tion of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." [1106] For a number of reasons, it would not have been wise to have overruled *Tyson* on the basis of arguable new discoveries.[1107]

Second, the decision turned on the lack of power vested in Congress to prescribe rules for federal courts in state cases. "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. No clause in the Constitution purports to confer such a power upon the federal courts." [1108] But having said this, Justice Brandeis made it clear that the unconstitutional assumption of power had been made not by Congress but by the Court itself. "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare

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[1106] 304 U.S. at 77–78 (footnote citations omitted).

[1107] Congress had re-enacted § 34 as § 721 of the Revised Statutes, citing Swift v. Tyson in its annotation, thus presumably accepting the gloss placed on the words by that ruling. But note that Justice Brandeis did not think even the re-enacted statute was unconstitutional. 304 U.S. at 79–80. *See* H. FRIENDLY, BENCHMARKS 161–163 (1967). Perhaps a more compelling reason of policy was that stated by Justice Frankfurter rejecting for the Court a claim that the general grant of federal question jurisdiction to the federal courts in 1875 made maritime suits cognizable on the law side of the federal courts. "Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past the claim of a sudden discovery of a hidden latent meaning in an old technical phrase is surely suspect."

"The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. [Here, the Justice footnotes: 'For reasons that would take us too far afield to discuss, Erie Railroad Co. v. Tompkins, 304 U.S. 64, is no exception.'] The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." Romero v. International Terminal Operating Co., 358 U.S. 354, 370–371 (1959).

[1108] 304 U.S. at 78. Justice Brandeis does not argue the constitutional issue and does not cite either provisions of the Constitution or precedent beyond the views of Justices Holmes and Field. Id. at 78–79. Justice Reed thought that Article III and the Necessary and Proper Clause might contain authority. Id. at 91–92 (Justice Reed concurring in the result). For a formulation of the constitutional argument in favor of the Brandeis position, *see* H. FRIENDLY, BENCHMARKS 167–171 (1967). *See also* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202, 208 (1956); Hanna v. Plumer, 380 U.S. 460, 471–472 (1965).