

ERIE-EFFECTS OF VOLUME 110: AN ESSAY ON
CONTEXT IN INTERPRETIVE THEORY

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Two Articles from this volume of the *Harvard Law Review* propose changes in the role of federal courts. One, by Curtis Bradley and Jack Goldsmith, argues that customary international law should not be considered federal common law, despite the contrary beliefs of many international lawyers. The other, by Dan Kahan, proposes that Chevron deference be granted to the Department of Justice's interpretation of criminal statutes. In this essay, Professor Lessig argues that the two Articles have more in common than might at first appear: both Articles attempt to make a commonly accepted practice contestable, and bid to change that practice in a manner that delegates decisionmaking power to more democratically accountable actors. The proposals of both Articles follow a pattern that he calls the Erie-effect. In this pattern, changes in context as well as changes in the practice at issue make it possible to question the legitimacy of continuing to engage in the practice and push the issue to the foreground of public attention. This essay hopes to spark debate on the proper role of context in interpretive theory by using the lens of the Erie-effect to explore how practices are rendered contestable.

Consider two Articles from this volume of the *Harvard Law Review*. The first argues that, contrary to dominant understandings of international lawyers, customary international law is not federal common law.¹ The second argues that, contrary to dominant understandings of criminal lawyers, *Chevron* deference should be given to the Department of Justice's interpretations of ambiguous criminal statutes.² To the unfamiliar, both claims seem quite innocuous. But to the rest, they are bombshells. Each makes a radical break with a dominant view (among academics at least); each will excite an extensive and sustained debate.

The substantive law that guides each Article is distinct, and so too are the problems that each addresses. Yet in this essay I want to argue that in an important sense, both Articles are the same. Both arise from a common source, and both argue a common pattern. The source is a kind of contestability; the pattern I call the *Erie*-effect.

The *Erie*-effect describes one model of legal change. It tracks a reallocation of institutional authority among legal actors, brought about by a change in the interpretive context of this institutional au-

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¹ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997).

² See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996).

thority. This change in context can be either a change in the practice in which these actors engage, a change in understandings about this practice, or both.³ But whatever its source, the change yields a certain *contestability* about this institutional authority, or more directly, about the legitimacy of these actors continuing to engage it. It is this contestability that in turn yields the reallocation that the *Erie*-effect describes.

These shifts are often significant. They include some of the most important interpretive changes in our constitutional past. Yet they are not themselves the product of democratic action. No one votes for the changes that an *Erie*-effect yields. Instead, *Erie*-effect changes arise indirectly, as a product of other direct action. They are the consequences of changes in how we view the world, and yield significant shifts in how law is practiced. Yet although they do not issue from democratic action directly, they are nonetheless the product of a certain respect for democratic authority. It is democratic legitimacy that ultimately justifies these democratically unratified changes in legal and constitutional practice. My aim in this essay is to suggest just how.

The key is an attention less on the foreground of interpretive practice, and more on the background; a turn away from a practice of interpretive theory that emphasizes the significance of text⁴ and political change,⁵ and toward a practice that reflects an understanding of how changes behind these foreground objects matter. This is the place for context theory: for an understanding of how changes in context matter to institutional practice, and how they might justify significant interpretive change.⁶ The *Erie*-effect is one part of such a theory; it may by its form suggest other parts as well.

³ For a more complete description of the *Erie*-effect, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426-38 (1995).

⁴ See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1224 (1995).

⁵ See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 119-21 (1991).

⁶ This is not the place to hazard either a complete catalog of competing interpretive theories within law or a complete account of how they might relate to what I call context theory. For purposes of introduction, plain-meaning theories may be the paradigm of foreground theories of interpretation, relying in their most extreme form on the text alone. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-45 (1990) (describing textualism). Simpler forms of originalism are likewise foreground theories, because of their focus on expressed understandings or arguments made by the Framers at the time of the founding. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-72 (1977). But foreground theories are not universally unsophisticated. Ackerman's account, for example, of constitutional change at the time of the New Deal is primarily foreground-focused, though quite reflective. See 1 ACKERMAN, *supra* note 5, at 105-30. Nor are context theories universally subtle (in the sense of using theory to predict judicial practice). See Michael J. Klarman, *Antifidelity*, 69 S. CAL. L. REV. (forthcoming Jan. 1997). Context theories, in the sense I explore below, include Eskridge's dynamic statutory interpretation theory, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* *passim* (1994), as well as the forms of moderate originalism described by Brest, see Paul Brest, *The Mis-*

In this short essay, I describe the arguments of the two Articles from Volume 110 enough to link them together, and to the model for the effect that I am describing — *Erie Railroad Co. v. Tompkins*.⁷ I then highlight other examples that follow the same pattern and, finally, suggest something about what this model might reveal about interpretive theory more generally. My aim is neither to give a full account of *Erie* nor to restate the arguments of the two Articles from this volume. It is instead to use this case, and these Articles, to suggest something about the nature of legal change, and something about the incompleteness of current interpretive theory within law.

I. *ERIE RAILROAD CO. v. TOMPKINS*

In the spring of 1938 — one year after the famous “switch in time” that saved the Supreme Court from President Roosevelt’s court-packing plan, two months after the appointment of Justice Stanley Reed, Roosevelt’s second appointee and the author of that court-packing plan, and four months after oral argument with no briefing on the question — the Supreme Court, in *Erie Railroad Co. v. Tompkins*, overturned a federal court practice with at least a ninety-six-year pedigree. This was the practice of “finding” “federal general common law,”⁸ contrary state court judgments notwithstanding. The practice had been widely attacked in the generation leading up to the case, most famously by Justice Holmes⁹ and originally by Justice Field.¹⁰ In *Erie*, these attacks finally had their effect. There is, the Court held, “no federal general common law.”¹¹ A practice common at the founding, and ratified uncontroversially by Justice Story in *Swift v. Tyson*,¹² was now, Justice Brandeis concluded, unconstitutional.¹³

Why? What had changed? Until recently, most have argued that nothing had changed — that *Swift* was wrong in 1842, as it was

conceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 205, 222-24 (1980). Though not directly about constitutional theory, Stanley Fish’s work is aptly described as a work of context theory. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES passim* (1989).

⁷ 304 U.S. 64 (1938). I use *Erie* as a model not because I believe the effect I am describing originates in *Erie*, but because *Erie* best reveals the features that will be important to the more general account. Once these features are seen, we can identify examples of the effect that predate *Erie*. I suggest at least one of these below. See *infra* note 86.

⁸ *Erie*, 304 U.S. at 78.

⁹ See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting).

¹⁰ See, e.g., *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

¹¹ *Erie*, 304 U.S. at 78.

¹² 41 U.S. (16 Pet.) 1 (1842).

¹³ See *Erie*, 304 U.S. at 77-78.

wrong in 1938.¹⁴ But recent scholarship has drawn this view into doubt.¹⁵ *Swift*, these scholars argue, was not wrong when decided. In its time, it ratified a practice that was wholly unremarkable, both at the state and federal level.¹⁶

But what then about *Erie*? If *Swift* was correct then, does it cast doubt on *Erie* now?¹⁷ In my view, it does not. Both cases, in my view, were correct when decided.¹⁸ Seeing why teaches us something important about interpretive change.

The key is to focus on changes in the practice of the common law, and changes in how the common law was understood. How did Justices, or as Professor Casto puts it, jurists in the “Justices Class,”¹⁹ view the practice ended by *Erie*? What had federal general common law come to mean for them?

To answer this question, we must start with the moment at which this doctrine was ratified — the case of *Swift v. Tyson*. *Swift* was a small case. In the scheme of things, it involved a tiny matter.²⁰ At issue was an open question of commercial law — “whether acceptance of a negotiable instrument in satisfaction of a preexisting debt rested upon sufficient consideration to confer upon the recipient the status of ‘a bona fide holder.’”²¹ Different authorities suggested different results: New York courts had held that the preexisting debt was not sufficient consideration;²² federal courts had concluded that it was.²³ The first question then was the priority of these authorities — whether these state opinions about a matter not within the federal power

¹⁴ See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 85 (1923). In a famous rebuttal, Judge Friendly challenged Warren’s statutory reading of section 34 of the Judiciary Act of 1789. See Henry J. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389 (1964).

¹⁵ See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1272, 1276-92 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514 (1984); Larry Hramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 277-79 (1992).

¹⁶ See TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM at xiii, 3 (1981).

¹⁷ See Friendly, *supra* note 14, at 392-94 (discussing Prof. Crosskey’s argument for why *Erie* was wrongly decided).

¹⁸ Other scholars have agreed with this view. See RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* 3 (1977) (stating that “the common law authority of the federal courts as it was actually employed between 1789 and about 1860 is constitutionally justifiable”); Edward S. Stimson, *Swift v. Tyson — What Remains? What is (State) Law?*, 24 CORNELL L.Q. 54, 65 (1938).

¹⁹ William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TULANE L. REV. 907, 912 (1988).

²⁰ See Fletcher, *supra* note 15, at 1514.

²¹ Clark, *supra* note 15, at 1277.

²² See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 17 (1842).

²³ See *id.* at 20.

should bind the Supreme Court's reading of the common law on such matters.²⁴

To answer that question, Justice Story turned to Congress's direction about which law federal courts should apply — the Judiciary Act of 1789. Its text was plain enough: “the laws of the 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.”²⁵ To a modern reader, the meaning of these words is fairly clear: law, we would think, is either federal or state law; this statute commands federal courts to track state law when it applies; thus, in a matter not governed by federal law, it directs federal courts to do what state law requires. Of course, the statute does not say who gets to say what state law requires. But it seems a stretch to read into that silence the idea that federal courts may interpret state law independently. That is no doubt a possible reading; it just seems a stretch. The more natural reading is that federal courts should follow state law, however that law is articulated.

This reading, however, was not Justice Story's. For although the statute directed federal courts to follow state law, Justice Story did not believe that “state law” included court decisions interpreting non-local matters:

It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts . . . and especially to questions of general commercial law, *where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. . . .* The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield . . . to be in a great measure, not the law of a single country only, but of the commercial world.²⁶

Much about this quote should strike us as odd. How is the task of finding the “true exposition of the contract”²⁷ relevant to the articulation of the common law? How could the law being articulated be neither state law nor federal law, but instead the law of the “commer-

²⁴ See Fletcher, *supra* note 15, at 1515.

²⁵ Judiciary Act of 1789, ch. 20, § 34, 1 Stat 73, 92 (codified as amended at 28 U.S.C. § 1652 (1994)).

²⁶ *Swift*, 41 U.S. (16 Pet.) at 18-19 (emphasis added) (citations omitted).

²⁷ *Id.* at 19.

cial world?”²⁸ And finally, as we learn from many other sources,²⁹ how is this law of the commercial world, though articulated by a federal court, not binding on state courts — and likewise, if articulated by a state court, not binding on federal courts?

These oddities are a clue. Two adjustments to Justice Story’s use of the word “law” will make them go away. First, Justice Story was speaking of the source of the common law, or more precisely, the source of its substance. He was not speaking of the source of its power. As any jurist from the time would have said, the power of the common law comes from its adoption, or recognition, by a domestic court. Courts give the common law its effect.³⁰ But the substance of the law to which a court gives effect is determined elsewhere — in this case, by the “commercial world.”

But this just raises a second problem for the modern reader. How could the substance of law be determined by private parties? How could lawmaking power be exercised by someone other than a sovereign? What is the “commercial world” to be determining the contours of sovereign authority? The picture is as odd as deciding that the law of cyberspace will be determined by Microsoft.

This oddness, I suggest, is the product of a modern blindness. When we think of “law,” we are likely to think of a rule of tort, or of an FCC regulation — binding external rules imposed on parties regardless of their preference for the rule, or of their desire to be bound. That is the essence of our modern, activist sense of “law,” and it is the sense we are likely to give the term when we read it in Justice Story’s hand.

But in this we forget another modern sense of the term “law” — a sense of “law” determined by private parties in just the way that Justice Story meant. We call this law “contract.” Contract recognizes a set of obligations, the substance of which is determined by private parties. These obligations, in the hands of a court, become “law.” They are law that the parties have chosen, not law in the sense of a regulation imposed.³¹ But though agreed to *ex ante*, rather than imposed *ex post*, they function as law just as regulations function as law.³² *Ex post*, they are expressions of sovereign authority, even if *ex ante* they are expressions of private desires.

²⁸ *Id.*

²⁹ See, e.g., Clark, *supra* note 15, at 1280; Fletcher, *supra* note 15, at 1514, 1517; Friendly, *supra* note 14, at 407.

³⁰ This is the view suggested much later by Justice Holmes in *The Western Maid*, 257 U.S. 419, 432 (1922), but nothing in the early practice must be seen as inconsistent with it.

³¹ Cf. BRIDWELL & WHITTEN, *supra* note 18, at 13 (stating that the derivation of custom is not “promulgation of a legal principle by the fiat of a sovereign”).

³² Indeed, as James Carter argued, that the common law does not impose duties *ex post* is one of its strongest virtues. See *id.* at 19-22.

This is the sense of law that Justice Story was speaking of (and it explains his odd reference to the rules for interpreting a contract as a way to understand the finding of the common law). The common law at issue in *Swift* was the law merchant.³³ The law merchant was customary law.³⁴ Customary law was constituted by the usual or ordinary understandings of parties to a commercial transaction.³⁵ It referred, that is, to a set of understandings, some ratified by long practice, but not all necessarily rooted in long practice.³⁶ This was law in the sense of defaults — rules that would govern in a contract where no explicit terms controlled.³⁷ It was law as the UCC might recognize the customs of an industry as law³⁸ — binding unless the parties agree differently.

No doubt, as the realists struggled to teach, this “law” entailed a delegation of sovereign authority to private actors.³⁹ But not all delegations are equally troubling, and this delegation in particular was relatively benign. It was benign not only because the power delegated was little more than the power to set a default, but also, and more importantly, because this law operated within a jurisdictional sphere that states on their own could only imperfectly regulate.⁴⁰ This “law” governed a set of relations that were, in the main, outside the scope of any single sovereign power.⁴¹ (This was general common law as articulated by a federal court sitting in diversity.) States were free to legislate locally where they could, and federal courts were required to

³³ See Clark, *supra* note 15, at 1290; Fletcher, *supra* note 15, at 1515. For a discussion of the “new law merchant,” see Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1646-50 (1996).

³⁴ See BRIDWELL & WHITTEN, *supra* note 18, at 66; Clark, *supra* note 15, at 1301.

³⁵ See BRIDWELL & WHITTEN, *supra* note 18, at 4, 58, 90.

³⁶ See *id.* at 12.

³⁷ See *The Reeside*, 20 F. Cas. 458, 459 (C.C.D. Mass. 1837) (No. 11,657) (“An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom”); BRIDWELL & WHITTEN, *supra* note 18, at 57 (“[T]here is certainly ample authority ... for the ability of express contract stipulations to control usages of the trade.”); Clark, *supra* note 15, at 1280 (defining customary law “as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary”).

³⁸ See Jim C. Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT’L L.J. 91, 95-98 (1992). Chen’s article offers another dimension along which we might say that the Erie-effect gets played. As contract law moved from subjectivist to objectivist, see *id.* at 108-11, the public law aspect of contract law became more salient and transparent. In the terms of this essay, this change in turn raised questions about the institutional allocation of customary law within contract law. These questions are forms of the Erie-effect.

³⁹ The classics are Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), and Louis L. Jaffe, *Law, Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

⁴⁰ See BRIDWELL & WHITTEN, *supra* note 18, at 8. As Bridwell and Whitten argue, the federal interest was substantively tied to maintaining neutrality among state forums and to protecting against state partiality. See *id.* at 13.

⁴¹ See *id.* at 8.

respect local rules.⁴² But where the states did not legislate, then like the law of nations, of which the law merchant was one part,⁴³ this law filled a gap in individual sovereign authority. This was customary law accommodating the limitations thought inherent in sovereign jurisdiction.

This relatively benign practice of *Swift*, however, was the practice of federal general common law only at its birth. It was not the practice that *Erie* overturned. For in the ninety-six years in between, and especially in the seventy-five years immediately prior to *Erie*, the practice of federal general common law, and the context of federal general common law, changed. Both changes changed the meaning of *Swift*.

The practice changed as federal general common law came to include a much broader range of law.⁴⁴ Although at the start its scope was essentially contract, by the end it reached far beyond contract, even to the law of torts.⁴⁵ This change in scope in turn changed the nature of the common law practice: federal general common law was less the practice of gap-filling for parties to a commercial transaction, and more a practice of norm-enforcement, covering a substantial scope of sovereign authority. The common law was no longer reflective, or mirroring of private understandings;⁴⁶ it had become directive, or normative over those private understandings.⁴⁷ It was no longer historical; the common law had become rationalizing.⁴⁸

As this practice changed, understandings about it changed as well. As theories of the common law developed, understandings about the nature of the common law changed. As the practice of the common law became less reflective and more directive, theories of the common law as custom yielded to theories of the common law as science. The theories that fit the emerging practice saw the common law as normative, and these in turn displaced theories that insisted that the common law was simply reflective.

⁴² See *id.* at 78.

⁴³ See *id.* at 51; Fletcher, *supra* note 15, at 1517, 1519. The source of the law merchant was the "law of nations," which was part of the common law — a distinct body of law operable within the United States, though not derived from the sovereigns of the United States. As Edwin Dickinson has noted, it "embraced a good deal more than the body of practice and agreement which came later to be called public international law." Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26 (1952).

⁴⁴ See Kramer, *supra* note 15, at 282-83.

⁴⁵ See BRIDWELL & WHITTEN, *supra* note 18, at 96-97, 116, 119; FREYER, *supra* note 16, at 69-72.

⁴⁶ See BRIDWELL & WHITTEN, *supra* note 18, at xiv (describing the early view of law as supporting "self-ordering forces"(internal quotation marks omitted)).

⁴⁷ This parallels a more general move, both on the right and left, to use law to transform society. See RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1820-1920*, at 5 (1995).

⁴⁸ See BRIDWELL & WHITTEN, *supra* note 18, at 123.

It is not my purpose to separate out which came first — the change in practice or the change in ideas about that practice, if indeed it is possible to say that one preceded the other. Whichever came first, or even if both emerged together, the important point is the effect that these shifts would have on the “benign delegation” that *Swift* had allowed. For it is one thing to delegate when the substance of the law delegated is narrow, and reflective, and law-by-default. But when the substance becomes broad, and directive, and displaces private choice, the role of the courts in this delegation becomes questionable. And this, I argue, is the uneasiness that led to the change effected by *Erie*.

The source of this trouble was a change in what the common law was.⁴⁹ Two questions were increasingly difficult to avoid. The first was the question about source (what we could call the positivist’s question): what is the source of the common law when it becomes rationalizing or activist? The second was the question about constraint (the realist’s question): whatever the source, to what extent was this activist common law tracking its source, and to what extent did the source really constrain it?

These two questions brewed in the criticism of *Swift* leading up to *Erie* —though few tied the criticism to the changed understanding of the common law, and most simply spoke of *Swift* as originally mistaken.⁵⁰ To the extent that no clear source existed, or to the extent that the source named may not really have been the source of the substantive norm, the position of federal judges became increasingly questionable. For the positivist, as these became questions more clearly within the domain of state law, the question became: why are *federal* judges making this *state* law? And for realists, as this practice seemed more and more making law rather than finding law, the question became: why are federal *judges making* this state law?

The force of both questions reached its climax in *Erie*. Wrote Justice Brandeis, echoing Justice Holmes, “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”⁵¹ This is Brandeis the positivist. And wrote Justice Brandeis, echoing Justice Field, “[federal general common law] is often little

⁴⁹ See *id.* at 124-26. For a description of the change in jurisprudence, see G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-century America*, 58 VA. L. REV. 999, 1013-28 (1972). See also FREYER, *supra* note 16, at xiii (describing changes in early twentieth-century jurisprudence).

⁵⁰ Justice Holmes was consistently quite unfair to *Swift*, writing as if the doctrine he was attacking was the doctrine that *Swift* had created. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting), and *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting)). This is blaming the parent for the sins of the child; *Swift* had little responsibility for the brooding omnipresence theory that Justice Holmes attacked.

⁵¹ *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533 (Holmes, J., dissenting)) (internal quotation marks omitted). Cass Sunstein links the same point to the Court’s

less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject.”⁵² This is Brandeis the realist. “Positivism” and “realism” became ways of organizing opposition to a practice that was no longer the benign delegation of *Swift*.⁵³ Together they rendered contestable the role of federal courts in this articulation of the common law.⁵⁴

This contestability followed from something relatively constant throughout the period.⁵⁵ This is the agency view of judging: that judges are to track the will of others, and that when they do not, at least without clear sanction, their actions in context appear “political”⁵⁶ They appear political in the sense of making decisions that seem more appropriate for a legislature than for a court. Thus, as the common law becomes more rationalizing, and as the source of its norms becomes less clear, it becomes less plausible to see courts as tracking the will of anyone.⁵⁷ And as this implausibility grows, the rhetorical cost of this practice grows as well. To the extent that it

changing view about the naturalness of contract and property. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880-81 (1987).

⁵² *Erie*, 304 U.S. at 78 (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)) (internal quotation marks omitted).

⁵³ I do not mean to suggest that the jurists of the mid-1930s would have found the delegations in *Swift* to be as benign as the Justices in *Swift* might have. No doubt there was a critical change in the legal culture at the time of *Erie* that increased sensitivity to this point of realism. My point is simply that this change in sensibility occurs at the same time as a change in practice, which suggests that the one may well be related to the other.

⁵⁴ See Clark, *supra* note 15, at 1262-63; Kramer, *supra* note 15, at 283 (“[T]his view of the common law . . . is dead, a victim of positivism and realism.”). It is misleading to suggest that there was only one realism during this period. Realists during the early period resisted judicial constructivism, although they argued that judges construct; realists during the later period pushed judicial constructivism. What unites the two schools is a rhetoric that emphasizes the constructive in judicial actions, though of course this idea does not define them or make them unique. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 30-33 (Noonday Press 1954) (1832); see also JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 49-50 (1995) (describing the conflict between the advocates of law as a legal science and law as a social science).

⁵⁵ I offer this explanation more as a hypothesis than as a claim, because I do not directly investigate the self-understanding of judges throughout the period. As a hypothesis, it helps explain the pattern I describe. But obviously its explanation of the pattern does not by itself validate the hypothesis.

⁵⁶ Elsewhere, I have called this view the “Frankfurter constraint,” tying the idea to the attitude of Justice Frankfurter in a wide range of cases. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 174 (“[A] rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application. . . . [T]o the extent that a rule appears political, we can observe that the Court will trade away from that rule.”).

⁵⁷ James Whitman's statement about custom in the fifteenth and sixteenth centuries thus applies to the twentieth century as well: “The result was an *evidentiary crisis of custom*. As local gatherings gave way to governmental courts, larger and larger numbers of litigants found themselves in governmental courts in which their customary rights were safe in theory, but were in practice impossible to prove.” James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1341 (1991).

became implausible to attribute the substance of federal general common law elsewhere, to the extent this law “finding” seemed more and more like law “making,” the actions of the judges articulating this law increasingly appeared, in this sense, political.

My argument is that this emerging impropriety created a pressure to restructure the practice of federal general common law.⁵⁸ *Erie* effected this restructuring. No longer would federal courts be free to ignore state courts on matters not federal; no longer would federal courts articulate a general common law. Common law lawmaking about nonfederal matters would be relegated to the states, to be allocated as the state chose either to state courts or to state legislatures.

It is from this story of change that I want to draw the model that I call the *Erie*-effect. The pattern has two steps: the first, the emergence of a kind of contestability about a practice within a legal institution (brought about by either a change in that practice, a change in the understandings about that practice, or a change in both); the second, a restructuring of that practice to avoid the rhetorical costs of that contestability. In *Erie*, the contestability was about the judicial role in the articulation of federal general common law. The response was to transfer the practice to another institution — the states. In other cases, the contestability will differ, and so will the response. But it is the conjunction of contestability and a response that I mean by the *Erie*-effect. My aim in the balance of this essay is to show its reach beyond this one case, and what it might mean for interpretive theory within law generally.

Much in this model will turn upon the meaning of contestability and the full range of accommodations that contestability might induce. I consider these questions below. But I first draw a parallel between the change that I have just described and the arguments of two Articles from this volume of the *Review*. My claim is that both are examples of the *Erie*-effect, and that seeing them in this way helps us to understand more fully their significance and reach.

II. VOLUME 110

The shift in *Erie* arose from two sorts of criticisms — one realist, the other positivist. *Erie* resolved the attack of each. Consider now a reflection of each criticism in two Articles from Volume 110, and an echo in each of a similar response.

⁵⁸ Deborah Hellman has offered an extended and careful theoretical account of the relevance of appearance to the judicial role. See Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1108 (1995) (examining the Court's growing concern with appearing principled and arguing that it should consider the appearance of principle in making decisions). Hellman's work would be central to an effort to justify a response such as the *Erie*-effect. I have not tried in this essay to offer a complete justification.

A. Bradley and Goldsmith on Customary International Law

Curtis Bradley and Jack Goldsmith tell a story that starts in the same place as *Erie* — with another part of the law of nations, customary international law (CIL).⁵⁹ Like the law merchant, CIL was a set of understandings among states that governed their relations.⁶⁰ And like the law merchant, it was a body of law that federal and state courts applied independently — the determinations of one were not binding on the other.⁶¹

For our purposes, however, the significance of this law is its customary nature, or more importantly, as I described *Swift*, its benignly customary nature. The customs behind CIL at the time of the founding were longstanding; the raft of treaties and agreements constructed against their background made it plausible to say that they were, in a sense, incorporated into the positive international law of the time. This longstanding recognition and stable practice gave these customs legitimacy.⁶² In large measure, they were defaults, like the law merchant.⁶³ And at least for domestic purposes, a sovereign always had the power to deviate from CIL, either through statute or through treaty.

Over time, but especially after World War II, customary international law changed.⁶⁴ In part, Nuremberg was the source,⁶⁵ but the sources of the shift were much broader than that. The new CIL declared that international law protected fundamental human rights, regardless of the consent of the sovereign.⁶⁶ Principles of human rights could pierce a sovereign's veil.⁶⁷ Citizens of a state could use international law to defend themselves from their state.⁶⁸ And although most nations recognized the content of these rights (and the justice in punishing the Germans for their nonrecognition), most also understood that these rights were only remotely the product of "consent" and "custom." Customary international law had become normative and rationalizing, in just the way that federal general common law had become normative and rationalizing. As with the change in the nature of federal general common law, this change in CIL would have significance.

⁵⁹ See Bradley & Goldsmith, *supra* note 1, at 816.

⁶⁰ See *id.* at 822.

⁶¹ See *id.* at 823-24; Clark, *supra* note 15, at 1283-83; Fletcher, *supra* note 15, at 1517.

⁶² See Bradley & Goldsmith, *supra* note 1, at 816-17.

⁶³ See BRIDLVELL & WHITTEN, *supra* note 18, at 52. This view of CIL as based on custom does not mean that there were no consequences to a nation's choice to deviate from CIL, but only that those consequences, from a domestic point of view, were not legal consequences.

⁶⁴ See Bradley & Goldsmith, *supra* note 1, at 831, 838-42.

⁶⁵ See *id.*

⁶⁶ See *id.* at 840-41.

⁶⁷ See *id.*

⁶⁸ See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2044-48 (1997).

After *Erie*, Bradley and Goldsmith argue, courts and commentators spoke of CIL as federal law. Consequently, CIL was said to preempt inconsistent state law, and presumably bind the executive under Article II.⁶⁹ But on what basis, Bradley and Goldsmith ask? For as CIL has become normative and rationalizing — as its source is less the consent or practice of states, and more the articulation of academics about what fundamental human rights law requires — it has become more important to isolate, and justify, its source. As CIL becomes normative and rationalizing, any implied delegation becomes less benign. The positivist's question thus becomes more salient: what is the source of these norms, and how can they apply as *law* within the United States?

By pointing out this change in the understanding of what CIL was, I do not mean to criticize the substance of this new CIL. Indeed, in my view, the substance is among the most productive and compelling in modern jurisprudence. Rather, my aim is to recognize a question about source, *given its substance*. If CIL were simply the reflection of the actual practices and implied consent of nations, viewing it as a delegation would be relatively benign. But when CIL embraces the norms of human rights law, this source is much less benign. Judgments about it begin to seem less finding, and more making. They begin to seem “political.” This “seeming political” is transitive: it passes from the source to its voice. Whatever the justice in its substance, it gives resonance to the question that Bradley and Goldsmith raise: who are judges to be making this law?⁷⁰

B. Kahan on Chevron and Criminal Law

Bradley and Goldsmith's argument thus parallels the first half of the criticism in *Erie* — the positivist half. The second half of *Erie* — the realist half — is mirrored in the story told by Kahan, although the realism here is of two very different kinds. The first is a realism about interpretation; the second, a realism about execution.

Kahan's story is this: the rhetoric of federal criminal law is that Congress makes the law, and courts and prosecutors find and apply it.⁷¹ The reality is quite different. In ways that we simply cannot ignore — we, post-realists, cannot ignore — federal criminal law is made by people other than Congress. Courts purport to interpret the laws that Congress enacts, but this “interpretation” is always more

⁶⁹ See Bradley & Goldsmith, *supra* note 1, at 844-47.

⁷⁰ See *id.* at 837. This focus on the positivist's question is not to say that Bradley and Goldsmith do not also exhibit the realist half as well. They do, but I am ignoring it. The distinctive part of their argument is not its realism, but its positivism, or at least, a particularly narrow view of positivism. See generally Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2059-72 (1995) (presenting a historical account of legal positivism in American jurisprudence).

⁷¹ See Kahan, *supra* note 2, at 471-72.

than mere “finding.” Prosecutors purport simply to execute criminal law, but their choices are more than mere execution.⁷² Both forms of execution (judicial and executive)⁷³ embody substantive judgments of policy — judgments that press the *Erie*-effect question: who are these courts, or these (effectively independent) prosecutors, to be making federal policy?

One might ask why we face this question now. The inappropriateness that Kahan identifies is nothing special to federal criminal law, nor is it special in the theory of interpretation of federal criminal law. Indeed, Kahan’s observation follows quite directly from the shift that led the Supreme Court in 1984 to adopt the rule of *Chevron*⁷⁴ itself. In *Chevron*, the Court held that if a statute is ambiguous, the administrative agency charged with the statute’s implementation gets deference in interpreting that statute.⁷⁵ It receives this deference because interpretive choices are policy choices, and policy choices should be made by agents with democratic accountability.⁷⁶

Chevron marks a shift in the view of what interpretation is. It is realism applied to reading.⁷⁷ Interpretation in the sense in which we use the term today has a constructive aspect to it. Seeing this aspect raises a question about the legitimacy of the reader. If interpretation is, as the Court called it in *Martin v. Occupational Safety and Health Review Commission*,⁷⁸ “interpretive lawmaking,”⁷⁹ the legitimacy of the lawmaker becomes especially important. In *Chevron*, the Court decided that as between the unelected judiciary and the presidentially appointed executive branch official, the democratic pedigree of the latter trumped the interpretive authority of the former. Courts were to defer to the agency because the agency was democratically more responsible.⁸⁰

Kahan applies this idea to the practice of federal criminal law. If interpretation is constructive, it is constructive with criminal statutes as well as with others. Judges interpreting criminal law are no more likely to be “finding” law than judges interpreting environmental statutes. When there is interpretation of ambiguous statutes, there is in-

⁷² See *id.* at 479-81.

⁷³ This division comes from Montesquieu’s views on the nature of the executive power. See BARON CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156-57 (Anne M. Cohler, Basia Carol Miller & Harold Samuel Stone trans., Cambridge Univ. Press ed. 1989) (1748).

⁷⁴ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁷⁵ See *id.* at 842-45.

⁷⁶ See *id.* at 865-66.

⁷⁷ As I have argued elsewhere, interpretation is also an example of the *Erie*-effect. See Lessig, *supra* note 3, at 426-38.

⁷⁸ 499 U.S. 144 (1991).

⁷⁹ *Id.* at 151 (internal quotation marks omitted).

⁸⁰ See *Chevron*, 467 U.S. at 842-45.

terpretive lawmaking. It is this lawmaking that Kahan urges us to consider.

Kahan presses a second, more timely, realism as well, by focusing on the politics of prosecution. As Justice Scalia tried to teach almost a decade ago in a case considering the constitutionality of the special prosecutor statute,⁸¹ prosecution is a political act. The decision whether to pursue a prosecution entails a judgment of policy. If this political act is to be allowed within our constitutional structure, to whom should this political actor be responsible? The best of Justice Scalia's argument in *Morrison* was exactly this: because individual liberty is at stake, and because the temptation to use prosecution for political ends is so great, a prosecutor must be accountable to an actor who is himself democratically responsible.⁸²

In the years since *Morrison*, people have begun to get the point. In my view, however, its truth is not eternal, but a story about our legal culture now. The truth is about the constraints, or lack of constraints, on a prosecutor now, and about the significance of that lack of constraints for democratic responsibility. As applied to federal criminal law "in the sense in which we think of such law today,"⁸³ this realism pushes in just the way that the realism pushed Justice Scalia in *Morrison* — to locate prosecutorial power in a body that is more directly responsible to a democratic official.

Both realisms push Kahan as parallel realisms pushed the realists in *Erie* — to shift criminal policy judgments away from independent actors to a body more plainly responsible to the President, such as the Justice Department. The Justice Department, Kahan argues, should be given *Chevron* power, and more importantly, *Chevron* responsibility.⁸⁴

⁸¹ See *Morrison v. Olson*, 487 U.S. 654, 722-32 (1988) (Scalia, J., dissenting).

⁸² See *id.* at 727-32.

⁸³ *Tompkins v. Erie R.R. Co.*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).

⁸⁴ See Kahan, *supra* note 2, at 520-21. *Chevron* power in this sense is the power of the Justice Department to give a reasonable interpretation of an ambiguous federal criminal statute. *Chevron* responsibility is the responsibility of the Justice Department to read ambiguous statutes narrowly and to be accountable for those readings. An example of how this doctrine might have been applied is the recent controversy over the Communications Decency Act of 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-36 (to be codified at 47 U.S.C. § 223 (a)-(h)). Lower federal courts rejected the Justice Department's efforts to define the scope of "indecent" under the statute. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 850, 883 (E.D. Pa. 1996) (holding that provisions of the Act restricting certain communication over the Internet violate the First Amendment). Following Kahan, however, this decision may have been a mistake.

C. Erie Reflections

Both Articles from Volume 110 parallel the change in Erie, each from a different side. One tracks the skepticism of the positivist; the other the skepticism of the realist. Both identify a practice that each works to render contestable. Each argues for restructuring that practice to eliminate this contestability. The questions are parallel; so too are the answers. Together, they constitute what I have called the *Erie-effect*.⁸⁵

My aim is not to endorse the substance of these two Articles. Nor is it to evaluate their weight. My aim instead is to use them to mark a pattern that is common in much of modern constitutional and statutory law.⁸⁶ This is the *Erie-effect*. Whether it describes the most im-

⁸⁵ We could summarize the cases with the following table:

	ERIE	BRADLEY & GOLDSMITH	KAHAN
INITIAL PRACTICE	Federal courts "find" general common law, state court judgments notwithstanding	Federal courts "find" GIL, state court judgments notwithstanding	Federal courts "find" federal criminal law through gap-filling interpretation; federal prosecutors execute federal criminal law through decisions to prosecute
CONDITIONS UNDERLYING PRACTICE	Federal general common law relatively narrow and customary	CIL essentially customary	Federal criminal law relatively slight
CHANGES IN UNDERLYING PRACTICE	Federal general common law grows to include far more than what would be considered customary	CIL grows to include non-customary human rights law	Federal criminal law grows to include far more general and less specific criminal law, grounded in highly vague statutes
CHANGES IN IDEAS ABOUT THIS PRACTICE	The common law is normative and rationalizing, rather than historical and reflective	CIL is normative and rationalizing, rather than historical and reflective	Federal criminal law has a common law aspect to it
CONTEST OVER THE NEW IDEA AND PRACTICE	The more normative, the less finding; the less finding, the more lawmaking; who are judges to be making this state law?	The more normative, the less finding; the less finding, the more lawmaking; who are judges to be making this international law?	The more expansive, the less finding; the less finding, the more lawmaking; who are judges to be making criminal law?
RESOLUTION OF THE CONTEST	Shift the practice back to state courts	Hold that CIL is not federal common law	Give the Department of Justice <i>Chevron</i> deference

⁸⁶ I have described some of these examples elsewhere and the others I have space only to mention briefly. See Lessig, *supra* note 3, at 426-38. Other *Erie-effect* examples include Justice Scalia's arguments for presidential control over independent agencies, see *id.* at 435 (discussing contestability about an independent agency's law-following ability and recommending a reallocation of interpretive authority to the president); Judge Bork's arguments for a changed understanding of antitrust law, see ROBERT H. BORK, *THE ANTITRUST PARADOX* 23-24, 26-27, 37, 42, 79-83, 87 (1978) (discussing contestability of judicial decisions about allocation in antitrust and recommending a change in antitrust doctrine to eliminate judgments about allocation and burdens of administrability); Justice Frankfurter's arguments for the change in the Court's Commerce Clause jurisprudence, see FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL*,

portant interpretive changes of this century, or just most of the interpretive changes of this century, the Erie-effect suggests something significant about our practice of interpretation, and something significant for which a theory of interpretation should account.

What it suggests is the place of context in interpretive theory, and more importantly, the place of contestability in understanding the role of context in interpretive theory. I consider both in the section that follows. I then return in the final sections to the application of contestability to these cases, and to interpretive theory more generally.

III. CONTEXT AND CONTESTABILITY

The image is familiar even if we can't quite place it: an old man has a way about him. He learned how to behave long ago. He learned to hold doors, or smile vaguely, to compliment a dress, or to speak differently when speaking with (he would say "to") a woman. At the time he learned this, these were the actions of a decent man. But the world around him changed. As it changed, these acts took on a different meaning. Their meaning became sexist or insensitive. They no longer marked him well.

This image is not about pc-ism. It is about the vulnerability of meaning. It is about meaning's vulnerability to changes in context. Words and acts and practices have a certain meaning in one place; when that place changes, the same words and acts and practices take on a different meaning. Meaning is vulnerable to these changes. It changes as the context changes. And sometimes it can change to render problematic something that before was completely benign.

TANEY AND WAITE 54-58 (1937) (discussing contestability about standards to apply to the Commerce Clause and recommending judicial retreat); the retreat of the old Court in the face of the New Deal, see Lessig, *supra* note 3, at 461-72 (discussing contestability about whether the Court was acting politically in its retreat from continued restraint on the New Deal); the retreat of the Court in ratemaking cases, see Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1388-93 (1997) [hereinafter Lessig, *Fidelity and Constraint*] (discussing contestability about judgments of value that led to a reduced role for the Court in reviewing ratemaking judgments by the legislature); the retreat of the Court from the federalism of *National League of Cities v. Usery*, see Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1225-26 (1993) (discussing contestability about judgments on "traditional state functions" that forced a retreat from the activism of the *National League* rule).

The pattern of these cases might suggest that the Erie-effect always yields less judicial activism. That conclusion does not follow. As I have argued elsewhere, sometimes contestability increases judicial activism. The key is to be precise about what has been made contestable. If contestability relates to the grounds for judicial action, then we have deference, as the examples in this essay suggest. But if contestability goes to the ground for resisting a right, the contestability may reinforce the right, and thereby increase activism. For example, if the Equal Protection Clause permitted discrimination against gays and lesbians because of a relatively uncontested view about homosexuality, then contestability about that view weakens the justification for discrimination, and thereby increases equal protection arguments for invalidating such discrimination. See Lessig, *Fidelity and Constraint*, *supra*, at 1427-29.

The *Erie*-effect rests on just such vulnerability. In the range of cases that it describes, an action or practice relatively unproblematic in one context is rendered problematic in another. The change in the common law, for example, was much bigger than the disputes about federal general common law; it was a change in the nature of law itself — both in its ideal and in its practice. As it changed, it rendered the practice of federal general common law problematic, increasing the rhetorical costs to those engaging in the practice, and creating a pressure on the federal courts that had not been there before.

And so the practice changed. For the law (unlike the old man) does not sit by passively as its actions are rendered problematic. The law's response is quite direct. It responds with institutional reallocation. A practice is reallocated from one institutional actor to another, from an actor vulnerable to the pressures or rhetorical costs of the practice at issue, to one less vulnerable to those costs. In response to contestability, the court picks a path that renders the contest less problematic.

At the core of this account is an idea of contestability. It is time to say a bit more about what this notion is. In the sense that I offer it here, contestability is a social predicate. It describes a social understanding, a type of sociology of knowledge.⁸⁷ Two conditions mark its presence. An issue is contestable when there is actual and substantial disagreement about it (that is, when it is actually contested), and when that disagreement is in the foreground of social life (that is, when it is seen and understood as generally contested). Both conditions are necessary, and both have an empirical and an interpretive component. The first requires that there be actual disagreement among a substantial proportion of the relevant public (a predominantly empirical question); the second that there be an awareness of and salience to that disagreement (a predominantly interpretive question).⁸⁸ Both conditions are independent of the truth of what is disputed: to say that something is contestable is simply to report a social understanding that there is disagreement about it, and that such disagreement is, for that issue, appropriate. It is not to say that there is no truth about the matter, or that there are no right answers.⁸⁹

⁸⁷ Cf. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 2-5 (Louis Wirth & Edward Shils trans., Harcourt, Brace & Co. 1952) (discussing the comparable sociology of knowledge).

⁸⁸ Thus, in the way in which I am using the term, "contested" refers to a social fact — that there is disagreement. "Contestable" refers to it being seen as appropriate that there is a contest about a certain issue. As I describe more fully below, an issue can be contested in the sense I mean without it being contestable, although it cannot be contestable without also being contested. Likewise, an issue can be uncontested without being uncontestable, but not uncontestable without being uncontested. An issue is uncontested when there is not a substantial disagreement about it; but it is uncontestable when it is understood to be inappropriate or odd to contest it.

⁸⁹ Obviously, contestability is relative. No discourse is completely contested, or absolutely uncontested. There is no truth for which disagreement cannot be generated, and neither is there a disagreement that is complete or radical. Nor will it be easy to draw lines between the contesta-

Some examples may help. Abortion, for us, is the clearest case of a contestable discourse. There is actual disagreement about the morality of abortion, and there is awareness that this disagreement exists and is important. Disagreement about abortion is in this sense normal or appropriate. There is space for differing views — a social space, constituted by an understanding about what views are reasonable.⁹⁰

Infanticide is just the opposite — not infanticide of extremely dysfunctional babies, but infanticide for reasons as subjective or wide-ranging as the reasons that a woman may legitimately have for an abortion. There is not a contest over whether infanticide so understood is morally justified. It is not. Nor is there any sustained public attention directed to the matter.⁹¹ The immorality of infanticide so understood is relatively uncontested and in the background of social life. It is a part of the moral universe that we simply take for granted.⁹²

These two cases mark out the extremes. But the extremes will not fully describe the dynamic that I want to track. Contestability moves through stages, and a matrix will better describe these stages and the paths through which it might move.

A. A Matrix of Contestability

I said that there are two conditions on contestability — an issue is either contested or uncontested, and it either lies in the foreground or background of public attention. These two conditions map four possibilities:

ble and the uncontestable. All that is necessary to make the claim understandable is the belief that on this continuum black does turn to white. My claim is simply that we gain something by considering the difference between black and white, or at least the difference among shades of gray.

⁹⁰ See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 73 (1995) (describing the social space defined by norms of privacy). Like Post, I am claiming that these social understandings define a space of constitutional appropriateness, though here the social space is the appropriateness of judicial action, rather than privacy.

⁹¹ There is, however, periodic questioning of the matter. See Jan Hoffman, *Teen-Agers Indicted for Murder in Newborn's Death*, N.Y. TIMES, Dec. 10, 1996, at B1 (discussing the indictment of a teenage couple accused of murdering their newborn son).

⁹² To test this conclusion, imagine the response if one genuinely and persistently aimed to question the dominant view. If one in full seriousness insisted upon the morality of infanticide — if one made this questioning of the dominant view one's life's work — one would not just face people who disagreed. One would face people who thought such a choice odd or alien. People who dissent from views such as these are not just different; they are outsiders. They do not just hold views contrary to the dominant view; they hold views that make them strange or abnormal. Disagreeing with views like these places one outside the normal social space. Issues such as these are simply off the table of moral or political debate.

	<i>contested</i>	<i>uncontested</i>
<i>foreground</i>	[1] contestable	[2]
<i>background</i>	[4]	[3] uncontestable

The extremes are box [1] and box [3]. Box [1] is the category of the contestable (both contested and foregrounded); again abortion is the paradigm case. Infanticide is its opposite, in box [3]: the uncontestable (neither contested nor foregrounded). These two boxes represent the boundaries on a continuum, with the two other cases lying in between.

These middle cases are the more interesting — interesting because they show us something about how contestability changes. Start with box [2]: these are discourses within which there is no longer a substantial dispute, but that continue to occupy public attention. Quid-pro-quo sexual harassment is an obvious example: views about the impropriety of sexual harassment are no longer contested. They once were, but that contest has quickly, and dramatically, died. Yet the topic still occupies public attention — an attention that is directed with an important vigor at rooting out continuing instances of this harassment.

This is the character of box [2] discourses. They have the flavor of a campaign. They are issues that we feel committed to reforming in the direction that the contest has resolved itself. Yet there is a sense that public attention is still required to effect this reform. There is, in other words, a consciousness and intensity to them; a commitment to eliminate the contrary view; a certain patriotism, or virtue, or sometimes self-righteousness, in speaking out against the contrary view; a certainty that the contest has, in principle, resolved itself; and an ideal about pressing that resolution to completion.

Box [2] discourses contrast with cases in box [4]. Box [4] represents cases where there is actual dissent, or a contest, yet the contest, for some reason, remains in the background of social life. An example is the issue of sex equality just after the ratification of the Fourteenth Amendment: certainly there was substantial disagreement about whether equality norms should be extended to women as they had been extended to black men.⁹³ If people had been asked, they would have taken very different positions on the matter. Yet for reasons unexplained, this dispute stayed quite firmly in the background of social and political life. One might say that the issue was suppressed, though not because some conspiracy succeeded in keeping people quiet about it. Rather, the dispute was not perceived to have social salience at the time. It took time and political action to force the issue into the public eye.

⁹³ This disagreement was pressed in the Supreme Court in the case of *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). Bradwell challenged Illinois's exclusion of women from the practice of law; the Supreme Court rejected the claim. See *id.* at 139.

Box [4] disputes are a resource for entrepreneurs of social change. These are the disputes that fuel social change. Change entrepreneurs draw upon these disputes, and if successful, force them into box [1]. Catharine MacKinnon's work on the law of sexual harassment is the clearest example of this process. MacKinnon took the issue of sexual harassment from box [4], and through both her writings about sexual harassment and the litigation that she and others waged, succeeded in pressing the issue into box [1].⁹⁴ After a relatively short time, the contest in box [1] was importantly resolved — sexual harassment was determined to be sex discrimination.⁹⁵ This determination moved the dispute into box [2], in which it currently remains, eventually (we might expect) to fall into box [3].

As I have described it, this matrix may apply to any domain of social discourse. It could describe political discourse, legal discourse, discourse within some field of fashion, or even discourse in physics.⁹⁶ The matrix is simply a mapping of the modalities of dialogic appropriateness, tracking the propriety of disputes within a particular discourse, and tracing how that propriety might change. The matrix does not attempt to explain why these modalities change; it simply offers a way to speak about the differences that such modalities might present.

My claim within law, however, is that these differences matter to how a court will treat a question within a particular discourse. When the legitimacy or appropriateness of a given practice is itself drawn into doubt — when it becomes, in the sense that I've described, contestable or within box [1] — the court will find a way to restructure this practice so as to avoid the cost of this perceived inappropriateness. This, again, is the *Erie*-effect. Alternatively, though beyond the scope of this essay, when the legitimacy of a court engaging a given practice is not in doubt — when it is, in the sense I have described, uncontestable or within box [3] — the court will engage in that practice quite actively, relying upon its truths, regardless whether they were the truths that the discourse originally admitted. Both extremes are constraints on interpretive judgment: contestability, by forcing a

⁹⁴ See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN passim* (1979); Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 816-26 (1991). I claim that MacKinnon moved the debate from box [4], rather than box [3], because feminists, without law, had done much to make the issue ripe within the law before MacKinnon took hold of the argument.

⁹⁵ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

⁹⁶ There is a huge body of literature related to this question, much of it tied to Thomas Kuhn's work. Kuhn scholars will argue that Kuhn has little relevance outside of the history of science, see Gary Gutting, Introduction to *PARADIGMS AND REVOLUTIONS: APPLICATIONS AND APPRAISALS OF THOMAS KUHN'S PHILOSOPHY OF SCIENCE* 1, 12-15 (Gary Gutting ed. 1980), though it is plain that many have seen parallels to Kuhn's argument outside of science, see, e.g., Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 *VA. L. REV.* 187, 261 & n.315 (1984). Although my account might resonate with much in this latter tradition, I do not believe it would be helpful to engage that debate here. The point should stand on its own, whatever its echo with debates outside of law.

kind of judicial neutrality; uncontestability, by forcing a conformity to the then uncontestable truths.

Again, the matrix does not explain why a discourse moves from one box to another,⁹⁷ and I do not believe that any general account is possible. Rather, it draws out features of these discourses, and suggests ways to account for differences in how discourses are treated. It is a topology of the differences that contestability might make, and although my focus has been quite narrow, it may explain differences beyond those I have sketched. It might, for example, suggest a way to think about the appropriateness of governmental involvement in the construction of a certain view within a particular discourse. I take it, for example, that there is a difference between the government taking sides in a dispute about abortion and the government taking sides in a dispute about sexual harassment or smoking. First Amendment demands of neutrality seem appropriate in the first case, but oddly not in the second two.⁹⁸ But this difference may align with different locations in the matrix. Sexual harassment and smoking are box [2] disputes: they are areas in which we believe social meanings need to be remade, and where as a consequence we give the government greater leeway in aiding social changes.⁹⁹ But with box [1] disputes such as abortion, contestability remains; here it is more appropriate for government to remain neutral. It is box [1] discourses that seem most

⁹⁷ This change in contestability can be seen by comparing the discourse over due process and the discourse over separation of powers. In the late 1970s, due process was less contested than separation of powers, in the sense that a claim of unconstitutionality grounded on the former would have been far more likely to succeed than one based on the latter. In the 1990s, the position is reversed; a claim based on separation of powers now has a far more automatic, or natural, sound to it than a claim based on due process. *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1995), is a perfect example of this difference. In *Plaut*, the Court had the option of deciding the case on either separation of powers or due process grounds and chose the former. See *id.* at 1450, 1452; *id.* at 1467 n.2 (Stevens, J., dissenting). Quite likely it would have followed the latter thirty years before.

⁹⁸ Compare the fervor of the battle over the First Amendment issue in *Rust v. Sullivan*, 500 U.S. 173, 192-200, 204-15 (1991), with the court's timidity in dealing with the question presented in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534-37 (M.D. Fla. 1991).

⁹⁹ I try to advance an argument like this in Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995), though there, like here, it is underdeveloped. My suggestion, however, is that this way of dividing up discourses might have relevance to a theory identifying those cases in which it makes sense to allow more government intervention in the construction of social meaning, as opposed to those cases in which it makes sense to allow less. Government intervention in box [1] cases would be the least permissible (because plainly contested). Box [3] cases may be what the morality exception (through obscenity law) in First Amendment law is about. Box [4] cases are the most predictable, and perhaps most troubling, because the state can use its power to suppress a contest. Box [2] may represent the least troubling and most appropriate area for government intervention. Cf. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 479-82 (1996) (explaining differential treatment in terms of government motive).

susceptible to First Amendment arguments for neutrality; and box [2] disputes where they are often ignored.¹⁰⁰

B. Applying the Matrix to Erie and Volume 110

However broadly the matrix might reach, we can tie it back to the Erie-effect in a fairly direct way. The discourse at issue in Erie moved through all four boxes.¹⁰¹ The practice of federal general common law as announced in Swift — given its narrow scope and the early salience to the law of nations — was relatively uncontested and backgrounded.¹⁰² It was a discourse that started in box [3].

As the nature of that practice changed, and as ideas about positivism and realism matured, questions about the practice were thrown into relief. For a while, these questions did not register. They were then within box [4]. Justice Field, and later Justice Holmes, in lonely yet passionate dissents, continued to push the questions forward. Eventually, Justice Holmes succeeded. Here Holmes is MacKinnon, though for a far less significant issue, and over a much greater period of time. His work succeeded in making the appropriateness of federal general common law contestable. Erie in turn mooted the contest, by relocating the practice so as to avoid the perception of inappropriateness. It thus moved the dispute from box [1] to box [2]. Finally, time and practice allowed the issue to fall again into box [3], so completely that most of us cannot even recognize what Swift was about. We have forgotten the struggle and its meaning; we are left baffled by the language of Swift and its progeny.

The matrix teaches something about the two Articles that are the focus of this essay as well. Neither Article describes a discourse that has moved through all four boxes. At best, the discourses of each Article began in box [3] with a practice that, in its original context, was relatively uncontested and backgrounded. Over time, this uncontestedness changed, moving the discourses into box [4].

It is here that the Articles from Volume 110 enter. Both make a bid at focusing our attention on its particular contest; both aim to force its contest into the foreground. Both attempt to make contesta-

¹⁰⁰ This suggests a way to understand MacKinnon's success, and failure, in her efforts to regulate pornography. Her success was in getting the political in porn made public — in getting others to see that it is an expression of a particular view of women. But this success rendered discourse about the message of porn political. Because political, regulation of such views was more easily seen as viewpoint based, because it is regulation that advances one (contestable) view over another. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985); Lessig, *supra* note 99, at 947.

¹⁰¹ See FREYER, *supra* note 16, at xiv-xv (tracing the development of and opposition to the Swift doctrine).

¹⁰² See, e.g., Fletcher, *supra* note 15, at 1517 (“[A]pplicability [of federal general common law] was so obvious as to go without saying.”).

ble the Court's role in each of these different domains, by showing something about how we now should view each discourse.

The contest that Bradley and Goldsmith identify is the contest over the status of customary international law. Within the culture of international lawyers, CIL has an evolving, naturalistic quality. It is a practice that continues the rhetoric of *Swift*; it is openly truth and justice seeking, less and less constrained by the actions of sovereigns. But within the culture of domestic lawyers, such rhetoric — such non-positivistic law — seems not *law*, at all. Rhetoric such as this died in U.S. domestic law with *Erie*. Thus a conflict exists between rhetorics, which Bradley and Goldsmith use to push this discourse from the background into the foreground. Their aim is to move the discourse from box [4] to box [1] — thereby making the practice contestable — by making plain the domestic law implications of the international lawyers' view.¹⁰³ Two legal cultures clash, and Bradley and Goldsmith use this clash to make the practice of CIL contestable.

This contest has been brought about both by a change in the practice of CIL and by a change in ideas about the nature of CIL. The practice of CIL is more extensive, and more normative; its conception is more naturalist. These changes combine to create a tension when this modern international law is brought home. From the perspective of a tradition that is more positivist and realist, this naturalism seems out of place; and its implications, Bradley and Goldsmith argue, unconstitutional.

The contest that Kahan points to is similarly the product of a change in both practice and ideas. Here, the changed practice is the extraordinary growth of federal criminal law, fueled by very general criminal prohibitions.¹⁰⁴ As the courts have processed this increase, the practice of federal criminal common law lawmaking has become more extensive. As the gaps to be filled have widened, this practice of gap filling has become less benign. At the same time, ideas about interpretation have also changed. As I described above, realism has invaded thought about reading. The constructive inherent in reading is more plainly at the fore.

Both changes combine to produce the contest that Kahan identifies. He, like Bradley and Goldsmith, is a contest entrepreneur; his aim, like theirs, is to escalate that contest into box [1].

Both Articles thus push the first step of an *Erie*-effect — both push to inflame. But both also have an answer to the contest that

¹⁰³ For example, see Bradley & Goldsmith, cited above in note 1, at 838-46.

¹⁰⁴ On the growth of federal criminal law, see, for example, Sara Sun Beale, *Federalizing Crime: Assessing the Impact of the Federal Court*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42-44 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980-81 (1995); and Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 707-09 (1995).

they attempt to create. Bradley and Goldsmith's answer is that CIL not be considered federal common law; Kahan's answer is that *Chevron* deference be accorded to the Justice Department. Both answers are, like *Erie*, recommendations about how to restructure an existing judicial practice; both suggestions would, through this restructuring, reduce the rhetorical cost of continuing the practice.

This common feature of these two Articles helps reveal an aspect of the *Erie*-effect that my discussion of *Erie* might have hidden. This is the choice that contestability yields. The discussion of *Erie* emphasized the constraints of the interpretive context that, in 1938, forced the Court to remake federal general common law. The picture is of a court that cannot help but do something; of the old man who has found his actions have different meanings, and who has little control over the meanings they now have. The image is passive — discourses are *rendered* contestable, while the old man simply sits by.

But this passivity is overstated, and these two Articles suggest why. Bradley and Goldsmith and Kahan *identify* a contest; they aim to *force* it into the foreground; and then they *argue* for a change to relieve the contestability that they have alleged. These are actions taken by individuals, and eventually (if they are successful) by a court. The creation of contestability is the product of action, whether by judges (such as Justices Holmes and Field with respect to *Erie*, or Justice Scalia with respect to prosecution) or academics (such as MacKinnon with respect to sexual harassment). In each case, it succeeds in part because of this action, and in part because of the state of the interpretive context within which it gets played. Not every backgrounded but contested box [4] discourse can be rendered contestable; and not everyone can render contestable those that can. The contest entrepreneur is no doubt constrained, but he or she acts against those constraints. It is these actions that produce an *Erie*-effect.

The response to contestability is also active. The Court *changes* something¹⁰⁵ to relieve the perceived pressure of the contestability then felt. In changing something, the Court has a choice about what will be changed — again, not a choice unconstrained by the interpretive context, but also not a choice completely determined by the interpretive context. Instead, the choice reflects the strength of the various values at stake. The choice says something, and what it says may itself create a kind of contestability.

We can see this dynamic by comparing the choices implicit in the arguments of Bradley and Goldsmith and Kahan. Here is a prediction: the reallocation pressed by Kahan will be an easier change to effect than the reallocation pressed by Bradley and Goldsmith. I am

¹⁰⁵ In the full range of examples, what changes differs. In some cases, the Court shifts the practice to the institution with the greatest legitimacy given the contemporary ideological context (*Chevron*, *Erie*); in other cases, it simply adopts a rule that reduces political pressure.

not recommending it, and I do not even know whether it is feasible. But if it were, my sense is that its costs are less significant than those of Bradley and Goldsmith's proposal. The reallocation that Kahan recommends does contradict values in our legal tradition, but the salience and importance of that contradiction, I suggest, will not be noticed. Kahan effectively argues that these values would be better advanced if the allocation that he presses for were adopted.¹⁰⁶ But never mind — even if they were not, they are not as significant as they may once have been. Giving *Chevron* deference to the Justice Department for ambiguous criminal statutes (and granting lenity when the Department fails to execute properly that deference) will not be such a terrible price to pay if the Article, along with similar articles, succeeds in making the issue contestable, and if the contestability is resolved in this way.

The same cannot be said about Bradley and Goldsmith, and here we must be more precise about describing their point. One aspect of their argument is quite formal and absolute: express authorization of CIL is required before CIL can become federal law.¹⁰⁷ At times they back away from this certainty,¹⁰⁸ but it is not clear, on their own terms, just how. In their strictly positivistic view, the only law is domestic law, and the only domestic law is statute or constitution based; so before international law gets incorporated into a domestic regime, a statute must ratify it.¹⁰⁹

One might resist this formalism, however, and reach a somewhat different result. No doubt all law is domestic in the sense that it must be adopted by some domestic authority.¹¹⁰ But one might imagine a regime that did not as strictly insist upon express authorization, at least within certain domains. In particular, in box [2] or [3] discourses, one might well imagine that rather than insisting on a clear statement rule of recognition, and thereby sacrificing a tradition of honor in international law,¹¹¹ the Court could instead recognize a tradition as longstanding or uncontested enough to be treated as adopted, the absence of a statute notwithstanding. Or more directly, in this conflict between a particular philosophy of law and a value of justice, the

¹⁰⁶ See Kahan, *supra* note 2, at 493-506.

¹⁰⁷ See Bradley & Goldsmith, *supra* note 1, at 840-42.

¹⁰⁸ See *id.* at 852.

¹⁰⁹ This idea of a written text being at the base of all law is not the essence of positivism. Whether written or not, all that most forms of positivism require is a rule recognizing some founding authority. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986); Sebok, *supra* note 70, at 2062-65. A narrow reading of Bradley and Goldsmith's claim is that it reaches only the new CIL, not CIL in general. But this simply focuses on the part of CIL that has changed.

¹¹⁰ See *The Western Maid*, 257 U.S. 419, 432 (1922).

¹¹¹ See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 488-93 (1989).

choice of the philosophy at the expense of justice may itself be too high a rhetorical cost.

I may well be wrong in this prediction. The most recent work of the Supreme Court suggests that I am.¹¹² But whether wrong or not, my point is only to emphasize the choice involved. If the contest that Bradley and Goldsmith champion is eventually recognized as contestable, then how the Court moves the discourse from box [1] to box [2] will say something about the legal values that the Court recognizes — about the value, we might say, of legal philosophy versus justice.

IV. CONCLUSION

I have drawn from Volume 110 two examples of a more general pattern. My aim is the pattern, not the particular examples. I have argued that the *Erie*-effect describes a class of legal change, brought about by changes in an interpretive context — by a contestability about practices within that interpretive context. It is a piece of a more general account of how context matters in interpretive theory. It is a promise that we might say something theoretical about how context matters — not because the theory is driving the examples, but because the examples and the theory might help us understand a certain class of interpretive change. More directly, they help us understand how changes in context can yield changed readings, and how these changes may be changes of fidelity.¹¹³

Most constitutional theory, I would argue, underplays the role of context. Most focuses on what we might call first-order objects of interpretive analysis — text, structure, historical understandings, and moral principles — objects that have their effect because of the substance of what they say. The question from this perspective is whether *X* with meaning *Y* has properly been added to the interpretive equation; disputes are over the range of permissible *X*'s and the various *Y*'s that the *X*'s may yield.

The *Erie*-effect looks to second-order phenomena — not to the substance of the object at issue, but to its social understanding or social meaning within its adjudicated context.¹¹⁴ It tracks shifts in the appropriateness of using that object, or class of objects, within some domain of interpretive dispute, and it predicts something of the effect that such shifts might yield. In this, the *Erie*-effect functions much like a motion for summary judgment: it resolves a question of inter-

¹¹² See *United States v. Alvarez-Machain*, 504 U.S. 655, 666-68 & nn.14-15 (1992) (holding that, contrary to international law, kidnapping does not invalidate prosecution); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (refusing to consider international standards and practice in construing the Eighth Amendment); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441-43 (1989) (refusing to allow CIL exemption to Foreign Sovereign Immunities Act).

¹¹³ I discuss this idea of fidelity in Lessig, cited above in note 3, at 401-03.

¹¹⁴ See the discussion in Lessig, cited above in note 99.

pretation by tracking not truth, but contestability; it expresses the constraints of judgment based not on truth, but on contestability.

By responding to contestability, the changes yielded by the *Erie*-effect might be said to demonstrate a certain respect for democratic authority. For by responding to contestability, courts are deferring where their claim to judicial authority appears most problematic. This is a practice of appearance,¹¹⁵ but it may say something about what courts believe their proper role to be. It thereby links the arguments of these two Articles, as well as the other examples of the *Erie*-effect, to something more fundamental in our judicial tradition — to the view that judges should not speak about matters that are viewed as contested, and hence political.

Left open, of course, are many questions — ranging from questions about the justifiability of such change, to questions about how such change is identified, to methodological questions about when a discourse is contested, or contestable, and about what keeps a contest in the background. This is the work that context theory needs to complete. This essay has not done that work. Its aim is simply to suggest the place and possibilities that such an account might provide.

¹¹⁵ See Hellman, *supra* note 58, at 1108-09.