

UNTETHERED NORMS AFTER *ERIE RAILROAD CO. v. TOMPKINS*: POSITIVISM, INTERNATIONAL LAW, AND THE RETURN OF THE "BROODING OMNIPRESENCE"

LEA BRILMAYER*

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* Howard M. Holtzmann Professor of International Law, Yale Law School.

INTRODUCTION

Positivism, in the American legal system, is the jurisprudence of choice. Law is not some metaphysical creation arising by spontaneous generation out of logical or philosophical first principles, which human judges then decipher.¹ Positivism tethers a legal norm securely to the entity that created it, with that same official entity calling the shots when the time comes to apply, interpret, alter, or overrule it. Untethered norms are dismissed as mere "brooding omnipresences."²

The case most associated with the Supreme Court's endorsement of positivism is *Erie Railroad Co. v. Tompkins*.³ In an opinion by Justice Brandeis that dabbled in American history,⁴ policy,⁵ and jurisprudence⁶—in addition to the usual constitutional law⁷ and statutory construction⁸—the positivists on the Court held that federal judges should cease their independent determination of "general common law" and follow in the footsteps of their state court colleagues sitting a block away.⁹

1. See *infra* Part I.

2. See *infra* Part I.A.

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

4. See *id.* at 72 ("But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous." (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923))).

5. See, e.g., *id.* at 74 ("Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties." (footnote omitted)).

6. See, e.g., *id.* at 79.

7. See, e.g., *id.* at 75, 80 (discussing equal protection and the absence of affirmative authority for federal courts to address subject matter left to the states).

8. See, e.g., *id.* at 66, 71 (referring to the Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2006))).

9. *Id.* at 78. For the reference to "a State court a block away," see *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.").

But the case for the positivist perspective is not as clear-cut as it first appears.¹⁰ The rejection of “untethered norms” is selective, with positivists relying on them whenever they are needed to prove the positivists’ point.¹¹ Moreover, it is unclear why general common law has been singled out for pariah status when other areas of law, similarly untethered, have not been written off as well. One of these other areas of law is customary international law, which, although nearly as vulnerable to the positivist critique as general common law, is rarely challenged.¹² Perhaps other subject areas, such as conflict of laws—a subject with historical roots deep in general common law—should enjoy comparable indulgence.¹³ As this Article will show, there are good arguments in favor of this proposal.¹⁴

Erie’s jurisprudence leaves many questions unanswered. And the fact that *Erie* got the answer to the basic legal issue right—on constitutional and statutory grounds—is not a reason to ignore these questions. *Erie* began the problem, and that is where we have to begin the search for a solution.

I. *ERIE*’S JURISPRUDENCE: THE POSITIVE SIDE

Erie Railroad Co. v. Tompkins is not a case that needs much introduction; however, it has many different strands and a word or two is needed to identify which ones are relevant. Our story focuses on *Erie*’s jurisprudential features, not its statutory or constitutional ones, and in particular on *Erie*’s claim that general common law does not exist.¹⁵

A. *General Common Law: Some Background*

Erie, as we all know, was based in large part on a reinterpretation of section 34 of the Judiciary Act of 1789, commonly known as the Rules of Decision Act.¹⁶ That Act stated that “[t]he laws of the

10. See *infra* Part II.

11. See *infra* Part II.A.

12. See *infra* Part II.B.

13. See *infra* Part III.

14. See *infra* Part III.

15. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

16. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652).

several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."¹⁷ The central question in *Erie* was whether the scope of the phrase "the laws of the several states" included only statutes, or if it also encompassed state decisional law.¹⁸

The pre-*Erie* taxonomy of "laws" was formidable. Kermit Roosevelt lists the different types recognized by general common law aficionado Joseph Beale, and summarizes their arcane definitions:

Beale's treatise recognizes several different kinds of law. "Theoretical law," for instance, he defines as "the body of principles worked out by the light of reason and by general usage, without special reference to the actual law in any particular state." By contrast, "[p]ositive law" is "the law as actually administered in a particular country." Last, in some ways intermediate between the positive and the theoretical law is what Beale refers to as the "general common law," an unwritten body of law "which is accepted by all so-called common-law jurisdictions but is the particular and peculiar law of none." The doctrines of the common law, Beale writes, "are authoritative in each state whose law is based upon it; and the decisions of courts of all such states are important evidences of the law."¹⁹

Some of the types of "laws" that Beale's treatise mentions qualified under the Rules of Decision Act as state law that had to be respected in federal courts; general common law, however, did not. Two characteristics of general common law were implicated in the fact that it did not qualify as "laws of the several states." These characteristics that marked general common law for special jurisprudential scrutiny were, first, the *position* of general common law

(2006)).

17. *Id.*

18. See *Erie*, 304 U.S. at 71.

19. Kermit Roosevelt, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1838 (2005) (alteration in original) (footnotes omitted).

in relation to state decisional law, and, second, general common law's *provenance* of communal authorship.

Norms possessing both of these characteristics will be referred to below as "untethered." Positivism rejects the concept of untethered law. Under positivism, law is not *found* by searching *above and beyond* the state: it is *made* by decision makers of the state itself exercising their appropriate political authority. And once made, it is the law of a *particular state*—the state that authored it—and not part of some shared enterprise. It is the position and the provenance of a norm or set of norms that make it untethered, and general common law was defective in both of these respects.

1. General Common Law: Position

The first distinctive characteristic of general common law was its supposed position in relation to state decisional law. As used here, "position" includes several interrelated elements. General common law was envisioned as *above* state decisional law in authority because it was considered more substantively reliable and accurate—the norm against which state decisional law could be tested for correctness. It was situated *beyond* the law of any particular state, meaning that it was outside the reach of state decision making and control. And it was *objective* in the sense that judges found it, not made it.²⁰ These overlapping elements of general common law's position will be referred to here as status, locus, and objectivity.

Commentators often used hierarchical and spatial metaphors to describe general common law's special position. They referred to general common law as a "brooding omnipresence *in the sky*,"²¹ or "a transcendental body of law *outside of any particular State* but obligatory within it."²² Similarly, "independence" was used to describe it:

20. See *infra* notes 31-33 and accompanying text.

21. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (emphasis added) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified It always is the law of some State.")

22. *Erie*, 304 U.S. at 79 (emphasis added) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) ("The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that *there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,*'

general common law was "independent of any particular state or lawmaking authority ... [but] authoritative in [] every common law jurisdiction."²³

General common law's supposed position brought it into direct conflict with basic positivist principles. Positivism denies that there are binding norms lurking somewhere in the great beyond, waiting to be discovered. Justice Holmes put the point clearly and simply: "The fallacy and illusion that I think exist consist in supposing that *there is this outside thing to be found*,"²⁴ adding that "the Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says with an authority that no one denies ... that thus the law is and shall be."²⁵ Courts make law, positivists say. They are not engaged in finding it, and certainly not in the locations where general common law expected it to be—namely, outside the reach of state authority.

Of course, there are bodies of law that are apart from and superior to state decisional law. The U.S. Constitution would be both "above" and "beyond" the reach of state decisional law if the two ever came in conflict.²⁶ But general common law is hardly in the same position as the U.S. Constitution. General common law's provenance, unlike the U.S. Constitution's, is questionable. The second distinctive characteristic of general common law was its shared authorship, a fatal flaw as far as positivism was concerned.

that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law.'" (emphasis added) (footnote omitted) (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

23. Roosevelt, *supra* note 19, at 1838.

24. *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting) (emphasis added). Justice Holmes continued:

Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

Id. at 533-34.

25. *Id.* at 535 ("Whether it be said to make or to declare the law, [the Supreme Court of a State] deals with the law of the State with equal authority however its function may be described.").

26. See U.S. CONST. art. VI, § 2 ("This Constitution ... shall be the supreme law of the land.").

2. *General Common Law: Provenance*

General common law's second jurisprudentially significant characteristic was its provenance. General common law purported to be based on the common law of the states—all of them. It was not the product of any one state's decisional law but a synthesis that took into account the common law of all.²⁷ As one pre-*Erie* case applying it explained,

For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule.²⁸

General common law “was common to, and authoritative in, every common law jurisdiction whose courts struggled to discern it, but it had no single source, and hence no single authoritative interpreter.”²⁹

As with its supposedly superior position, general common law's unorthodox provenance was a direct affront to positivist principles. Positivism denies that legal norms can exist without a specific state author. As Justice Holmes wrote in dissent in a prominent pre-*Erie* case, “In my opinion the authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word.”³⁰ Thus, there is Missouri law, and French law, but not “the common law of contracts.” *Erie* endorsed the positivist position that law must always be “the law of [a] State existing by the authority of that State.”³¹

It did not improve matters that the individual components from which general common law was synthesized were themselves positive law of individual states. The process of synthesizing individual states' contributions into a single body of legal norms was not itself sufficiently objective and reliable.³² It required subjective assess-

27. Roosevelt, *supra* note 19, at 1838.

28. *Black & White Taxicab*, 276 U.S. at 529-30.

29. Roosevelt, *supra* note 19, at 1838.

30. *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting).

31. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

32. See Roosevelt, *supra* note 19, at 1857-58.

ments of which positions were more persuasive or weighty and required judgment calls about which norms had a greater degree of state support. Obviously, there are differences of opinion over the correct results; these are the sorts of things that Restatement drafters or hornbook writers often debate. And even more obviously, before *Erie* was decided, federal judges and state judges used to disagree about these things.³³ If they had not, there would not have been much need for *Erie*.

Synthesizing the various different norms is a creative function. Even if general common law was based on nothing but an aggregation of legitimate state court decisions, the creative process by which these decisions are put together injects an element of decision making that can only be thought of as political choice. The most objectionable feature of general common law, from this point of view, is that an entity other than an official state decision maker arrives at subjective judgments about contentious legal questions and then presents the results as objectively binding. This problem exists precisely because there is no single identifiable official author; that is why it is necessary to blend the numerous authorities into a single body of legal norms.

Positivism rules out norms without the proper provenance, just as it rules out norms claiming an unacceptable position. In imposing these requirements, positivism taps into American political assumptions, in particular the commitment to popular participation in political decision making. By adopting the positivist outlook, the Court brought the work of our courts more into line with American conceptions of legitimacy.

3. Untethered Norms, Popular Participation, and Legitimacy

Before *Erie*, a premium was placed on whether a decision was substantively correct. Any judge who believed that he or she was equipped to determine the correct general common law result was encouraged to think a legal problem through independently, consulting precedents from all states and any other logical, moral,

33. See, e.g., *Black & White Taxicab*, 276 U.S. at 518; *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), overruled by *Erie*, 304 U.S. 64.

or philosophical first principles.³⁴ Process values, such as procedural regularity, were subordinated to an elusive notion of substantive correctness.³⁵

Positivism rejects the notion of substantive values untethered to particular state decision makers. Other values cannot claim superiority over the decisions of the state because there simply are no values extrinsic and superior to the state's decisions. Under positivism, the denial of untethered legal norms and the limitation to official state decision makers—themselves chosen democratically or appointed according to democratic constitutional principles—help to ensure popular participation. If procedures are followed in choosing who represents the state, and if those procedures are themselves legitimate, then the decisions that are made by those state representatives are entitled to be treated as legitimate too.

As positivism would have it, people are legally bound by the laws that they create. They are not legally bound by transcendental principles that exist independently of human preference and over which they lack any control. *Erie's* jurisprudence thus resonates with essential themes of American democracy. As a secular, liberal state with a commitment to political pluralism and freedom of thought, the United States does not employ religious or comparable morality tests, or other standards imposed from "above" and "beyond." General common law had to go because it collided with the values of popular participation and procedural regularity, all in the name of an illusion of objective correctness that was hopelessly wrongheaded.

Today, the conventional wisdom on general common law is that *Erie Railroad Co. v. Tompkins* drove a stake through its heart.³⁶ *Erie* stated bluntly that "[t]here is no federal general common law,"³⁷ and elaborated:

34. See generally Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1135-37 (2010).

35. *Id.*

36. Much has been written about the various sources of support adduced by the *Erie* majority. *Erie* blends constitutional themes with construction of the Rules of Decision Act—and, in later cases, the Rules Enabling Act—but also grounds the whole operation on its jurisprudential analysis. Without denigrating the importance of the constitutional or statutory sources, we will keep our focus narrow, as though the only source of inspiration was the Court's jurisprudence.

37. *Erie*, 304 U.S. at 78.

Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.³⁸

Justice Holmes made essentially the same point in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*: "The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found."³⁹ His dissent in the familiar "taxicab case" is now the majority view: general common law is a delusion. "It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned.... But there is no such body of law."⁴⁰ Kermit Roosevelt concludes about general common law that "we have it on good authority that there is no such thing."⁴¹ General common law, apparently, does not exist after *Erie*, and, assuming that Holmes and Brandeis were correct, it probably never did.

II. *ERIE'S* JURISPRUDENCE: THE CRITICAL SIDE

To this point, we have focused on the case against general common law. But there is also a case to be made *for* general common law and *against* its jurisprudential challengers. A threshold issue concerns what kinds of evidence and arguments should be consulted to determine whether general common law exists. A second question concerns areas of contemporary domestic law that appear to be untethered in the same way as general common law, but are still recognized as existing law.

38. *Id.*

39. 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Justice Holmes went on to state:

Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

Id. In fact, Justice Brandeis also quoted this language in *Erie*. 304 U.S. at 79.

40. *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).

41. Roosevelt, *supra* note 19, at 1840.

A. *Unavoidable Reliance on Untethered Norms*

The first question is what sort of evidence, arguments, and authorities would be relevant for establishing whether general common law does or does not exist? Consider, for example, Kermit Roosevelt's rejection of general common law due to "good authority" that it does not exist:

The regime under which a forum will apply its own understanding of general law rather than the understanding of the geographically appropriate state court is familiar to students of legal history. It is the regime of *Swift v. Tyson*, which the positivists, Oliver Wendell Holmes notably among them, attacked, and which the Supreme Court rejected in *Erie Railroad Co. v. Tompkins*. And that is the second and more devastating objection to the appeal to general law: we have it on *good authority* that there is no such thing.⁴²

It is not totally clear, but the "good authority" that Roosevelt cites for the proposition that *Erie* is correct seems to be *Erie* itself.

This raises a host of questions. Is the authority "good" simply because that is what the Supreme Court decided? If so, then was *Swift v. Tyson* "good authority" prior to the announcement of *Erie*? Or is the authority for the nonexistence of general common law "good authority" because it is correct, and, if so, how is that evaluation made? Putting the same point a bit differently, is the existence of general common law a subjective matter, something on which decisional law is truly dispositive: general common law does not exist, by definition, because the Supreme Court says it does not? Or do we consider the Court's opinion dispositive about general common law's objective existence only insofar as its expertise makes it fairly likely that the Court is right? Or is there some other explanation? More generally, in deciding a foundational question such as whether general common law exists, should we rely on positive law, on untethered extralegal norms, or perhaps on both?

The first Part of this Article, explaining the nature of general common law and its eventual rejection, relied on untethered logical and jurisprudential principles that were not part of the positive law

42. Roosevelt, *supra* note 19, at 1840 (emphasis added) (footnotes omitted).

of any particular state. The *Erie* opinion did the same. *Erie* was motivated by a conviction that *Swift v. Tyson* was wrong and Holmes's dissenting opinions were right. But if *Swift* was mistaken, this was presumably as a matter of jurisprudence and not as a matter of positive law. The reasoning that the majority opinion rested on to show that general common law does not exist was not conventional case law but general principles about the nature of law, state authority, and so forth.⁴³

There seems to be a double standard in operation; the arguments used to establish the nonexistence of untethered law seem to be exactly the sort of untethered principles that are not supposed to exist. When the Brandeis majority held that there was no general common law, this was presumably meant as a jurisprudential principle from someplace above and beyond. Apparently, Holmes and Brandeis did not intend their denial of the existence of an abstract legal principle to apply to the debate over *Erie's* jurisprudential foundations. That debate takes place on a higher plane, "outside" the sphere of state positive law and on the level of transcendental principle. The evidentiary qualifications for arguments about *Erie's* persuasiveness are methodologically different and less demanding than the evidentiary qualifications for arguments about whether a landowner owes a duty of care to trespassers who are injured by a passing train. The former type of arguments includes considerations of general logic, jurisprudence, and so forth; the latter includes only state positive law.

Of course, it could not really be otherwise. It is not possible to resolve issues such as the one raised in *Erie* by looking at only state positive law. The values relied on are "transcendental" because the issue itself is "transcendental." Bodies of law rest on basic principles of logic and jurisprudence that are assumed to be general and foundational in a way that the legal norms that rest on them are not. The foundation, as it were, is built of different stone than the superstructure. *Erie* does not claim otherwise.

43. These included premises such as "law in the sense in which courts speak of it today does not exist without some definite authority behind it" and "[t]he common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State." *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 278 U.S. at 533 (Holmes, J., dissenting)).

Such reliance does not really undermine the central *Erie* holding. *Erie* concerned state common law subjects such as torts or contracts, which were within state power and were not, the Court noted, constitutionally suited for the exercise of federal authority.⁴⁴ The fact that *Erie*'s jurisprudence must be established in a different way from Pennsylvania state tort law is hardly fatal to *Erie*'s interpretation of the Rules of Decision Act.

Reliance on such values, however, does challenge an important element of *Erie*'s jurisprudence: the claim that such things do not exist.⁴⁵ And if the door is open to their existence, we need to know how far their influence extends. We consider one possible example next.

B. Customary International Law

The most direct approach to evaluating the claim that "[t]here is no ... general common law"⁴⁶ is simply to search for other bodies of untethered law to see if they are treated as really being law. One such body of untethered law is customary international law and another, arguably, is conflict of laws.

1. Customary International Law: What It Is

Customary international law, in certain respects, might be thought of as the general common law of the international community.⁴⁷ It consists of international law norms that states adhere to out of a belief that these norms are legally binding.⁴⁸ As with treaty law, customary international law is said to be based on state consent; although, unlike treaty law, consent to customary law must generally be inferred from state practice.⁴⁹ The International Court

44. *Id.* at 78 ("[N]o Clause in the Constitution purports to confer such a power upon the federal courts.").

45. *See id.*

46. *Id.*

47. JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 29 (3d ed. 2005). Treaty law, from this point of view, is the statutory law of the international community.

48. SHABTAI ROSENNE, *PRACTICE AND METHODS OF INTERNATIONAL LAW* 55 (1984).

49. *See S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("[R]ules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law Restrictions

of Justice lists "international custom, as evidence of a general practice accepted as law," as one of the legitimate sources of law.⁵⁰ Although controversial in some respects, customary international law's status as "law" is rarely challenged.⁵¹

The types of evidence that may support a finding of customary international law are almost unlimited. According to Ian Brownlie, the list includes the following:

diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.⁵²

Brownlie also lists criteria for weighing evidence of customary international law. He names duration of the practice, uniformity and consistency of the practice, generality of the practice, and *opinio juris*—a sense that the practice is legally obligatory, as opposed to simply maintained out of habit or convenience.⁵³

In the classic case of *The Paquete Habana*, decided more than a century ago, the Court upheld the application of customary international law;⁵⁴ it has never retracted that endorsement⁵⁵:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdic-

upon the independence of States cannot therefore be presumed.").

50. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

51. See *id.* (listing "international custom" as a type of international law that is considered binding).

52. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6-7 (7th ed. 2008) (footnotes omitted).

53. *Id.* at 7-10.

54. *The Paquete Habana*, 175 U.S. 677, 677 (1900).

55. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731-38 (2004) (applying standards of customary international law).

tion, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.⁵⁶

Here we find explicit recognition that, in the absence of a treaty, law can be formed from "the customs and usages of civilized nations" as compiled by international legal scholars. Other cases, especially the older ones, reinforce *The Paquete Habana*.⁵⁷ And in a much more recent case argued in front of a Court generally considered unfriendly to international legal norms,⁵⁸ the Court raised the evidentiary standard for proving individual norms of customary international law but pointedly did not take advantage of the opportunity to report its demise.⁵⁹

Like general common law, customary international law is clearly "untethered." Both seem more "found" than "made," and the location where they are found is outside of and above the usual domestic law of the state. Both are created communally through the gradual accretion of legal authority from practices and convictions of the

56. *The Paquete Habana*, 175 U.S. at 700.

57. See, e.g., *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (stating that the Court would be "bound by the law of nations" until Congress passed a contrary enactment).

58. See, e.g., Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Keynote Address to the American Society of International Law Proceedings: Foreign Legal Authority in the Federal Courts, in 98 AM. SOC'Y INT'L L. PROC. 304, 307 (2004) ("[M]odern foreign legal materials can never be relevant to an interpretation of ... the U.S. Constitution.").

59. See *Sosa*, 542 U.S. at 731-38 (applying the evidentiary standard for proving individual norms of customary international law). Another limit is refusal to recognize customary international law because it is not sufficiently precise. *Sosa v. Alvarez-Machain* found that norms must be sufficiently specific and generally accepted before courts may recognize them as customary international law: "[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725; see *id.* at 731-32 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*.... [W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

entire community of states. Both have been targeted by positivist skeptics, and the reasons in both cases are connected to the fact that they are untethered. But they are treated very differently: customary international law is recognized as enforceable law whereas general common law is dismissed as nonexistent.⁶⁰

2. Customary International Law and Erie's Nonexistence Claim

Generally, international law has struggled for recognition. As Lori Damrosch and her coauthors put it:

International law has had to justify its legitimacy and its reality.... Skeptics have argued that there can be no international law since there is no international legislature to make it, no international executive to enforce it, and no effective international judiciary to interpret and to develop it, or to resolve disputes about it.⁶¹

It is ironic that positivism, today, is probably the dominant philosophical perspective on international law; it has been dubbed "the lingua franca of most international lawyers."⁶² It is also ironic that positivism is generally recognized as having played an important role in the early theorizing of international law⁶³ because positivists have figured prominently among the skeptics—particularly John Austin.

Austin's most formidable challenge to the existence of international law was based on his "command theory":

60. Compare *supra* Part I (describing general common law), with *supra* notes 47-59 and accompanying text (describing customary international law).

61. LORI DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 16 (4th ed. 2001).

62. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999) ("Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations. For positivists, international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent. In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please.... It remains the lingua franca of most international lawyers." (footnotes omitted)).

63. The distinction between natural and positive law dates to Grotius's recognition of the distinction between *jus naturale* and the *jus gentium*. DAMROSCH ET AL., *supra* note 61, at xxxi-xxxiii.

Laws properly so called are a species of *commands*. But, being a *command*, every law properly so called flows from a *determinate* source....

And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion.⁶⁴

Austin denies legal status to international law because law necessarily "flows from a *determinate* source" and because "every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."⁶⁵ Law must be the product of state decision making and must be attributable to a particular state. Austin's reason for denying the existence of international law is, effectively, that it is untethered.

General common law and international law are somehow alien to, removed from, or outside of the usual law of the state. Likewise, neither general common law nor customary international law is attributable to a single authoritative source; authorship is communal. Customary international law is formed with input from all of the state members of international society. Like general common law, customary international law is a synthesis of the precedents of many jurisdictions. One old maritime case, *The Scotia*, described customary international law in exactly these terms:

[N]o single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it

64. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 138, 201 (1832) ("The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.")

65. *Id.* at 138, 208.

has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation.⁶⁶

In both general common law and customary international law, the final product was a synthesis of state practice and legal assumptions from all members of the interstate or international community. For general common law, the synthetic function was at one time facilitated by institutions such as the American Law Institute's Restatements of common law subjects. For customary international law, specialized institutions such as the International Law Commission assist in collecting and reconciling state practice, international judicial decisions, and other evidence of customary international law from around the world.

Despite these similarities, customary international law and general common law are different in one important way: there seems to be widespread agreement that customary international law exists and general common law does not. The Supreme Court—the same institution that was responsible for declaring general common law a dead letter—recognizes customary international law as valid law.⁶⁷ This is not to say that customary international law is popular with the current Court or that its foundations are trouble free. “The relative legal status of state law, federal statutory law, treaties, and constitutional law has been an active subject of debate over the course of American history.”⁶⁸ But the basic difference in status between customary international law and general common law is undeniable.

If the Court does not appear poised to declare that customary international law does not exist—the way it did to general common law in *Erie*—then the question becomes whether there is some

66. *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1872).

67. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731-38 (2004) (recognizing customary international law as valid by applying it as a standard).

68. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1318 (2008).

distinction between the two to explain the difference in treatment. The immediately obvious candidates, however, do not hold water.

3. Possible Distinctions

One possible distinction is that general common law is in direct competition with state laws dealing with identical issues; it is not needed, therefore, because state law already performs the necessary functions.⁶⁹ State common law of contracts, for example, deals with the same issues as the general common law of contracts. It does not seem right or necessary to add a fifty-first version of state contract law, dealing with the same exact questions. In contrast, it could be argued, customary international law does not duplicate the laws of the world's member states; it adds something new, and useful, to the equation by providing rules about how they should interact.⁷⁰

But this distinction is not, strictly speaking, accurate. Customary international law comes, so to speak, in two different types: there is the general synthesis that constitutes customary law, and there are the individual states' views on what customary international law requires.⁷¹ The latter reflects the states' experiences, interests, and points of view, all of which form the basic raw material that compose, generally, customary international law.⁷² For example, the *Restatement (Third) of Foreign Relations Law* expresses an American view of international law, including much customary law.⁷³ Although the "general version" of customary international law is formed in such a way as to synthesize all of the states' views, it should be expected that they might differ, just as general common law and the common law of particular states do.⁷⁴

A better distinction might rest on the different constitutional statuses of customary international law and general common law.

69. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[T]he voice adopted by the State as its own ... should utter the last word.").

70. See HERBERT WOLCOTT BOWEN, *INTERNATIONAL LAW: A SIMPLE STATEMENT OF ITS PRINCIPLES* 1 (William S. Hein & Co. 2003) (1896) ("International law is the law recognized by civilized nations as applicable to them in their relations with one another.").

71. See BROWNLIE, *supra* note 52, at 7-10.

72. BOWEN, *supra* note 70, at 2.

73. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 1 (1987).

74. *Id.* at ch. 1, intro. note.

As *Erie* indicated, general common law effectively extended federal authority into all areas that were covered by state common law, and these included subject matters that did not fall under federal authority in the U.S. Constitution.⁷⁵

Customary international law, arguably, does not share that defect. International law is a quintessentially federal subject matter; indeed, the federal government has authority under the treaty power to regulate subject matter that would be unconstitutional if it undertook to legislate in that area directly.⁷⁶ Moreover, federal treaty law is authorized specifically by the Constitution itself: Article I, Section 8 provides a basis for federal legislation on the subject,⁷⁷ whereas Article II, Section 2 provides the executive with a method for concluding treaties.⁷⁸ Furthermore, the Supremacy Clause provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁷⁹

75. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

76. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.").

77. U.S. CONST. art. I, § 8, cl. 10 (stating that Congress shall have the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").

78. This Section states the following:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id. art. II, § 2, cl. 2.

79. *Id.* art. VI, § 2.

This distinction, however, does not quite solve the problem.⁸⁰ If this argument were accepted, then it could constitute a powerful claim against general common law—as indeed the *Erie* drafters, who used it to justify their rejection of general common law, believed it would.⁸¹ But it would not serve as a jurisprudential argument that general common law does not exist because it relates not to the nature or existence of law but to what law-making authority the federal courts were entitled to exercise. This particular distinction between general common law and customary international law, even if upheld as a matter of the reach of federal power, does not explain why general common law does not exist but customary international law does.

Although *Erie*'s jurisprudence is framed in categorical terms—that “general common law does not exist”—this seems an overstatement.⁸² General common law as it then existed might have been an intrusion on states' rights, a historical mistake, a misinterpretation of the Rules of Decision Act, or a practice that created unacceptable discrimination between locals and those nonresidents who qualified for diversity jurisdiction. But those are different questions than whether general common law exists. The existence of at least one type of untethered norm—customary international law—indicates that the claim that untethered norms do not exist cannot be true.

This suggests that there might be subject matter areas in addition to customary international law in which the premise that there can be no untethered general common law should be chal-

80. First, the Supremacy Clause mentions only treaties and not customary international law. The relative status of the two under the Supremacy Clause has thus been debated, with certain literalists taking the position that customary international law is not included and therefore does not preempt state law. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1581 (2003). If this argument is accepted, then the ability to distinguish customary international law from general common law on the basis of federal constitutional authority evaporates. Additionally, although the “law of nations” is mentioned in Article I, Section 8, this is only to the extent that Congress might act “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. In any event, the cases in which customary international law was enforced in American courts did not necessarily involve congressional definitions or any legislative action; therefore, Article I, Section 8 might not be relevant.

81. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

82. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676-77 (1998).

lenged. We will next examine one such area with historical connections to general common law, in which foundations are currently in flux on closely related issues: conflict of laws.

III. CHOICE OF LAW AND UNTETHERED NORMS: AN EXPERIMENT

Explicit recognition of the existence of untethered norms might pave the way for useful developments in one or more substantive areas of law. In light of the experimental nature of this proposal, a few preliminary observations are in order.

First, the fact that general common law or something like it is a possibility does not mean that general common law should be adopted in its entirety. It does not seem likely that we would benefit from using general common law as an all-purpose approach. Instead, it could be called on when a particular subject matter is in need of help. The comparison to customary international law suggests that this can be done on a subject matter-by-subject matter basis without a problem.

Second, the relevant questions are not about existence because it may not even be completely clear what that term means. Admittedly, general common law has no physical existence; it is not like Yosemite National Park or the Hope Diamond. But then, neither is "Connecticut's common law of contracts" much like either of those, although there does not seem to be much hesitation about saying that Connecticut contract law exists.⁸³ In order to avoid unresolved metaphysical questions about what it means to say that a set of norms "exists," we can rephrase the question to focus more on whether we want to recognize some particular set of norms. The question is not whether general common law exists as much as whether we want to make use of the idea.

Finally, we are not addressing here the important questions regarding consistency with other statutory and constitutional authorities. Resolving the jurisprudential question of existence does not make these considerations go away. Federal court practice is governed by statutes such as the Rules of Decision Act,⁸⁴ not to

83. See CONN. GEN. STAT. ANN. § 42a-1-101 (West 2012).

84. 28 U.S.C. § 1652 (2006).

mention the Rules Enabling Act,⁸⁵ and the basic *Erie* holding requiring judges to follow state decisional law.⁸⁶

With these disclaimers in mind, I propose to explore here, briefly, what recognition of untethered norms might contribute to the foundations of one particular body of legal norms: choice of law.

A. *Why Choice of Law?*

There are several reasons that choice of law might be a promising environment in which to test the utility of untethered norms. First, choice of law is related historically to general common law in many respects. It is suggestive that the same man, Joseph Beale, was responsible for promoting both.⁸⁷ We alluded to Professor Beale's remarks, above, on the foundations of general common law.⁸⁸ Beale was also the chief reporter for the *First Restatement of Conflicts*, which relied in important ways on general common law.⁸⁹ In this light, choice of law and general common law appear to have conceptual similarities and overlaps. While studying general common law, then, it makes sense to consider the utility of what we learn from its cousin, choice-of-law theory.

The second reason for choosing choice of law as a test case is its structural similarities to customary international law.⁹⁰ As both deal in large part with the interactions between different sovereigns, it is not surprising that similar substantive issues arise in both. Common questions concern jurisdiction, deference to other sovereigns, cooperation in enforcement of one another's legal norms, and other issues relating to interstate relations. Other commonalities will be addressed below. Indeed, in many states, choice of law is referred to as "private international law."⁹¹

85. *Id.* § 2072.

86. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

87. See generally 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 3.5 (1935).

88. See *supra* Part I.A.

89. For an account of the rivalry between Joseph Beale and the "legal realists" during the 1920s and 1930s, see generally LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 (1986), especially Chapter 2.

90. See generally Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531 (2011).

91. *Id.* at 1537 n.34.

Finally, the policies, concepts, and strategies employed in international law and choice of law are overlapping, similar, or analogous. For example, international law aspires to promote smooth, uniform, and predictable interaction among states, relying on strategies of mutuality, reciprocity of benefit, and comity.⁹² General common law and customary international law both embody these objectives. Choice of law, historically, proposed to do this by ensuring that the same state's law would be applied regardless of where litigation was initiated. General common law sought to integrate and unify state decisional law by creating a single uniform substantive law that all courts might apply. Both employ different strategies, but with the same underlying objectives. All in all, the conclusions arrived at in general common law and customary international law are ripe for application to American conflict of laws, in particular choice of law.

B. Choice of Law: Basic Problem, Urgent Needs

Choice of law is one subject matter area in which foundational debate has played a significant role. Its historical development has, to some degree, tracked the development of the *Erie* doctrine, although a decade or two later in time.⁹³ As with *Erie*, at the start of the twentieth century, things were relatively well settled and in line with commonly held jurisprudential assumptions of the time. By the middle of the century, however, a revolution was underway, inspired by the jurisprudential developments of *Erie*.⁹⁴

The earlier version of choice-of-law theory was grounded squarely on pre-*Erie* jurisprudence. Joseph Beale was the author of the *First Restatement's* so-called "vested rights theory," which indicated application of the law of the state where the parties' rights had vested.⁹⁵ The vesting of the parties' rights took place in the state in which the "last act" necessary to complete the cause of action

92. BOWEN, *supra* note 70, at 2.

93. See generally John R. Leathers, *Erie and Its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791 (1974).

94. See *id.*

95. For an extended discussion of the basic theoretical concepts of Beale's vested rights theory, with evaluation of the competing theoretical approaches, see LEA BRILMAYER, *CONFLICT OF LAWS* (1995).

occurred.⁹⁶ Determination of which occurrence was the "last act," however, required a definitive account of what the last act was, a point on which the contending states might disagree.⁹⁷ In such cases, only general common law could resolve the dispute; the judge was supposed to turn to general common law for a definitive list of necessary components of the cause of action to determine correctly which act was "last."⁹⁸

Around the time that *Erie* was decided, critics began to denounce the underlying jurisprudence of the vested rights theory for its metaphysical nature—a natural law theory about what constituted a cause of action and what justified application of a particular state's law.⁹⁹ The critical voices did not provide alternative approaches until the late 1950s and early 1960s, when Brainerd Currie proposed a theory that came to be known as "governmental interest analysis."¹⁰⁰ That theory examined the different state laws vying for application to determine whether one or the other state had an "interest" in having its law applied.¹⁰¹ These laws were supposed to be subjected to the ordinary processes of statutory construction and interpretation to determine whether either or both were designed to apply to the particular fact pattern at issue in a particular case.¹⁰²

As has become increasingly evident, however, both traditional and modern choice-of-law theories have metaphysical elements that cannot be explained by reference to positive law.¹⁰³ In the case of the vested rights theory, proponent Joseph Beale relied on an a priori definition of what constituted a vested right. His premises and definitions were distinctly untethered; indeed, they did not pretend to

96. *See id.* at 21.

97. For a critique of the notion that the function of choice of law is to identify the single relevant connecting factor, a central premise for the *First Restatement*, see Brilmayer & Anglin, *supra* note 34.

98. *See* BRILMAYER, *supra* note 95, at 23-25.

99. *See id.* at 25, 40. For an extended discussion of the function of the metaphysical notion of "rights" as it applies to choice of law, see generally Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 99 *YALE L.J.* 1277 (1989).

100. *See generally* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *MICH. L. REV.* 392 (1980).

101. *Id.* at 393-94.

102. *Id.* at 394.

103. Brilmayer & Anglin, *supra* note 34, at 1174.

be anything else.¹⁰⁴ But the so-called "modern" approaches were equally prone to dependence on a priori thinking. The governmental-interest-analysis supporters used untethered norms to determine whether the involved states had interests, despite their criticism of *First Restatement* reliance on such metaphysical constructs, and their representation that modern theory avoided that problem completely.¹⁰⁵ The untethered norms are of a different sort though; they take the shape of rules of statutory interpretation compelling application of a law whenever a state domiciliary would benefit from it.

It is striking, but not surprising, that choice-of-law theory has not been able to rid itself of a priori assumptions about the nature of law, the elements of a cause of action, and the purpose of the choice-of-law process. Keeping in mind what has already been said about untethered norms, even the *Erie* opinion was grounded in substantial part on untethered reasoning about the nonexistence of general common law. As argued earlier, the basic philosophical reasoning on which a field of law is based is unlikely to be completely explicable in terms of positive law.¹⁰⁶ *Erie's* authors did not appear to have made any particular effort to avoid such assumptions or to conceal the fact that this was what they had done.

There is good reason to believe that reliance on untethered foundational norms is unavoidable, so the questions that must be asked concern what would make the choice-of-law process most satisfactory to the people who rely on it. Trying for complete avoidance of value judgments from above or beyond the natural reach of state law is a hopeless project that only leads either to frustration or dishonest argumentation.¹⁰⁷ Choice of law should focus on identifying the most useful rules rather than devising a system devoid of metaphysical assumptions.

104. See *supra* text accompanying notes 95-98.

105. See Brilmayer, *supra* note 100, at 392 (arguing that Currie did not escape the trap that captured Joseph Beale, but engaged in equally metaphysical reasoning).

106. See *supra* Part II.A.

107. See *supra* Part II.A.

CONCLUSION

We have focused on just one of *Erie's* many themes. There are several other important ways of understanding the decision, which are different from the focus here on jurisprudence and general common law. These include (1) the belief that judges should not be creative lawmakers but rather followers of the elected branches of government; (2) the conviction that in the federal system created by the U.S. Constitution, legislative power was given to Congress and not the courts; (3) the position that the relevant federal statutes limit judges' discretion by requiring them to follow state law on substantive matters; and (4) the premise that federal power is limited: if federal judges were allowed to create general common law, they would have wider jurisdiction than Congress and this would violate the sovereignty of the states.

These themes overlap with one another and with the theme of central interest here, namely, the rejection of the general common law of untethered norms. The chief difference is that all four of these understandings differentiate between federal and state judges. For example, federal judges are not elected, but many state judges are.¹⁰⁸ The statutes that limit the decision-making power of federal courts do not apply to state courts. The fact that federal authority is limited by the specific enumerated powers listed in the Constitution has no relevance in limiting what states may do. And, there is no concept comparable to Tenth Amendment state sovereignty that limits the states as they exercise their law-making authority.

The purely jurisprudential angle that we have been examining does not depend on whether a dispute is heard in state or federal court, nor does it depend on the support of a statute. One might say that this principle, itself, is untethered.¹⁰⁹ Indeed, focusing on how strong the rejection of untethered norms really is—it applies to all

108. For information regarding the various methods of state judicial selection, see *Judicial Selection and Retention Resource Guide*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Selection-and-Retention/Resource-Guide.aspx> (last visited Jan. 13, 2013).

109. See *supra* Part II.A.

courts, state or federal, simply because they are courts—makes one suspicious that it goes too far. This Article reaches that conclusion.

If one puts aside the pejorative connotations and sets about identifying what it was that supposedly made the general common law so jurisprudentially unpalatable, the “brooding omnipresence” starts to seem considerably less sinister. So it is far from clear, jurisprudentially, why general common law has been declared a dead letter while customary international law lives on. It is wrong to say that general common law does not exist but customary international law—or other possible models—does. A critical look for *Erie’s* jurisprudential angle is essential—a jurisprudence that we now take far too much for granted.

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