes 177-95 and accompanying text (Justice Stevens); *supra* note 196 (Justices Rehnquist, Marshall, Blackmun, O’Connor and White).

aration-of-powers principle into a statement that "[judicial] power does not encompass the making of substantive law" is not.²⁴⁰ The constitutional scheme of separation of powers is not transgressed provided the judiciary's creation of substantive rules is limited to those furthering a specific policy found in positive law.²⁴¹ The appropriate standard is not whether the judiciary has created new rules, but whether those rules can be traced to policy expressed with some specificity in either the Constitution or federal statutes.²⁴² Thus, Professor Merrill's assertion that judicial creation of common law is appropriate only when there is an express or implied delegation of lawmaking power is too restrictive.²⁴³ The federal courts must have such power if the constitutional scheme is to function effectively. At the other extreme, Professor Eskridge's vision of dynamic judicial interpretation goes too far in its willingness to permit the judiciary to make fundamental policy choices on the basis of the "evolutive context."²⁴⁴ The federal courts should not be the initial reflectors of societal values that ordinarily are expressed in positive law. If a statutory scheme has become outdated by social evolution, the representative branches, not the courts, must change the scheme.²⁴⁵

240. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988)(Scalia, J., dissenting).

241. Professor Field argues that the authority for creating common law stems from positive law and from the necessity of an authoritative source to confer on the federal courts the power to create common law. See Field, *supra* note 17, at 927-29. Thus, Professor Field seems to contemplate an implied delegation of law-making power from Congress or the Constitution. On the somewhat broader view of this Article, however, such implication is necessary.

242. Moreover, there is always the safety-valve. Congress may overrule judge-made law which it believes misconceives the present underlying federal policy or which it subsequently decides is unwise. The legislature, however, should not be placed in the position of having to exercise a veto over a free-ranging judiciary. See Merrill, *supra* note 17, at 22 & nn.91-93. There is a fundamental institutional difference between a judiciary that creates its own policy, leaving the legislature to veto, and a judiciary that endeavors to implement legislative policy and in the course of doing so, makes occasional mistakes. The former is illegitimate; it violates separation-of-powers principles. The latter presents no more of a problem than when courts misinterpret statutes. There, it is left to the legislature to correct the error, but the error is not thus transformed into a constitutional violation. As Professors Weston and Lehman observe, "Every time a court misconstrues an act of Congress, it makes law that Congress does not want made; yet it hardly seems useful to say that the court is thereby also usurping the legislative power of Congress." Weston & Lehman, *supra* note 95, at 341.

243. See Merrill, *supra* note 17, at 70-72.

244. Eskridge, *supra* note 215, at 1538.

245. Dean Calabresi's idea that courts should overrule outdated statutes is unwise. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 19-26 (1982). Our constitutional scheme does not entrust such unrestrained discretion to the judicial branch nor does it contemplate the judiciary as the appropriate body to determine whether a particular measure is

This view of separation of powers does not offend the Rules of Decision Act.²⁴⁶ That Act, as Professor Redish has asserted, circumscribes the reach of federal law, but it does not limit state law displacement “to those *specific* instances in which Congress—rather than the federal judiciary—chooses ‘to do so.’”²⁴⁷ Regarding “specifics,” the Rules of Decision Act looks to macro effects of the creation of federal law, not the micro effects. When Congress occupies an area, federal courts should be partners in giving the occupation scope, not in ways that diverge from congressional policies, but in ways consistent with the statutory structure. Indeed, Professor Redish’s “specific instances” view places on Congress an intolerable burden of comprehensiveness and specificity. This Article offers an approach that does not leave the Rules of Decision Act without function; that Act directs the federal courts to avoid creating common law in areas that Congress has not entered. An overview of the areas of law previously discussed demonstrates how this proposed standard works.

Implied rights of action, whether from statutes or constitutional provisions, do not inherently violate separation of powers.²⁴⁸ In *Cannon v. University of Chicago*,²⁴⁹ for example, the majority argued persuasively that Congress understood and intended that there be private rights of action under Title IX.²⁵⁰ Irrespective of that understanding, it certainly is consistent with the legislative goal of eliminating sex discrimination for the Court to imply a private right of action. Under the standard proposed by this Article, even the four-factor test of *Cort v. Ash*²⁵¹ is too restrictive. The appropriate standard for implying private rights of action is found

outdated. That is a quintessential policy decision.

246. 28 U.S.C. § 1652 (1988).

247. Redish, *supra* note 64, at 766 (emphasis added).

248. For these purposes, actions implied under statutes are not distinguished from actions implied under constitutional provisions. The only difference is the positive law source that establishes the policy. The author agrees with Professor Brown’s suggestion that the standards for the two types of implication seem to be merging, but urges that the Court’s evolving standards are overly restrictive and will have the effect of inhibiting, rather than effectuating, policy decisions made by the people’s representatives. See Brown, *supra* note 17, at 295-98.

249. 441 U.S. 677 (1979).

250. See *id.* at 703.

251. 422 U.S. 66 (1975). *Cort*’s four-factor test is: (1) Does the statute create a federal right in favor of plaintiff? (2) Is there any indication of legislative intent to create such a remedy or to deny one? (3) Is it consistent with the legislative scheme to imply such a remedy for plaintiff? (4) Is the cause of action one traditionally relegated to state law? See *id.* at 78; see also *supra* note 38 and accompanying text (*Cort* test as stated by the Court).

in *Texas & Pacific Railway Company v. Rigsby*.²⁵² a person intended to be benefitted by the statute has a private right of action for injury when the statute has been violated.²⁵³ Implied rights of action, therefore, are consistent with respect to separation of powers and the legislative role in lawmaking.²⁵⁴

The abstention doctrines, however, do not fare as well as implication of private remedies under the proposed standard.²⁵⁵ The abstention doctrines, unlike implied private actions, do not further specific statutory or constitutional policies. Indeed, abstention doctrines automatically involve a clash between the proper policymaking branch, the Congress, and the abstention policy-maker, the judiciary. Before abstention will be in issue, jurisdiction over the subject matter must exist. For all the abstention doctrines, Congress already has expressed, through its jurisdictional grants, policies that particular classes of cases should be heard in the federal

252. 241 U.S. 33 (1916). In *Rigsby*, the Court stated:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law: "So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." This is but an application of the maxim, *Ubi jus ibi remedium*.

Id. at 39-40 (citations omitted).

253. See *id.* at 38-41.

254. It would be anomalous to deny federal courts the power to imply private rights of action because of separation-of-powers problems. It is commonplace that unless a federal statute makes federal jurisdiction exclusive, federal claims can be brought in the state courts. There is no inherent impediment, therefore, in state courts implying private rights of action in federal statutes otherwise properly before them. Certainly, the separation-of-powers doctrine presents no hurdle. Several state courts have considered a request that a private right of action be implied in a federal statute. Although implication was denied in each case, it was denied on the merits of the criteria for such implications, not because the state courts thought they lacked the power to imply a private action in an appropriate case. See, e.g., *City of Tucson v. Superior Ct. of Pima County*, 127 Ariz. 205, 619 P.2d 33, 36 (Ct. App. 1980) ("Based on the criteria established by the Court in *Cort v. Ash* we conclude that a private remedy was not implicit in the [Comprehensive Employment Training Act]."); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1066 (Del. 1986) ("Because we find no intent to create a private remedy in either the statutory language or the legislative history of the [Securities Exchange Act of 1934], we must deny a private cause of action."); *Ayala v. Jamaica Sav. Bank*, 121 Misc. 2d 564, 468 N.Y.S.2d 306, 309 (Sup. Ct. 1983) ("From a review of the [disclosure] regulation and its enabling statute [Federal Deposit Insurance Corporation Act], no private right of action can be implied."); *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d 284, 289 (N.D. 1982) ("The failure of Congress expressly to provide a private remedy ordinarily indicates an intent on its part to not make such a remedy available.").

255. See *supra* notes 66-78 and accompanying text (explaining abstention doctrines).

courts. The federal courts have created the abstention doctrines to further what they believe are worthy policy goals—goals that invariably conflict with the grants of jurisdiction. As Professor Redish pointed out:

If Congress intended that the federal courts exercise a particular jurisdiction, either to achieve substantive legislative ends or to provide a constitutionally-contemplated jurisdictional advantage, a court may not, absent constitutional objections, repeal those jurisdictional grants. But one may question why, if the courts do not possess the institutional authority to repeal the legislature's jurisdictional scheme, they possess any greater authority to modify the scheme in a manner not contemplated by the legislative body.²⁵⁶

There is no identifiable source for the abstention doctrines in the Constitution or federal statutes. Abstention represents judicial policymaking without a clear textual anchor in positive law.²⁵⁷ As such, a supporter of the New *Erie* doctrine should disavow the abstention doctrines.²⁵⁸

The statute of limitation cases are more difficult to characterize. Judicially created limitations periods, whether borrowed from state or other federal statutes, do not conflict directly with clear congressional policy. On the other hand, Congress obviously understands the concept of limitations.²⁵⁹ Its failure, therefore, to provide a limitation may indicate that either state law should be used or Congress intends no limitation to apply. Because having no limitations period on civil actions would be unusual, a court may infer that Congress intended some limitations period to exist. If so, federal courts do not violate separation of powers when they select a limitations period, whether borrowed from state or federal statutes, that is consistent with the policy of the statute that creates the cause of action.

Nor does Federal preemption run afoul of separation of pow-

256. Redish, *supra* note 70, at 76-77.

257. Chief Justice Marshall referred to both usurpation of jurisdiction and declining of granted jurisdiction as "treason to the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

258. Professor Redish also noted the inconsistency in some of the Justices' positions on judicial lawmaking. Characterizing Chief Justice Burger, Chief Justice Rehnquist and Justices Powell and O'Connor as great supporters of abstention, and noting their opposition to implied rights of action generally, Professor Redish observes that "[i]f the four Justices applied the same rigorous [separation-of-powers] analysis to the issue of judge-made abstention, they would be required to alter drastically their support of such judicial power." Redish, *supra* note 70, at 82 n.58.

259. See *supra* notes 132-34 and accompanying text.

ers, even though Congress rarely calls for it expressly.²⁶⁰ It is difficult to conceive that preemption of state law is inconsistent with the substantive policy underlying the federal law. Therefore, courts should freely apply preemption when they find that the statutory scheme requires it. Congress cannot possibly anticipate all state legislation. If the courts cannot help define preemption, Congress is faced with the choice of either explicitly preempting all state law, thus unnecessarily intruding into the states' domains, or of compromising the effectiveness of federal legislation. The Court's recognition of the three-branch preemption doctrine avoids this dilemma.²⁶¹ Were courts to act otherwise, separation of powers would be undermined by the courts' implicit refusal to allow the federal legislation full scope.

All the areas in which federal common law traditionally existed cannot be treated in the same manner. Much of admiralty law, for example, is judge-made; there is no discernible admiralty policy in positive law.²⁶² The Constitution merely commits admiralty and maritime jurisdiction to the federal courts. Congress has enacted some statutes on substantive admiralty law²⁶³ but has left the courts without policy direction for creating most of the law to govern admiralty. Thus, constitutional and congressional default casts the federal courts in the role of policy-makers. While the Courts' efforts are not inconsistent with positive law, there is not a positive law anchor. Separation of powers, if not directly offended, is at least substantially embarrassed.

In labor and antitrust law, however, the result is different. Here, Congress has provided policy guidelines—albeit in broad terms. The very breadth of those guidelines and the necessity for that breadth underscores why it is appropriate to regard federal courts as having substantial common-law powers. In the antitrust area, Congress realized that it could not provide a statutory scheme that would cover the myriad ways in which trade might be restrained. Accordingly, the Sherman Antitrust Act²⁶⁴ merely expresses the congressional policy against monopolization, implicitly leaving the federal courts to implement that policy. This is an appropriate relationship between the branches and does not violate

260. See *supra* notes 84-87 and accompanying text.

261. See *supra* note 87 and accompanying text.

262. See *supra* notes 88-91 and accompanying text.

263. See, e.g., Death on the High Seas Act, 46 U.S.C. app. §§ 761-67 (1988); Jones Act, 46 U.S.C. app. § 688 (1988).

264. 15 U.S.C. §§ 1-7 (1988).

separation of powers: policymaking remains in the legislature and the courts actively participate in its implementation.

The “unique federal interest” cases are the most difficult to reconcile with the New *Erie* doctrine. The doctrine of *Clearfield Trust v. United States*—federal courts may create common law if a unique federal interest is at stake—has been long accepted.²⁶⁵ Yet, accepting *arguendo* the Court’s rationale for the rule—the need for uniform federal law—there still is no body of positive law upon which to base it. The *Clearfield* majority’s need for uniformity apparently escaped Congress’ attention.²⁶⁶ The expressed policy was the Court’s, not Congress’.²⁶⁷ Had the Court refrained from creating federal law in *Clearfield*, Congress might have been struck by the impracticability of state law governing the particular area and then would have enacted appropriate legislation. But, the need had not yet been felt by the policymaking branches of the federal government, and, therefore, the Court should not have implemented its policy in the absence of congressional action.

The Court’s creation of a new federal defense in *Boyle v. United Technologies Corp.*²⁶⁸ demonstrates concretely the problems created by the Court’s acting under the nebulous “unique federal interest” standard. The *Boyle* majority expressed a substantive policy goal—that the government’s ability to contract should not be impeded by contractors’ fears of civil liability—that was reasonable but there is no positive law embodiment of such a policy.²⁶⁹ In addition, as Justice Brennan pointed out in his dissent, on six prior occasions Congress had declined to enact measures that would have protected government contractors.²⁷⁰ Thus, the majority’s position in *Boyle* directly contradicted repeated legislative decisions not to protect government contractors.

The Court’s articulation of the uniquely federal interest standard leaves each Justice to determine, without congressional policy guidance, when a federal interest is strong enough to warrant dis-

265. 318 U.S. 363 (1943). *See supra* notes 99-102 and accompanying text (discussing *Clearfield Trust*).

266. *See Clearfield Trust*, 318 U.S. at 367.

267. The “act of state doctrine” from *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964), can also be characterized as the Court’s policy and not Congress’ *See supra* note 103 and accompanying text.

268. 487 U.S. 500 (1988). *See supra* notes 104-11, 182-84 and accompanying text (discussing *Boyle*).

269. *See Boyle*, 487 U.S. at 511-13.

270. *See id.* at 522-25 (Brennan, J., dissenting). *See supra* notes 112-19 and accompanying text (discussing Justice Brennan’s *Boyle* dissent).

placement of state law. The Court creates for itself a standardless standard, and therefore opens the door for the analytical problems that confront the Justices today. The Justices do not agree either among or within themselves about when federal interests are unique with respect to a particular case or about the broader and more important question of when, if ever, it is appropriate for the federal courts to make law.

VI. CONCLUSION

The largest problem today with respect to federal common law and the New *Erie* view of separation of powers is the individual Justices' doctrinal inconsistency. Condemnation of judicial law-making in one case, juxtaposed with the creation of substantive rules of decision in another is a form of intellectual dishonesty. When all of the Court's members join in the practice, it bears out Professor Beermann's cynicism that the Court's members are pursuing their own policy agendas and using the New *Erie* doctrine as a tool, not as a principle.²⁷¹ Without so intending, the Justices silently assert that the end justifies the means. Such an approach to the law is inconsistent with our constitutional structure. The Constitution certainly is concerned with the appropriate ends of government, but the Framers' primary concern was with the means through which governmental power would be exercised. They intended that power be exercised in a principled way. When decisional rules are manipulated rather than followed, the law suffers. It becomes not a statement of evenly applied rights and duties, but the government's *ipse dixit*. As Justice Scalia pointed out in another context, "[i]t is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution."²⁷²

Neither the New *Erie* doctrine nor the routine creation of federal common law is illegitimate.²⁷³ It is inappropriate for federal courts to make wide-ranging policy choices. The courts' limitations in the area of making policy, however, do not mandate that they should be less than vigorous in carrying out, with all of the tools at the disposal of the judiciary, policies properly decided upon by the

271. See Beermann, *supra* note 14, at 1049.

272. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

273. Judge Friendly argued that the original *Erie* doctrine could co-exist with federal common law. See Friendly, *supra* note 17, at 421-22. The New *Erie* also can co-exist with federal common law provided that both the doctrine and the scope of federal common law are properly understood and not artificially inflated.

representative branches. Federal common law exists and should exist to implement the Constitution and federal statutes.²⁷⁴ One can defend a polar statement of the New *Erie* doctrine—that the federal courts should never make law—although such a position is not justified historically. Similarly, one can defend the opposite pole—that the federal courts are true common-law courts, unconstrained except by the Constitution—though perhaps with more difficulty, because such a view sets the courts and Congress permanently at odds. Those positions, at least, have the virtue of consistency.

The only position that is indefensible is a decisional rule of convenience that allows a Justice to assume one set of colors when useful to support a desired outcome and a different set when the first is no longer needed. Surely, different Justices may present themselves in different colors, but each individual Justice's color should, from day to day, be the same, or at least undergo only principled and articulable evolution. There is no place for juridical chameleons on the Court.

274. See *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942)(Jackson, J., concurring).