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A Theory of Federal Common Law

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A THEORY OF FEDERAL COMMON LAW

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Federal common law is a puzzle. Despite *Erie*'s declaration that "[t]here is no federal general common law,"[1] well-established and stable pockets of federal common law persist in several areas: cases affecting the rights and obligations of the United States,[2] disputes between states,[3] cases

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[1] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[2] *See* discussion *infra* Part II.A.

[3] *See* discussion *infra* Part II.B.

affecting international relations,[4] and admiralty.[5] If anything, federal common law is expanding. Eighteen years ago, a case in which state law was in "significant conflict" with "uniquely federal interests" provided an occasion for the Supreme Court to create another form of federal common law.[6] Five years ago, the Court added yet another piece to the puzzle, holding that the preclusive effect to be given to a judgment in a diversity case was a question of federal common law.[7]

Erie, of course, does not preclude common law rulemaking in these pockets. In these areas, federal common law applies in both state and federal courts; *Erie* bars federal courts only from creating federal common law applicable in federal courts when state courts would apply state law.[8] But the statutory, policy, and constitutional rationales of *Erie* are in tension with the continued existence of federal common law.[9] If federal (and state)

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[4] *See* discussion *infra* Part II.C.

[5] *See* discussion *infra* Part II.D.

[6] Boyle v. United Techs. Corp., 487 U.S. 500, 507–09 (1988), discussed *infra* Part II.E.

[7] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), discussed *infra* Part II.F. The Court had already held that federal law governed the claim-preclusive effect of a federal judgment in a federal question case. Stoll v. Gottlieb, 305 U.S. 165 (1938); Deposit Bank v. Frankfort, 191 U.S. 499 (1903).

[8] *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469–70 (1942) (Jackson, J., concurring) ("The federal courts have no *general* common law . . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law. I do not understand Justice Brandeis's statement in [*Erie*] that 'There is no federal general common law,' to deny that the common law may in proper cases be . . . the basis of . . . decision of federal questions."). According to standard theory, federal common law is a species of federal law, which state courts must apply by virtue of the command of the Supremacy Clause. *See* U.S. CONST. art. VI, §1, cl. 2; Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 689 (N.C. 1999). *But see* Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005) (rejecting view that the Supremacy Clause is an adequate basis on which to compel state courts to make federal common law, but concluding that historical practices, constitutional structure, and adjudicatory norms permit state courts to make federal common law in certain circumstances). As we discuss *infra* note 185 and accompanying text, *Semtek* operates only in federal courts, and seems to be the type of federal common law that *Erie* precludes. In fact, *Semtek* can be explained by our theory of federal common law. *See infra* notes 308–327 and accompanying text.

[9] According to Justice Brandeis, three arguments supported the result in *Erie*. First, the regime of federal common law created by the then-regnant *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), was inconsistent with the Rules of Decision Act. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71–74 (1938). Second, federal common law created undesirable policy outcomes such as lack of "uniformity in the administration of the law of the state" and discrimination against in-state parties by parties who could often change citizenship in order to avail themselves of more favorable federal law. *Id.* at 74–78; *cf.* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (recasting these policies into "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws"). Third, the use of federal law in diversity cases in which state courts would have applied state law was unconstitutional. *Erie*, 304 U.S. at 78–80. *Erie* never identified the precise constitutional defect from which *Swift v. Tyson* suffered. Some of the language in the opinion, as well as the first generation of *Erie* scholarship, tended to locate the defect in the Tenth Amendment. More recent scholarship has regrounded *Erie* as a separation of powers case. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000) (describing both Brandeis's own theory of constitutional

courts have broad powers to make federal common law, then the power refused to federal courts in *Erie* pales in comparison to the power retained by federal (and state) courts to establish federal rules of decision.

Reconciling *Erie* and federal common law is only a part of the challenge. Following the analysis of Paul Mishkin[10] and Henry Friendly,[11] the Supreme Court has held that courts are not required to exercise their federal common lawmaking powers in all cases; the application is in some cases discretionary, and courts can choose to apply extant state law rather than to create new federal law.[12] As a practical matter, this declination of power lessens the tensions with *Erie*'s penumbra.[13] But it also makes difficult any attempt to craft a theory that both justifies courts' power to create federal law and guides the discretionary refusal to exercise this power.[14]

This Article begins our effort to craft such a theory. One of the fundamental difficulties in developing any theory of federal common law is defining what federal common law is. The Supreme Court has never assayed a definition, and the commentators are divided over a proper definition.[15] In this Article, we examine only those cases in which the Supreme Court acknowledges that it is establishing federal common law.

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judging and the historical treatment of *Erie* by scholars); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79 (1993).

Erie's policy rationale would not necessarily be offended by a robust power to create federal common law. As long as the law applied in both state and federal courts is uniform, the undesirable policy consequences of *Swift v. Tyson* can be avoided. Indeed, since federal law provides greater uniformity both within the courts of one state and across the court systems of the various states, *Erie*'s policy rationale arguably supports the broad use of federal common law.

The statutory and constitutional rationales are less tolerant of federal common law. The statutory rationale has come under attack in recent years, as some scholars have argued that the phrasing of the Rules of Decision Act authorized federal courts to create their own common law. WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 126–48 (1990); Borchers, *supra*; Jerome A. Hoffman, *Thinking out Loud About the Myth of* Erie*: Plus a Good Word for Section 1652*, 70 MISS. L.J. 163 (2000). As long as the Court adheres to *Erie*'s interpretation of the Rules of Decision Act, however, federal common law and § 1652 co-exist uneasily. Likewise, in their strongest form, federalism and separation of powers concerns leave no room for federal common law to operate. *See infra* notes 187–191 and accompanying text.

[10] Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

[11] Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

[12] *See, e.g.*, *Semtek*, 531 U.S. at 508–09 (incorporating state preclusion law); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

[13] *Semtek*, 531 U.S. at 508–09.

[14] *Cf.* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 950–62 (1986) (suggesting that the two-prong inquiry of power and discretion should be collapsed into a single inquiry, the power to create federal common law in nondiversity cases is vast, and the only real question is the set of factors that limit federal common law).

[15] *See infra* notes 21–44 and accompanying text.

Part I describes the conflicting definitions of federal common law. We adopt, for analytical purposes, the narrowest understanding: that federal common law exists only in those six "enclaves"[16] in which the Supreme Court has acknowledged its exercise of federal common lawmaking power. Part II describes these six enclaves in more detail. Part III reviews the literature and shows the inadequacy of the positions that have emerged to explain or criticize federal common law. Finally, Part IV develops our theory of federal common law and its relationship to *Erie*.

Briefly stated, our theory is that in certain areas, states have such a strong self-interest in a controversy or have erected such high barriers to political participation by some groups that state law cannot be expected to provide a sufficiently detached, reliable, and neutral rule of decision for a controversy. For instance, states cannot be expected to create neutral principles when they are involved in border disputes with other states. In these areas, states must resort to another source of law. Unless Congress or the Constitution has created a rule of decision, that law must by default be federal common law.[17] Such bias is not, in itself, a *sufficient* condition to create federal common law; factors noted by other commentators—especially the need to achieve uniformity in a matter of national interest—also determine the decision. But potential bias in creating state law is a *necessary* condition for creating federal common law.

On the other hand, in certain areas a state's self-interest in the outcome is less acute, and participation by interested parties is possible. In these cases, no resort to a separate body of federal common law is necessary, and states can legitimately create the rules of decision. Even when there is sufficient impartiality in the *creation* of law, however, reasons may exist to doubt the impartial *application* of state law against poorly represented interests. In these cases, a neutral forum to apply state law is all that is required—hence *Erie*, which commands the use of state law in diversity cases, for which federal courts supply the neutral forum in which to apply that law.[18] Rather than being in tension, federal common law and *Erie* work together.

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[16] The use of the word "enclave" seems to have originated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) (describing "limited enclaves" of federal common law); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026 (1967).

[17] Our theory recognizes the primacy of congressional authority to create law so that the federal common law power yields in the face of a federal statute that occupies the field. *Cf.* Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) (holding that the power to make a federal common law of interstate pollution was supplanted by "the establishment of a comprehensive regulatory program supervised by an expert administrative agency").

[18] The thesis that diversity jurisdiction exists primarily to provide a neutral forum to protect against state court bias against out-of-state litigants has been around as long as the Constitution. In *The Federalist Papers*, Hamilton observed:

> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own

Our theory also explains why courts sometimes incorporate state law as the federal common law rule. The *raison d'etre* for federal common law is potential self-interested bias. The presumption in favor of federal common law can be overcome with a showing that self-interest or barriers to participation are not in fact present. When bias does not exist and no other factors counsel the creation of a uniquely federal rule of decision, a court has discretion to choose state law as the federal rule of decision.

Indeed, only one of the classic forms of federal common law—"instance" cases in admiralty[19]—arguably escapes our theory. Although we argue that instance cases can be accounted for within our theory, we suggest that the likelihood of state law bias in instance cases is sufficiently small that state law could now control their decision.[20]

I. THE DEFINITION(S) OF FEDERAL COMMON LAW

The Supreme Court has been unsuccessful in offering either an inclusive definition or a theory of federal common law. Indeed, it has never really tried.[21] On the assumption that the first step in analyzing a problem is

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cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Carl Van Doren ed., 1973). *See* Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (noting that "the constitution itself . . . views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between citizens of different states"); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3.2 (4th ed. 2003) (describing arguments for diversity jurisdiction). To the extent that this rationale seeks to justify our present use of diversity jurisdiction, it is controversial. Some argue that the fears of bias in favor of in-state litigants no longer pertain, and others argue that bias provides an insufficient account of the present structure of diversity jurisdiction. *See, e.g.*, FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38–40 (1990) (positing that arguable concerns for bias are not sufficiently strong to outweigh costs of diversity jurisdiction); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (arguing against continued relevance of fears of bias); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97 (1990). Neither argument diminishes the force of the theory we propose.

[19] For the definition of "instance" cases, see *infra* notes 133–145 and accompanying text.

[20] *See infra* note 306 and accompanying text.

[21] *See* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 915 (1996) (observing that the Supreme Court "never has had an entirely consistent theoretical conception of the nature and extent of federal common law making power"); *see also id.* at 915 n.63 (listing sources to same effect); Field, *supra* note 14, at 890 ("Definitions of the phrase 'federal common law' differ. No definition is inherently correct . . . .").

Perhaps the Court's best effort to create a coherent understanding of federal common law occurred in 1980, when the Court observed that the "few and restricted" areas of federal common law "fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law." Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (internal quotations and citations omitted); *see also* United States v. Standard Oil Co., 332 U.S. 301, 307 (1947) (arguing that federal common law covered matters "vitally affecting interests, powers and relations of the Federal Government [that] require uniform national disposition rather than diversified state rulings" and that *Erie* was not intended to have the "purpose or effect for broadening state power over matters essentially of federal

defining it, commentators have therefore offered various definitions of federal common law. For our purposes, we can identify three main definitions—one narrow, one intermediate, and one broad. The intermediate definition is the modern standard: "Federal common law" means "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[22]

This definition is broad enough to encompass each of the six enclaves in which the Supreme Court has self-avowedly created federal common law. But it controversially excludes several important situations in which a court might arguably be said to be creating federal common law. First, this definition excludes circumstances in which a court creates federal rules of decision in response to an explicit statutory command. For example, Federal Rule of Evidence 501 directs federal courts, in any area not otherwise governed by federal constitutional or statutory law, to develop the rules of privilege using federal common law "in the light of reason and experience."[23]

Second, this definition excludes situations in which courts imply the power to create federal common law. Such a power might derive from a statute. For instance, *Textile Workers Union v. Lincoln Mills*[24] interpreted section 301 of the Labor Management Relations Act[25] to imply a power, fashioned from the policy of national labor law, to create federal common law to enforce collective bargaining agreements,[26] and *Illinois v. City of*

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character or for determining whether issues are of that nature"). *Texas Industries*'s latter category does not involve federal common law of the kind we discuss in this Article. *See infra* notes 24–30 and accompanying text. The former category of "uniquely" or "vital" federal interests is less an analytical conception of federal common law than a conclusory label. *See* Field, *supra* note 14, at 909 (noting that the cases "reveal an extensive federal common law, of many different varieties, with no coherent unifying principle, whose current boundaries are uncertain"); *infra* notes 218–219 and accompanying text.

[22] RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003).

[23] In full, the Rule states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. This rule was initially enacted by legislation. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1933–34 (1976).

[24] 353 U.S. 448 (1957).

[25] Labor Management Relations Act of 1947, ch. 120, § 301, 61 Stat. 136, 156 (1948) (codified at 29 U.S.C. § 185 (2000)).

[26] *Lincoln Mills*, 353 U.S. at 456. Similarly, it has often been claimed that section 1 of the Sherman Act is an implicit directive for federal courts to create a federal common law of antitrust. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

Milwaukee[27] interpreted the Federal Water Pollution Control Act[28] to permit the creation of federal common law for environmental pollution. Similarly, defenses[29] and presumptions[30] can be judicially implied from a federal claim. Because Congress implicitly grants courts a common law power, the standard definition does not treat the question as one about the power of courts to make federal common law, but rather as one about the power of Congress to delegate its lawmaking function.

Third, the standard definition excludes another circumstance that arguably involves common lawmaking power: implying judge-made remedies to supplement federal statutes or constitutional rights. Although the Supreme Court's decisions concerning private rights of action to supplement a federal statute have not been uniform,[31] these inconsistencies are unimportant for purposes of the standard definition. Because the court that creates a supplementary remedy must begin its analysis by examining the statutory scheme, the remedy is traceable to a congressional enactment, and therefore fails to meet the standard definition's criteria for federal common law.[32] On the same analysis, the standard definition does not extend to situations in which a court creates a remedy to protect a right granted in the Constitution.[33] Although these cases may involve different considerations

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[27] 406 U.S. 91 (1972).

[28] Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948), *superceded by* 33 U.S.C. § 1251 (2000).

[29] *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). *Boyle*, which also involves the creation of a federal common law defense, should be distinguished from these cases, for the underlying claim in *Boyle* was one grounded in state law, and the federal defense could not therefore be implied from the existence of a federal claim. Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

[30] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[31] *Compare* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("'[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" (quoting Bell v. Hood, 327 U.S. 678, 684 (1946))), *with* Cort v. Ash, 422 U.S. 66, 78 (1975) (abandoning the *Borak* approach and creating a four-factor test to determine whether a federal statute implies a private right of action, with legislative intent being one of the four factors), *and* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (holding that, in deciding whether a private right of action exists, "our task is limited solely to determining whether Congress intended to create the private right of action"). For the time being, the Court has settled on the *Touche Ross* analysis. Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Statutory intent . . . is determinative."); *cf.* City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005) (employing a similar inquiry into congressional intent in determining whether 42 U.S.C. § 1983 permits suits against state officials for violations of federal statutes).

[32] *Cf.* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993) (implying an "ancillary" right of contribution from an implied Rule 10b-5 right of action); *Touche Ross*, 442 U.S. at 568 ("The question of the existence of a statutory cause of action is, of course, one of statutory construction.").

[33] *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (creating a remedy in damages for a violation of a private citizen's Fourth Amendment rights by federal officials); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the "exclusionary rule," a remedy making evidence seized in violation of a person's Fourth Amendment rights inadmissible against that person in court); *Ex Parte* Young, 209 U.S. 123 (1908) (creating an injunctive remedy against a state official for state violation of the Due Process Clause of the Fourteenth Amendment).

than those in which the courts supplement a statutory scheme,[34] a remedy implied to enforce a constitutional interest is traceable to the Constitution, not to the power of a common law court.

Finally, the standard definition excludes most federal procedural rules. In large measure, the question of the power to create federal procedural rules has been one of determining whether federal courts can apply procedural rules different than those of a state court sitting in the same geographical area. The analysis devolves into either an *Erie* inquiry or an inquiry about whether a particular procedural rule is traceable to and consonant with an implementing statute such as the Rules Enabling Act.[35] In either case, the question does not meet the standard definition's criteria for federal common law. On the other hand, some federal procedural rules, such as rules of preclusion for claims or issues that were initially decided by federal courts,[36] or the right to a jury factfinder on certain federal claims,[37] do apply in both federal and state courts. Even here, however, the procedural rules are not necessarily an instance of federal common law rulemaking. For instance, the requirement that state courts use a jury as factfinder in FELA cases is traceable to the federal statute, not to the court's common law powers.[38]

The standard definition can be criticized on two grounds. First, its description lacks justificatory force. The definition fails to explain *why* federal common law is limited only to six categories and provides no principles that should guide courts in deciding whether to exercise common law rulemaking in the future. Second, the definition excludes a number of situations, like those just described, that look, smell, and feel like federal common law rulemaking.

Broader and narrower sets of definitions seek to remedy, respectively, the difficulties of the standard definition. A broad definition encompasses everything included within the standard definition, plus many or all situations excluded by it. "Federal common law," in other words, constitutes "any rule of federal law created by a court . . . *when the substance of that*

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[34] Or perhaps not. *See Bivens*, 403 U.S. at 407 (Harlan, J., concurring) ("[I]t strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to . . . legal interests [protected by the Constitution] than with respect to interests protected by federal statutes.").

[35] The present version of the Rules Enabling Act is codified at 28 U.S.C. § 2072 (2000). On the relationship among procedural rules, *Erie*, and the Rules Enabling Act, see *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

[36] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001); Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *see also* DAVID L. SHAPIRO, PRECLUSION IN CIVIL ACTIONS 144–51 (2001).

[37] Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952).

[38] *Cf.* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (discussing potential constitutional limits on the ability of Congress and federal courts to fashion procedural rules binding on state courts).

rule is not clearly suggested by federal enactments—constitutional or congressional."[39] Indeed, in one extreme form, the definition denies that a meaningful line can be drawn between creating common law and interpreting constitutional or statutory enactments; every time a court addresses a question of federal law, it is making common law.[40]

A broad definition has the advantage of not gerrymandering a definition simply to cover what the Supreme Court has itself stated to be common law. It also links "classic" federal common law to related issues, such as the implication of remedies from statutes or the Constitution, that seem to functionally behave as exercises of judicial authority. A broad definition lacks, obviously, any internal principle that explains the limitations that the Court has itself placed on creating federal common law. As Professor Field remarks, "[J]udicial power to act is not limited to particular enclaves and . . . is much broader than the usual references to judicial power would suggest."[41]

On the other side, a narrow definition of federal common law suggests that federal common law can exist only in certain defined enclaves, the content of which are determined by the Court. Thus, federal common law is made when the United States is a party, in interstate disputes, in foreign relations matters, and in admiralty. Of course, this enclave approach worked better before the most recent expansion of federal common law in *Boyle v. United Technologies Corp.*[42] and *Semtek International Inc. v. Lockheed Martin Corp.*[43] A definition that simply adds new categories as time goes by is not a definition, but rather a list.

A proper definition acts, in a system of reasoned adjudication, as a constraint on the raw, unbridled exercise of judicial lawmaking. In our view, Professor Field offers the best definition; at a minimum, her definition forces anyone wishing to craft a theory of federal common law to consider the theory's implications for issues such as the creation of private rights of action under federal statutes and the Constitution. But we need not belabor the definitional point. As Professor Field correctly observes, a principal function of a definition is simply to establish a common lexicon

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[39] *See* Field, *supra* note 14, at 890; *see also id.* (stating that the definition includes such areas as rules designed by courts in response to a congressional or constitutional command to create rules in an area, remedies created for violations of constitutional provisions, remedies implied in otherwise silent statutory schemes, and even interpretation of federal statutes). For a comparable definition, see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) ("'Federal common law,' as I use the term, means *any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense.").

[40] *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 807 (1989).

[41] Field, *supra* note 14, at 887.

[42] 487 U.S. 500 (1988).

[43] 531 U.S. 497 (2001).

for analysis.[44] Any valid theory must at a minimum justify the results of the cases in which the Supreme Court has expressly indicated that it is making federal common law. For purposes of this Article, therefore, we accept the narrowest definition of federal common law, and limit our analysis to the existing enclaves of federal common law. We leave to future analysis the extension of the theory to the range of issues suggested by the broader definitions of the subject.

II. THE ENCLAVES OF FEDERAL COMMON LAW

Traditionally, federal common law governed four pockets, or enclaves: (1) cases affecting the rights and obligations of the United States (typically, but not always, when the United States is a party), (2) interstate controversies, (3) international relations, and (4) admiralty. In more recent years, the Supreme Court has expanded federal common law beyond these traditional enclaves, creating (5) the government contractor defense, a doctrine which involves "uniquely federal interests" that significantly conflict with state law rules of decision, and (6) certain federal rules of preclusion. We briefly examine each enclave.

A. Cases Affecting the Rights and Obligations of the United States

The first area in which courts have created federal common law involves cases affecting the rights and obligations of the United States. *Clearfield Trust Co. v. United States*[45] is seminal. Clair Barner, at the center of the case, performed work for the Works Progress Administration. On April 28, 1936, a check for $24.20, drawn on the Treasurer of the United States, was mailed to Barner. He never received it. Instead, an unknown person, who identified himself as Barner, cashed it at the J.C. Penney store in Clearfield, Pennsylvania. J.C. Penney endorsed the check over to the Clearfield Trust Company, which in turn endorsed it to the Federal Reserve Bank of Philadelphia for payment, guaranteeing all prior endorsements. All of the endorsers acted in good faith, and none knew of the forgery.[46]

Around May 10, 1936, Barner complained to his supervisor that he had never received the check. The United States informed Clearfield Trust of the forgery on January 12, 1937. Clearfield Trust first received notice that the United States was asking for reimbursement on August 31, 1937.[47] In 1939, the United States sued to recover its payment, basing its claim on Clearfield Trust's guaranty of the prior endorsements.[48] The District Court held that "the rights of the parties were to be determined by the law of

[44] *See* Field, *supra* note 14, at 890.

[45] 318 U.S. 363 (1943).

[46] *See id.* at 364–65.

[47] *See id.* at 365. The record does not disclose the reason for the length of the delay by the United States both in notifying Clearfield Trust and in seeking payment.

[48] *Id.*

Pennsylvania and that, since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Co., it was barred from recovery."[49] The Circuit Court reversed, holding that *Erie* did not require the application of state law to the matter.[50]

The Supreme Court affirmed the Circuit Court. Because the United States' authority to issue a check derives solely from the Constitution and federal statutes and is "in no way dependent on the laws of Pennsylvania or of any other state,"[51] the Supreme Court found that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."[52] In the absence of any controlling federal statute, "it is for the federal courts to fashion the governing rule of law according to their own standards."[53] The Court reasoned:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[54]

This reasoning has been resoundingly affirmed in subsequent decisions, including in cases dealing with commercial paper issued by the United States[55] and federal government contracts.[56]

Moreover, the United States need not be a party to a case for this rationale to apply. Rather, the effect on the rights and obligations of the United States occasioned by the involvement of a federal agency or official

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[49] *Id.* at 366.

[50] United States v. Clearfield Trust Co., 130 F.2d 93, 94–95 (3d Cir. 1942).

[51] *Clearfield Trust Co.*, 318 U.S. at 366.

[52] *Id.*

[53] *Id.* at 367.

[54] *Id.* The common law rule the Court proceeded to create resulted in a victory for the United States. The Court held that a drawee's failure to give prompt notice of a forged endorsement to the payor of a check bars the drawee's suit "only on a clear showing [by the payor] that the drawee's delay in notifying him of the forgery caused him damage." *Id.* at 370. Finding that Clearfield Trust had not made this showing, the Court allowed the government's claim to proceed. *See id.*

[55] *See* Nat'l Metro. Bank v. United States, 323 U.S. 454, 456 (1945) (discussing the "rights and liabilities of the government which stem from the issuance and circulation of its commercial paper" and affirming that "legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law and that, in the absence of an applicable Act of Congress, federal courts must fashion the governing rules"); *cf.* Tenet v. Doe, 125 S. Ct. 1230, 1238 (2005) (Stevens, J., concurring) (describing the rule that bars suits alleging constitutional violations by federal officials who failed to honor contractual promises to former spies as a "federal common-law rule"); Hercules, Inc. v. United States, 516 U.S. 417 (1996) (applying without discussion federal common law of implied contracts).

[56] *See* Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947) (applying federal common law to the construction of a federal government contract and stating that it "is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law"); United States v. Standard Rice Co., 323 U.S. 106, 111 (1944) (same).

is sufficient to trigger the application of federal law. In *United States v. Kimbell Foods, Inc.*,[57] the Court, ruling in two consolidated cases, found that, absent a federal statute setting priorities, federal common law governs the question of whether contractual liens arising from certain federal loan programs—in one case administered by the Small Business Administration ("SBA"), and in the other by the Farmers Home Administration ("FHA")—take precedence over private liens:

> The SBA and FHA unquestionably perform federal functions within the meaning of *Clearfield.* Since the agencies derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a "constitutional function or power," . . . their rights, as well, should derive from a federal source. When Government activities "aris[e] from and bea[r] heavily upon a federal . . . program," the Constitution and Acts of Congress "'require' otherwise than that state law govern of its own force." . . . In such contexts, federal interests are sufficiently implicated to warrant the protection of federal law.[58]

The Court continued,

> That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. It is precisely when Congress has not spoken "'in an area comprising issues substantially related to an established program of government operation,'". . . that *Clearfield* directs federal courts to fill the interstices of federal legislation "according to their own standards."[59]

B. Interstate Controversies

A second broad category in which federal common law controls, in the absence of a governing federal constitutional or statutory provision, is that of disputes involving two or more states. Typically these cases involve water-apportionment, pollution, or boundary disputes,[60] and they often involve states as opposing parties. Early cases in this area tended to be intensely factual. Consequently, "for the first century or so the Court gave little attention to the precise source of law."[61] Courts did, however, realize that what they really were doing was applying federal law, and at that, federal common law. The Supreme Court declared that the law it applied in con-

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[57] 440 U.S. 715 (1979).

[58] *Id.* at 726–27 (citations and footnotes omitted).

[59] *Id.* at 727 (citations omitted).

[60] Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (water pollution); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) (boundary dispute); Lund, *supra* note 21, at 917 n.69.

[61] Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 348 n.80 (1992); *see also* Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931) ("For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require.").

troversies between two states was beyond the competence of either state to prescribe, and thus could not be altered by either state.[62]

Among the most explicit statements on the power of courts to create federal common law in disputes between two states are those found in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[63] a case authored by Justice Brandeis and decided on the same day as his far more famous decision in *Erie*. *Hinderlider* involved a dispute between two parties over rights to the waters of the La Plata River, which forms part of the border between Colorado and New Mexico.[64] In 1898, the plaintiff, a Colorado citizen, had established water rights to a significant portion of the La Plata's summertime flow. Allegedly, Hinderlider, State Engineer of Colorado, had refused to permit the plaintiff to divert any water from the La Plata during certain periods of time.[65] Hinderlider defended himself by arguing that an interstate compact between Colorado and New Mexico, ratified by the states and by Congress in the 1920s, gave him the authority to override the plaintiff's water use and permit the water to flow downstream to other uses in both states. The Colorado Supreme Court disagreed and upheld the plaintiff's rights.[66]

The Supreme Court reversed. According to the Court, the plaintiff's rights in water from the La Plata could not be greater than the rights of the State of Colorado, under whose law the plaintiff had obtained its rights.

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[62] *See* Kansas v. Colorado, 206 U.S. 46, 97 (1907) ("[T]he common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. . . . [D]isputes between [states] must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of Government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute."); *id.* at 98 ("If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.").

[63] 304 U.S. 92 (1938).

[64] As the Court explained:

> The La Plata River rises in the mountains of Colorado, flows in a southerly direction until it reaches the boundary of New Mexico and in the latter State until it empties into the San Juan River. The stream is non-navigable; has a narrow watershed; and a large run-off in the early spring. Then the quantity flowing begins to fall rapidly; and during the summer months little water is available for irrigation. In each State the water of the stream has long been used for irrigation; and each adopted the so-called appropriation doctrine of water use. Under that doctrine the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right, provided he diligently continues his enterprise to completion and beneficially applies the water. The rights of subsequent appropriations are subject to rights already held in the stream.

Id. at 97–98 (footnote omitted).

[65] *Id.* at 95–97. A particularly dry summer in 1928 occasioned the actions of the defendant. The flow of the river was so low that allowing the plaintiff its full use of water under its 1898 rights would have deprived all downstream users of water. Hinderlider and his counterpart in New Mexico decided to permit all of the river's water to flow into New Mexico for ten days, then to divert all water to Colorado uses for ten days, then back to New Mexico for ten days, and so on.

[66] Because the case did not involve a dispute between two or more states, and did not even involve a state as a party, the Supreme Court had no original jurisdiction in the case. *See* U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (2000).

Nor could the conferral of rights by the State of Colorado bind either the State of New Mexico or its citizens.[67] Instead, each state was entitled only to an equitable share of the water from the La Plata.

The Court indicated that the source of the principle of equitable apportionment could be either a compact or federal common law.[68] Whether a compact or federal common law did the heavy lifting in *Hinderlider* is unclear. Both sources established precisely the same principle of apportionment, and therefore led to precisely the same result. On the one hand, the Court seemed to suggest that, because federal common law predated the establishment of the plaintiff's rights in 1898, it was federal common law that acted to limit each State's right to grant its citizens an interest in the water from the river.[69] On the other hand, the Court stated that any person's rights to water or property were subject to later compacts that adjusted disputed rights among states.[70] On the latter view, the compact, and not federal common law, provided the *ratio decidendi* of the case.

At the end of the case, however, the Court turned to the issue of whether it had appellate or certiorari jurisdiction to entertain the case—a determination that hinged on the then-extant jurisdictional statutes on whether a federal question was present. The Court acknowledged that the compact created no federal question because the compact was not a treaty or statute of the United States. But it argued that the judgment of the state court depended on the assumption that the State of Colorado was absolutely entitled to take all the water. That assumption was in error, and therein lay the jurisdiction-conferring federal question: "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."[71] Thus, the ability of courts to fashion federal common law for interstate disputes was essential to the judgment in *Hinderlider*.

Hinderlider made clear that the power to create federal common law in controversies affecting states and their citizens is not limited to cases to which states are the only parties.[72] Even more significant is *Hinderlider*'s temporal juxtaposition with *Erie*. Before *Hinderlider*, the proposition that federal common law supplied the appropriate rule of decision in disputes between states was largely taken for granted.[73] *Hinderlider* shows that *Erie*

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[67] *Hinderlider*, 304 U.S. at 102–03.

[68] *Id.* at 106.

[69] *Id.* at 102–03.

[70] *Id.* at 104–05.

[71] *Id.* at 110.

[72] *See id.* at 110–11.

[73] *Hinderlider* favorably cited numerous cases that used federal common law to resolve border disputes, including *Washington v. Oregon*, 297 U.S. 517 (1936); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); and *Kansas v. Colorado*, 206 U.S. 46 (1907).

did not change this understanding. As the Court said in dicta, "[j]urisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions."[74]

The federal common lawmaking power in this enclave has never been seriously questioned. Commentators generally agree that federal common law governs in disputes between states.[75] In recent Supreme Court decisions, federal common law has been applied without comment.[76]

C. International Relations

Banco Nacional de Cuba v. Sabbatino[77] announced a third area controlled by federal common law: foreign relations. In *Sabbatino*, the defendant, a New York corporation, had contracted with an American-owned Cuban company (C.A.V.) to buy sugar in Cuba.[78] In response to American congressional[79] and executive[80] action, which resulted in a decrease of the sugar quota for Cuba, the Cuban Council of Prime Ministers passed a law giving the Cuban President and Prime Minister the power to nationalize property or enterprises in which American nationals had an interest by forcible expropriation.[81] Under this law, the Cuban government expropriated the sugar and passed title to a bank that was an instrumentality of the Cuban government. The defendant signed a contract with the bank, agreeing to the same terms that it had negotiated with C.A.V. The bank then assigned its right to payment (embodied in bills of lading) to a second bank, which was also an instrumentality of the Cuban government.[82]

When the sugar arrived in New York, the defendant accepted the bills of lading presented by a nominee of the second bank. It then negotiated the bills to its customer and received payment for the sugar. However, it re-

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[74] *Hinderlider*, 304 U.S. at 110 (citing Rust Land & Lumber Co. v. Jackson, 250 U.S. 71, 76 (1919); Cissna v. Tennessee, 246 U.S. 289, 295 (1918); Coffee v. Groover, 123 U.S. 1, 8 (1887); Howard v. Ingersoll, 54 U.S. (13 How.) 381 (1851)).

[75] *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 66 n.37 (1995) (noting that some scholars believe that, in controversies between the states, federal courts "have the authority to formulate governing law even in the absence of a statute"); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 288 n.84 (1992) ("Federal Courts exercise lawmaking authority unconnected to substantive laws enacted by Congress in cases involving . . . disputes between states."); Lund, *supra* note 21, at 917 n.69 (arguing that federal courts have the authority "to formulate federal common law rules in the absence of a statutory rule" in cases involving "interstate controversies").

[76] *See, e.g.*, New Jersey v. New York, 523 U.S. 767 (1998); Louisiana v. Mississippi, 516 U.S. 22 (1995).

[77] 376 U.S. 398 (1964).

[78] *Id.* at 401.

[79] *See* Act to Amend the Sugar Act of 1948, Pub. L. No. 86-592, 74 Stat. 330 (1960).

[80] *See* Proclamation No. 3355, 25 Fed. Reg. 6414 (July 8, 1960).

[81] *See Sabbatino*, 376 U.S. at 401. The Court noted that, "although a system of compensation was formally provided [for under the law,] the possibility of payment under it may well be deemed illusory." *Id.*

[82] *Id.* at 404–05.

fused to transfer payment to the nominee, and instead proposed to pay the price to C.A.V.[83] The bank then brought suit in federal district court for conversion of the bills of lading.[84] Both the district court and the court of appeals held that the Cuban expropriation violated international law and therefore did not convey good title.[85]

The Supreme Court reversed. Applying the "act of state doctrine," which "in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory,"[86] the Court held that

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[87]

The Court stressed that, even though the case sounded in diversity jurisdiction, none of state law,[88] international law,[89] or the Constitution compelled it to apply the "act of state" doctrine.[90] Although the Court noted that its "conclusions might well be the same whether we dealt with this problem as one of state law . . . or federal law," it held that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[91] The "problems" posed by the case were "uniquely federal in nature. If . . . state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject."[92] The Court therefore distinguished *Erie*:

> It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided [*Erie*]. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international rela-

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[83] *Id.* at 405–06.

[84] *Id.* at 406.

[85] Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962).

[86] *Sabbatino*, 376 U.S. at 401.

[87] *Id.* at 428.

[88] *Id.* at 421.

[89] *Id.*; *accord* W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., 493 U.S. 400, 404 (1990) (noting that act of state doctrine derives from concerns for separation of powers, not from principles of international law).

[90] *Sabbatino*, 376 U.S. at 423.

[91] *Id.* at 425 (citation omitted).

[92] *Id.* at 424.

> tions. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.[93]

The Court analogized this use of federal common law to other "enclaves of federal judge-made law which bind the States" that "have been thought by this Court to be necessary to protect uniquely federal interests."[94] It cited *Clearfield Trust* in support of this proposition but thought that the best analogy was to "the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters."[95] Because "[t]he problems surrounding the act of state doctrine are, albeit for different reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes, . . . [the] scope of the act of state doctrine must be determined according to federal law."[96] The lone dissent in the case, authored by Justice White, did not dispute that, in the absence of an act of Congress, federal common law governs in this area.[97]

Four years later, *Zschernig v. Miller*[98] affirmed the supremacy of federal law in the area of foreign relations. *Zschernig* invalidated an Oregon statute that, as applied, prevented foreigners from inheriting if their home country did not recognize reciprocal inheritance rights for United States citizens.[99] The Court declared that the statute was "an intrusion by the State into the field of foreign affairs,"[100] and that such an intrusion was inadmissible because "[t]he statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[101] The statute as applied did, "indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy."[102]

Zschernig did not itself create federal common law; it did, however, recognize that state law "must bow to superior federal policy."[103] That pol-

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[93] *Id.* at 425 (citation and footnote omitted).

[94] *Id.* at 426.

[95] *Id.* The Court specifically cited and discussed *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), in making its analogy.

[96] *Sabbatino*, 376 U.S. at 427 (citing "constitutional and statutory provisions [that] indirectly support this determination"). Ultimately, Congress enacted the Hickenlooper Amendment, which changed the result announced in *Sabbatino*. On remand, the district court and court of appeals applied the statute and entered judgment in favor of the American defendant over the Cuban bank's objection that the "act of state" doctrine was the law of the case. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967).

[97] *See Sabbatino*, 376 U.S. at 439 (White, J., dissenting).

[98] 389 U.S. 429 (1968).

[99] *Id.* at 432.

[100] *Id.*

[101] *Id.* at 440.

[102] *Id.* at 441.

[103] *Id.*

icy can be established by federal treaty, as in *Zschernig*,[104] or by federal statute, as the Court has later recognized.[105] But *Zschernig* was clear that state laws could also conflict with "federal policy" that was not legislatively determined; state law needed to give way as long as the state law might "disturb foreign relations."[106] In determining the content of those relations and the potential for state law to disturb them, the Court seems engaged in a form of federal common lawmaking.

The most recent *Restatement of Foreign Relations Law* confirms the supremacy of federal common law (in the absence of a federal treaty or statute) in matters of foreign relations. Section 112 provides, in relevant part, that "[t]he determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States."[107] The comments to that section explain, "The conclusive authority of the United States Supreme Court to determine and interpret international law for all courts in the United States derives from the character of that law as federal law."[108]

D. Admiralty

Admiralty is one of the most difficult areas of federal common lawmaking to understand. Today, there is a well-established "tradition of federal common lawmaking in admiralty."[109] Moreover, the Supreme Court has held that any state rule that governs an incident of maritime law is invalid if it "works material prejudice to the characteristic features of the general maritime law."[110] The exact matters that fall within the area of federal common lawmaking, however, are not clear. As the Court itself has recognized, "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence."[111]

Perhaps the best way to make sense of the scope of admiralty law is to examine the background of the grant of admiralty jurisdiction to the federal

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[104] *Id.* (citing Kolovrat v. Oregon, 366 U.S. 187 (1961)).

[105] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 n.6 (2000).

[106] *Zschernig*, 389 U.S. at 441.

[107] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1987).

[108] *Id.* § 112 cmt. a.

[109] Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994); *see also* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996) (explaining that "the general maritime law" is "a species of judge-made federal common law"); Nw. Airlines v. Transport Workers Union, 451 U.S. 77, 95–96 (1981) ("We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.").

[110] S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[111] *Miller*, 510 U.S. at 452; *see also Calhoun*, 516 U.S. at 210 n.8.

courts.[112] In a report prepared for the House of Representatives of the first Congress, then-Attorney General Edmund Randolph explained that "admiralty" included at least four different categories of disputes: the "condemn[ation of] all lawful prizes in time of war," prosecutions under the "criminal sea law," "offenses on water against the revenue laws," and "claims for specific satisfaction on the body of a vessel, as for mariners' wages, &c."[113] Randolph's understanding of the content of admiralty law tracks that of the original draft of the Virginia Plan, which he presented to the Constitutional Convention. That plan split the jurisdictional head of admiralty into three separate grants of jurisdiction: "all piracies & felonies on the high seas, captures from an enemy, [and] cases . . . which respect the collection of the National revenue."[114] As one author has explained:

> The Convention was initially unable to agree upon a specific delineation of federal jurisdiction and referred the matter to the Committee of Detail. The Committee "opted for a general admiralty clause and rejected the drafting strategy of breaking admiralty jurisdiction into subcategories." Randolph's Report indicates that the effect of the Committee's approach was to expand federal admiralty jurisdiction beyond the three categories of cases set forth in the Virginia Plan to encompass "claims for specific satisfaction on the body of a vessel, as for mariners' wages, &c." as well.[115]

Of these four species of admiralty cases, two can be disregarded for present purposes. First, given the Supreme Court's subsequent refusal to generate a federal common law of crimes,[116] the piracy and felony cases are no longer a permissible subject for federal common lawmaking. The revenue cases are also unimportant here, as they would be duplicative of the cases in which the United States or one of its agencies is a party—an enclave of lawmaking power discussed earlier.[117] Consequently, to understand the scope of federal common lawmaking in admiralty, only those cases in

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[112] *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.").

[113] H.R. REP. NO. 1-17 pt. 1 (Dec. 31, 1790), *reprinted in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 21, 21–22 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834). Randolph's understanding of the four forms of admiralty jurisdiction was "more than an idiosyncratic insight." William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL. HIST. 117, 128 (1993). Professor Casto argues, however, that the first three categories of "public" cases were regarded as far more fundamental and important than the last category of "private" cases. *Id.*

[114] JAMES MADISON, NOTES ON THE CONSTITUTIONAL CONVENTION (1787), *reprinted in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 22 (Max Farrand ed., 1911).

[115] Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1333 n.421 (1996) (citation omitted).

[116] *See, e.g.*, United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (finding that the "exercise of criminal jurisdiction in common-law cases" is not within the power of the federal courts).

[117] *See supra* Part II.A.

the first and last categories identified by Randolph, commonly referred to as "prize" and "instance" cases, respectively,[118] need be examined.

1. Prize Cases.—As an adjunct of American wartime policy, prize cases were "arguably the most important cases within the federal courts' admiralty and maritime jurisdiction because they had the greatest potential to affect the public peace."[119] According to Professor Clark:

> Under the law of nations, when two powers were at war, each had the right to make prizes of the ships, goods, and effects of the other acquired by capture at sea. As a means of augmenting their military forces, countries encouraged privateers to capture enemy vessels by permitting them to "obtain title to the seized property, ship, and cargo, through judicial condemnation carried out by an admiralty court." Thus, prize courts played an essential role in encouraging such captures. Facilitating captures was not the only function of prize courts. Equally important was the prize courts' power "to regulate the adventurers and to remedy their abuses."[120]

Thus, as Justice Story noted in his Commentaries, prize courts functioned to "restore property upon an illegal capture," to "afford . . . adequate redress for the wrong," and to "punish the aggressor."[121] Without such a guarantee, frictions with foreign powers might increase—a disastrous possibility at a time when the fledgling country's survival depended on avoidance of fractious foreign entanglements. Leaving prize cases to state courts was not at all desirable, as "the peace of the whole nation might be put at hazard at any time by the misconduct of one of its members."[122] For that reason, even the Articles of Confederation government, which had no general judicial power, enjoyed jurisdiction over "appeals in all cases of capture."[123]

The decision in *The Pacquete Habana, The Lola*[124] is a good example of how the courts have handled common lawmaking in prize cases. *The Pacquete Habana, The Lola* involved appeals in two cases, arising during the Spanish-American War, in which a lower federal court had "con-

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[118] Admiralty courts were called "prize courts" when hearing questions involving "revising the acts of the sovereign himself, performed through the agency of his officers or subjects" and "instance courts" when hearing "mere questions . . . arising between individuals." Rose v. Himley, 8 U.S. (4 Cranch) 241, 282–83 (1808) (Johnson, J., dissenting).

[119] Clark, *supra* note 115, at 1334.

[120] *Id.* (footnotes and citations omitted).

[121] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 866 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833).

[122] *Id.*; *cf.* La Amistad de Rues, 18 U.S. (5 Wheat.) 385, 390–91 (1820) (arguing that the absence of "neutral prize tribunals" would create "irrationalities and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties"); Brown v. United States, 12 U.S. (8 Cranch) 110, 128–29 (1814) ("The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens.").

[123] ARTICLES OF CONFEDERATION, art. IX, § 1. Trial jurisdiction also existed over "piracies and felonies committed on the high seas." *Id.*

[124] 175 U.S. 677 (1900).

demn[ed] . . . fishing vessels and their cargoes as prize of war."[125] After the captured ships had been sold at auction, their owners sued in federal court to recover the proceeds.[126] The Court, relying on "a rule of international law . . . that coast fishing vessels . . . are exempt from capture,"[127] declared the capture "unlawful."[128] It therefore ordered that "the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs."[129]

In explaining why it had resorted to the rule of international law, the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, 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. . . .
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> . . . .
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> This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.[130]

The dissent disagreed on the merits, arguing that there existed no established rule of international law and that the executive had the discretion to prosecute the war without judicial interference. There was no disagreement, however, that the legality of the ships' seizure should be determined, in the absence of treaty or statute, by federal common law.

A lively debate has recently emerged about whether international law should be, as a rule, part of federal common law.[131] Whatever the answer to that question, the Court has in fact exercised federal common lawmaking

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[125] *Id.* at 678.

[126] *Id.* at 679.

[127] *Id.* at 708.

[128] *Id.* at 714.

[129] *Id.*

[130] *Id.* at 700, 708 (citing Hilton v. Guyot, 159 U. S. 113, 163, 164, 214, 215 (1895)).

[131] *See* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–26 (1998) (arguing, without relying on the Constitution, that customary international law is part of federal common law). *But 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 (1997) (arguing that customary international law is not part of federal common law).

power by looking to customary international law to formulate the federal common law rule applicable to the cases before it.[132]

2. Instance Cases.—Instance cases, or admiralty cases dealing with private maritime claims,[133] have evolved dramatically in scope since the inception of the Union. Early in the life of the Nation, this branch of admiralty was seen as comprising only cases involving "contracts and things exclusively made and done upon the high seas, and to be executed upon the high seas."[134] According to Professor Clark, two developments during the nineteenth century expanded the court's federal common lawmaking power "over private maritime claims. First, the Supreme Court abandoned the narrow common-law conception of admiralty and maritime jurisdiction . . . ."[135] As early as 1815, in *De Lovio v. Boit*,[136] Justice Story had argued that "the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries."[137] The Court definitively addressed the question in 1870, when *New England Mutual Marine Insurance Co. v. Dunham*[138] embraced Justice Story's broad construction of admiralty jurisdiction over private claims.

In the second significant development, "the Court abandoned the traditional tidewater doctrine, which limited the exercise of admiralty and maritime jurisdiction to matters arising on the high seas or waters within the ebb and flow of the tide."[139] In *The Propeller Genesee Chief v. Fitzhugh*,[140] the Court expanded admiralty jurisdiction to include all "public navigable water, including lakes and rivers in which there is no tide."[141] The combination of *Dunham* and *Genesee Chief* meant that admiralty jurisdiction extended to contract and tort injuries occurring on any navigable water in the United States.

The broad expansion of jurisdiction worked by *Dunham* and *Genessee Chief* is especially important because of a third development, *Southern Pa-*

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[132] *But see* Clark, *supra* note 115, at 1340 (arguing that "the international law rules applied in cases like *The Pacquete Habana* do not constitute federal common law. Rather, federal courts apply such rules in order to implement the exclusive power of the political branches to conduct foreign relations."). This argument, however, seems only to relocate the courts' lawmaking power to the international relations enclave discussed *supra* Part II.C.

[133] As one Justice once observed, these claims constitute "mere questions of meum and tuum arising between individuals." Rose v. Himely, 8 U.S. (4 Cranch) 241, 282 (1808) (Johnson, J., dissenting).

[134] De Lovio v. Boit, 7 F. Cas. 418, 426 (C.C.D. Mass. 1815) (No. 3776).

[135] Clark, *supra* note 115, at 1341–42.

[136] 7 F. Cas. at 426.

[137] *Id.* at 444 (quoting Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 89).

[138] 78 U.S. (11 Wall.) 1 (1870).

[139] Clark, *supra* note 115, at 1342.

[140] 53 U.S. (12 How.) 443 (1851).

[141] *Id.* at 457.

cific Co. v. Jensen.[142] *Jensen* held that, in the absence of a governing federal statute, the right to create federal common law is coextensive with admiralty jurisdiction. It further held that state law is preempted to the extent that it "works a material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[143]

Jensen creates a perplexing relationship between federal common law and state law. The present statutory grant of admiralty jurisdiction to the federal courts gives to the district courts "original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[144] This "saving to suitors" clause has been a part of federal admiralty jurisdiction since its inception in 1789.[145] Therefore, suitors enjoy a right to bring any state law claim that they would have had in state court. Presumably, however, this right is subject to the exception that the claim cannot be brought if it is preempted under *Jensen*. Perhaps just stating the result is enough to demonstrate its vagueness: In the absence of federal statutory authority, federal common law applies in all private maritime claims, but state law claims can also be brought except when they cannot be brought because federal common law preempts them.

E. "Significant Conflicts" Between "Uniquely Federal Interests" and the Operation of State Law

Although the four situations described above are the only ones in which the Supreme Court has posited that federal common law creates an actionable claim, the Court has observed that there may be other, special situations in which federal common lawmaking is appropriate. In *Boyle v. United Technologies Corp.*,[146] the Court recognized one such situation: when a federal common law defense is necessary to avoid a significant conflict between federal interests and the state law that supplies the actionable claim. In *Boyle*, the Court recognized the "government contractor defense,"[147] under which a federal contractor can in some circumstances avoid state tort liability. The case stemmed from the death of a United States Marine helicopter copilot, David A. Boyle, who was killed when his helicopter crashed off the coast of Virginia Beach, Virginia during a training exercise. Boyle survived the impact of the crash, but the design of the escape hatch

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[142] 244 U.S. 205 (1917).

[143] *Id.* at 216.

[144] 28 U.S.C. § 1333(1) (2000).

[145] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified at 28 U.S.C. § 1333(1) (2000)).

[146] 487 U.S. 500 (1988). One of the Authors of this Article served in the Justice Department and commented on memoranda that preceded the government's brief in *Boyle*.

[147] *Id.* at 503.

prevented him from escaping the helicopter. As a result, he drowned.[148] His father brought an action against the Sikorsky Division of United Technologies Corporation, which had manufactured the helicopter under a contract with the United States government. The complaint alleged, inter alia, that the hatch was defectively designed. In defense, Sikorsky argued that because it had manufactured the hatch in accordance with government specifications, it could not be held responsible for the damage.[149] The threshold issue in the case was whether federal common law, rather than state law, should be used to fashion a "government contractor defense."

The Court began by observing that it had, "[i]n most fields of activity, . . . refused to find federal pre-emption of state law in the absence of either a clear statutory prescription or a direct conflict between federal [statutory] and state law."[150] Nevertheless, the Court admitted:

> [A] few areas, involving "uniquely federal interests," . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."[151]

The Court decided that the case invoked such "uniquely federal interests" because it involved "the civil liabilities arising out of the performance of federal procurement contracts."[152] It explained:

> [It] is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties. It is true that where "litigation is purely between private parties and does not touch the rights and duties of the United States," . . . federal law does not govern. . . . But the same is not true here. The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.[153]

The Court thought, however, that the existence of uniquely federal interests was, by itself, an insufficient reason to create federal common law. Joined with uniquely federal interests, the Court must find "'a significant conflict' . . . between an identifiable 'federal policy and the [operation] of state law,' . . . or [that] the application of state law 'would frustrate specific objectives' of federal legislation."[154] In *Boyle* the significant conflict arose

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[148] *See id.* at 502.

[149] *See id.* at 502–03.

[150] *Id.* at 504 (citations omitted).

[151] *Id.* (citation omitted).

[152] *Id.* at 505–06.

[153] *Id.* at 506–07 (citation omitted).

[154] *Id.* at 508 (citations omitted; first word substitution in original).

because the lawsuit indirectly challenged design decisions of military personnel who were themselves shielded from suit for their decisions by federal legislation—the discretionary function exception to the Federal Tort Claims Act.[155] To permit liability against the contractor while insulating the government from liability "makes little sense";[156] contractors would ultimately pass the costs of judgments back to the government through higher contract prices, and state law would force the government to pay indirectly for damages that Congress had forbidden directly.[157] Thus, the Court concluded, creation of federal common law was appropriate.[158]

In relation to the earlier enclaves, *Boyle* presents several challenges and opportunities. Unlike prior areas, *Boyle* does not establish a new claim, but rather engrafts a federal defense onto a state law claim. The fine-tuning or leveling of varying state products liability laws to create a modicum of national uniformity is a new use of federal common law—and one that the Court neither remarks upon nor justifies.

Moreover, *Boyle* makes more difficult the maintenance of the "enclave" theory of federal common law. Although it skirts the edges of the "United States as party" and admiralty enclaves, *Boyle* fits squarely within none of the traditional four categories. Indeed, Justice Brennan in dissent defended the enclave theory against this interloper,[159] but the majority refused to engage him on the point. Either the enclave theory must be expanded to include a new category—and a defensive one at that—or it must be regarded as a failure. If the former is true, then some account of that expansion must be assayed.

F. Preclusion

Semtek International Inc. v. Lockheed Martin Corp.[160] represents the Court's most recent effort to create federal common law. The plaintiff, Semtek, brought suit in California state court, alleging various state law claims. The defendant, Lockheed, removed the case to federal court in California. Holding that California's statute of limitations barred Semtek's claims, the federal court dismissed the claims "in [their] entirety on the

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[155] *See* 28 U.S.C. § 2680(a) (2000) (precluding liability against the United States on "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government"). The Court thought that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." *Boyle*, 487 U.S. at 511.

[156] *Id.* at 512.

[157] *Id.* at 511–12.

[158] In a subsequent part of the opinion, the Court held that the government contractor defense contained three elements: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

[159] *Id.* at 517–18 (Brennan, J., dissenting).

[160] 531 U.S. 497 (2001).

merits and with prejudice."[161] Because of Maryland's longer statute of limitations, Semtek then refiled the case in Maryland state court. Lockheed responded both by asking the federal court in California to enjoin the Maryland lawsuit under the All Writs Act,[162] and by removing the Maryland case to federal court. Both maneuvers failed.[163] But the Maryland trial court did ultimately grant judgment for Lockheed on the theory that the California federal judgment operated as claim preclusion over Semtek's Maryland case. That judgment was affirmed on appeal.[164]

The difficulty in the Maryland case was that, under California law, a dismissal on statute-of-limitations grounds was not claim-preclusive of a later case filed within an appropriate statute of limitations. Had the case remained in California state court and been dismissed there, the Maryland courts would have been required to give the same effect to the judgment as a California state court would have.[165] In other words, the Maryland court would have been required to hear the case under the longer statute of limitations. Because the case had been dismissed by a *federal* and not a *state* court in California, however, the Maryland appellate court came to the opposite conclusion. Its rationale was that the preclusive effect of judgments entered in federal court is governed by federal, not state, law, and federal preclusion law bars further proceedings on a claim dismissed "on the merits"—a phrase that includes a claim barred on statute-of-limitations grounds.[166] Because no federal statute addressed the preclusive effect of a federal judgment, the federal law on which the appellate court relied was federal common law.

Had Semtek's case been based on federal law, this rationale might have passed without much controversy, but the power of a federal court to specify a federal rule of preclusion for a claim grounded on state law was debatable. The case first required the Court to navigate the Scylla of precedent and the Charybdis of *Erie* and the Rules Enabling Act. A decision in

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[161] *Id.* at 499.

[162] 28 U.S.C. § 1651 (2000). On the use of the All Writs Act to enjoin related litigation, see *In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002), and *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985). *See also In re* Lupron Mktg. & Sales Practices Litig., 345 F. Supp. 2d 135, 146 (D. Mass. 2004), *stay of injunction pending appeal denied*, No. 04-2693 (1st Cir. Jan. 21, 2005), *appeal dismissed*, No. 04-2693 (1st Cir. Jul. 1, 2005); *cf.* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002) (noting that All Writs Act does not provide federal jurisdiction to remove cases subject to anti-suit injunction to federal court); Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) (noting that Anti-Injunction Act permits injunction against state court proceedings in some situations). One of the Authors of this Article wrote the district court and appellate briefs in support of the injunction in the *Lupron* case.

[163] *Semtek*, 531 U.S. at 500.

[164] Semtek Int'l Inc. v. Lockheed Martin Corp., 736 A.2d 1104 (Md. Ct. Spec. App. 1999), *cert. denied*, 742 A.2d 521 (Md. 1999).

[165] *See* U.S. CONST., art. IV, § 1; Underwriters Nat'l Assurance Co. v. N. Car. Life & Accident & Health Guar. Ass'n, 455 U.S. 691 (1982); 18B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4467 (2d ed. 2002).

[166] *Semtek*, 736 A.2d at 1108–09.

1875, *Dupasseur v. Rochereau*,[167] clearly decided the matter in favor of the use of the California, rather than a federal, rule of claim preclusion in diversity cases, but *Dupasseur* had been decided during the ascendancy of the Conformity Act of 1872.[168] That Act required each federal court hearing an action at law to adopt the procedures of the state in which it sat. The Conformity Act was superceded by the Rules Enabling Act of 1934,[169] which authorized the creation of federal rules of procedure. Hence, *Dupasseur*'s continuing vitality was suspect.

Indeed, one of the Federal Rules of Civil Procedure, Rule 41(b), seemed to cover the preclusive effect of federal judgments. Rule 41(b) states that, with limited exceptions not involved in *Semtek*, a dismissal "operates as an adjudication upon the merits."[170] Read broadly but not unnaturally, this language specifies a federal rule of claim preclusion for all federal judgments. But such a reading, the Court thought, brought Rule 41(b) into tension with the limitation the Rules Enabling Act imposes on all valid Federal Rules—that they "shall not abridge, enlarge or modify any substantive right."[171] "[I]t would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself."[172] Implicit but never expressly stated in the Court's reasoning is the premise that rules of claim preclusion are substantive rather than procedural in nature.

The powerlessness of the Federal Rules to establish a federal rule of claim preclusion for federal judgments was bolstered "in many cases" by "the federalism principle of *Erie R.R. Co. v. Tompkins*."[173] The different claim preclusion rules in a state court in California and a federal court in California would likely induce out-of-state defendants to remove cases filed in state court in order to obtain the broader federal rule. The attempt to eliminate "'substantial variations [in outcomes] between state and federal

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[167] 88 U.S. (21 Wall.) 130 (1875).

[168] Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196 (1873).

[169] Act of June 19, 1934, ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. §§ 2071–2077 (2000)).

[170] FED. R. CIV. P. 41(b). Rule 41(b) states in full:

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

[171] 28 U.S.C. § 2072(b) (2000).

[172] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001).

[173] *Id.* at 504. Because a power to declare a rule of claim preclusion seems to be inherent in the right to create the substantive obligation itself, it is not evident that *Erie*, which concerns primarily diversity cases, prevents the use of a federal rule of claim preclusion for cases based on federal law. This fact likely explains the "in many cases" qualification the Court placed on its *Erie* analysis. *See id.* at 504–05 (addressing the claim-preclusive effect of Rule 41(b) in federal-question cases).

litigation' which would '[l]ikely . . . influence the choice of a forum'" was one of the essential concerns of *Erie*.[174]

Interpreting Rule 41(b) in light of these concerns, the Court found that the preclusive effect of the "upon the merits" language of Rule 41(b) extended only to a second suit filed in the same court as the first case. Therefore, had Semtek re-filed its case in the same federal court in California, Rule 41(b) would have prevented that court from entertaining the case. Rule 41(b) did not, however, prevent a different federal or state court from entertaining the case.

Having eschewed reliance on either *Dupasseur* or Rule 41(b)—two lifelines tethered to opposite shores—the Court remained adrift in its effort to find the source of law that might provide a principle to determine the preclusive effect of the federal judgment. Enter federal common law. With little discussion, the Court declared that "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."[175] The Court's primary argument for its holding was to cite several of its prior federal-question cases in which the Court had applied a non-textual federal rule of preclusion. From these cases the Court distilled the principle that "[s]tates cannot give those [federal-question] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."[176] Over the next several sentences, the Court emphasized the point twice more: The preclusive effect that state courts give to federal judgments "is by direction of *this* Court, which has the last word on the claim-preclusive effect of *all* federal judgments,"[177] and the deference to state law in *Dupasseur* "was *the federal rule that this Court deemed appropriate*."[178] Obviously, to claim the authority is not to justify it, and an *ipse dixit* quality hangs over *Semtek*.[179]

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[174] *Id.* at 504 (quoting Hanna v. Plumer, 380 U.S. 460, 467–68 (1965) (alterations and ellipsis in original)).

[175] *Id.* at 508.

[176] *Id.* at 507.

[177] *Id.*

[178] *Id.* at 508. It is interesting to note that, in this account of *Dupasseur*, the Court rejected the influence of the Conformity Act of 1872 on the decision. Earlier in its opinion, however, the Court relied on the Conformity Act as its main reason for not adhering to the *Dupasseur* holding. *See supra* note 168 and accompanying text.

[179] The issue of whether federal law provided the rule of preclusion in these cases had long divided the academy. *Compare* Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976) (arguing for a federal rule of claim preclusion on the theory that the court system which renders a judgment should be able to prescribe the preclusive effect of that judgment), *and* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945 (1998) (stating that federal common law applies), *with* Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625 (1985) (arguing that federal common law applies, but that, in shaping this law, federal courts should generally borrow state preclusion rules). Professor Burbank has written a post-*Semtek* coda, applauding aspects of *Semtek* but arguing that the Court's approach "is, if not the wrong rule, then not quite the right rule." Stephen

The Court then adopted the following rule of preclusion for diversity cases: Federal courts should apply the rule of preclusion that a state court sitting in the same state as the federal court that rendered the judgment would have applied. Thus, the preclusive effect of a judgment rendered in a federal court in California is the same as the preclusive effect of a California state judgment entered in identical circumstances; and since California did not extend preclusive effect to dismissals on the statute-of-limitation grounds, the Maryland courts could not extend preclusive effect to the judgment either. As a result, the judgment of the Maryland court against Semtek was reversed, and its case reinstated.[180]

Semtek raises a number of important thematic issues. The first is its incorporation of state law as the federal rule of decision. *Erie*-like concerns heavily influenced the decision to incorporate state law; in particular, the court wanted to make uniform the preclusive effect of judgments rendered in state and federal courts to prevent the "'forum shopping . . . and . . . inequitable administration of the laws that *Erie* seeks to avoid."[181] The Court saw "no conceivable federal interest in giving that time bar more effect in other courts than the California courts themselves would impose."[182] It did, however, recognize that it would not refer to state law "in situations in which the state law is incompatible with federal interests"[183]—a phrase reminiscent of the "significant conflict" language of *Boyle*[184] and a reminder that any adequate account of federal common law must address the incorporation of state law as the federal rule of decision.

Second, *Semtek* uses federal common law to address procedural matters. The story of federal common law is often told as one of federal substantive law supplanting state substantive law in discrete enclaves. Procedural law, however, typically operates across substantive categories, so it is no longer possible after *Semtek* to imagine federal common law as being confined to certain substantive categories. Nor can we see the power to create federal procedural common law simply as a necessary implication of federal substantive law, because *Semtek* involved state substantive law. *Semtek* forces the creation of a richer account of federal common law.

Finally, and most problematically, *Semtek*'s form of federal common law comes into being only because federal courts and federal diversity jurisdiction exist. Other categories of federal common law existed independently of the court that applied the law; for instance, state courts must apply the federal law of international or interstate relations. In contrast, the need

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B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1039 (2002).

[180] *Semtek*, 531 U.S. at 509.

[181] *Id.* at 508–09 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965) (ellipses in original).

[182] *Id.* at 509.

[183] *Id.*

[184] *See supra* notes 154–157 and accompanying text.

for a federal law of claim preclusion arises from our structure of federal and state courts; without federal courts, the law of California would have applied to determine the preclusive effect of a California state-court judgment decided under California law.[185] Therefore, an adequate theory must explain the development of federal common law that operates in and owes its existence to the federal courts sitting in diversity—something that *Erie* had seemingly abolished generations ago.

III. THE INADEQUACIES OF PRESENT THEORIES

Although the Supreme Court has never suggested a coherent, unifying rationale for the enclaves of federal common law,[186] the academic literature has constructed an array of theories. Analytically the theories can be grouped into three categories: those that deny entirely the legitimacy of federal common law; those that see the scope of federal common law as far vaster than its present use, with judicial discretion serving as the only significant limitation on judicial lawmaking; and those that stake out an intermediate position accepting the legitimacy of federal common law but suggesting significant, principled limits on the power of courts to create it. Each theory has important gaps.

A. Theories of Illegitimacy

A handful of commentators deny the legitimacy of any federal common law.[187] Armed with the ambiguous phrasing of the Rules of Decision Act[188] and the political truism that, in a democracy, the creation of law should be left to the political branches of government, they believe that courts do not have the institutional competence to make federal common

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[185] The result is less clear for federal question claims adjudicated in state courts. *See* SHAPIRO, *supra* note 36, at 137–40; 18B WRIGHT ET AL., *supra* note 165, §§ 4467–4468. Whether a federal common law of preclusion or a state law of preclusion applies in this scenario does not, however, matter for present purposes; the critical issue is that, in at least some cases, the presence of federal courts results in the creation of federal common law that was otherwise nonexistent.

[186] *See supra* note 21 and accompanying text.

[187] Among those opposing any creation of federal common law are Professors Merrill and Redish. Merrill, *supra* note 39; Merrill, *supra* note 61; MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 119–48 (2d ed. 1990); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989) [hereinafter Redish, *Federal Common Law*]. For a more limited argument that admiralty and perhaps foreign relations should not be judged under the standards of federal common law, see Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469 (2004).

[188] The Rules of Decision Act was originally found in section 34 of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. With modest changes, it survives today and provides that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2000). Professor Redish grounds his objection to federal common law on this statute, rather than on constitutional concerns for separation of powers or federalism. *See* Redish, *Federal Common Law*, *supra* note 187.

law.[189] Sometimes blended into this argument is a concern for federalism. Federal common law displaces state law, and thus shifts the balance of power from state to federal government. Because federal common law also creates federal subject matter jurisdiction,[190] it shifts power from state to federal courts. When the case remains in state court, it also creates the odd political circumstance of state courts creating federal law[191]—something that state legislatures surely could not do. Indeed, the combined gravitational force of statutory, separation of powers, and federalism considerations seems so great that it is difficult to believe that any actual instances of federal common law have escaped their pull.

But escape they have. And therein lies the fatal flaw in the abolitionist stance against federal common law. Whatever the normative merit of this stance, the stubborn reality is that federal common law exists and is expanding. So far, the republic has not fallen. It could be argued that federal common law is a slow-growing cancer that must be cut out before it metastasizes to the central organs of democracy. But that claim works best if we assume that federal common law has no internal principle of limitation—that courts can and will make federal common law to the full extent of the federal lawmaking power.

The normative merit of the abolitionist position is also uncertain. First, the Rules of Decision Act is a markedly vague basis for asserting the illegitimacy of federal common law. The instruction that federal courts must apply the "laws of the several states . . . in cases where they apply" is a tautology.[192] Recent scholarship suggests that, when originally enacted, the "laws of the several states" referred to a kind of general American law that operated independently of the law of any state or of the English common law.[193] In other words, at least insofar as it involved nonstatutory law, *Swift*

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[189] Professor Field disputes the idea that separation of powers concerns have any direct effect on limiting the use of federal common law. She acknowledges, however, an indirect effect. Federal lawmaking supplants state lawmaking, and states are protected from excessive federal lawmaking by the manner in which Article I of the Constitution structures Congress. Federal common law bypasses this check on federal power. *See* Field, *supra* note 14, at 931–33. Other commentators perceive a direct separation of powers challenge to judicial lawmaking. *See, e.g.*, CHEMERINSKY, *supra* note 18, § 6.1, at 356–58.

[190] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[191] For an example of a state court extending and applying *Boyle*'s government contractor defense, see *Silverstein v. Northrop Grumman Corp.*, 842 A.2d 881 (N.J. Super. App. Div. 2004); *cf.* Bellia, *supra* note 8 (discussing constraints on state courts in creating federal common law).

[192] Weinberg, *supra* note 40, at 816 (quoting 28 U.S.C. § 1652 (2000)). For an attempt to rescue the Act from the tautology, see Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853, 854–56 (1989).

[193] *See* RITZ, *supra* note 9, at 126–48; Borchers, *supra* note 9. As Professor Ritz puts it:

> American law is to be found in the "laws of the several states" viewed as a group of eleven states in 1789, and not viewed separately and individually. It is not a direction to apply the law of a particular state, for if it had been so intended, the section would have referred to the "laws of the respective states."

RITZ, *supra* note 9, at 148.

v. Tyson might well have interpreted the Rules of Decision Act correctly;[194] *Erie* had it wrong. A final problem with the Rules of Decision Act, as Professor Weinberg states, is that it applies only to federal courts—and therefore ironically leaves state courts free to fashion federal common law.[195] It is unlikely that a statute intended to ban any federal common law would take such a form.

Second, the extent of the federal common law's affront to the concerns for separation of powers and federalism often lies in the eye of the beholder.[196] Courts with common lawmaking power were hardly unfamiliar to the framers of the Constitution.[197] As an *a priori* matter, it is far from clear that an absolute prohibition on, as opposed to a tailored authorization of, federal common law is the appropriate response to these concerns. Nor have these concerns led the Supreme Court to reject all federal common law. Indeed, distinguished commentators find explicit and implicit authorization for federal common law in the same Constitution from which the concerns for separation of powers and federalism derive.[198]

In a country with a centuries-old common law tradition, the claim that courts lack the institutional or constitutional competence to create federal common law is too weak to be sustained in its strongest form. But the abolitionists issue an important challenge to anyone advocating federal common law: Find a theory of federal common law with sufficient strength to justify the antidemocratic and antifederalist impulses of judicial lawmaking.

B. Theories of Broad Power and Discretion

On the other shore of the debate over federal common law are commentators who posit a subterranean reservoir—in some formulations, quite a vast reservoir—of federal common law. The reservoir encompasses, depending on the precise theory, either those matters in which existing federal legislation or activity evinces a particular federal interest,[199] all matters of

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[194] Professor Ritz's interpretation suggests that federal courts were also free to disregard state statutory law when applying "the laws of the several states." RITZ, *supra* note 9, at 148. *Swift* had held that federal courts were required to follow state statutory law. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842).

[195] Weinberg, *supra* note 40, at 817–18. In responding to Professor Weinberg, Professor Redish, whose argument against federal common law hinges entirely on the Rules Enabling Act, fails to address this point. Redish, *supra* note 192; *see also* Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989) (further developing her critique of the Rules of Decision Act as an argument against federal common law).

[196] *Cf.* CHEMERINSKY, *supra* note 18, § 6.1, at 358 ("[N]either value provides any clear guidance as to when federal courts should create or refrain from creating federal common law.").

[197] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 537–38; THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 18, at 563–64; *cf.* U.S. CONST. amend. VII (permitting reexamination of a jury's factual findings only "according to the rules of the common law").

[198] *See infra* notes 201, 220–226, 238–241 and accompanying text.

[199] Mishkin, *supra* note 10.

national import,[200] or, most broadly, all matters on which Congress permissibly could legislate but has not.[201] According to these theories, federal common law has bubbled to the surface from this reservoir in certain enclaves and not in others. The potential application of federal common law is great, even if its actual usage is more modest.[202]

In these theories, the critical question is one of discretion, not power. The power to create federal common law is a given. But courts need not exercise the full scope of that power. The usual task of such theories is to sketch the relevant factors that do, or should, guide courts' discretion.

The most notable efforts are those of Professors Field and Weinberg. Professor Field suggests four factors: the need for national uniformity, the presence of the United States as a party, the presence of well-developed state law and the need for uniformity within a state, and the feasibility of judicial lawmaking in light of the relative capacity of courts and legislatures to declare a particular rule.[203] Professor Weinberg does not detail factors as such, but suggests a "clusters of ideas that are important to a clarified modern understanding of federal common law."[204] Among these ideas are a legitimate national interest; federalism; a proper historical understanding of *Erie* and federal common law; the supremacy of inchoate national policy in relation to the protection of traditional state governance of an issue; the (often misguided) exercise of judicial restraint in making law; separations of powers; legislative intent; and "the new politics" (i.e., the political goals of judges both in terms of judicial restraint versus activism and in terms of liberal versus conservative substantive policy preferences).[205] Professor Weinberg's exposition of her guidelines leads her to argue for an expansive creation of federal common law. In contrast, even though she rejects the limiting notion of "enclaves," Professor Field suggests that her factors counsel restrained use of federal common law. In her judgment, application of the factors boils down to a simple principle: "[F]ederal rules will be made when there is a need for national uniformity that outweighs the need for uniformity within a state; or when national interests require. But state

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[200] Weinberg, *supra* note 40, at 805, 809, 851 (arguing that "there are no fundamental constraints on the fashioning of federal rules of decision" except for a "cluster of ideas" that help a court to determine whether "national substantive policy is, on balance, thought to be better served" by federal common law).

[201] Field, *supra* note 14, at 887 ("[T]he only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule."); *id.* at 924 (suggesting "that federal courts can make rules in the first instance whenever Congress has power to act but has not acted"); *id.* at 927–30 (stating that, due to *Erie*, neither Article III's grant of diversity jurisdiction nor the Rules of Decision Act can be interpreted to authorize federal common law).

[202] *See id.* at 888.

[203] *Id.* at 953–62.

[204] Weinberg, *supra* note 40, at 809.

[205] *Id.* at 809–51.

law should apply whenever that result is not inconsistent with federal purposes."[206]

The immediate problem with broad permissive theories is evident: They threaten to undermine separation of powers and federalism constraints on judicial power. Even if these concerns should not lead to outright rejection of federal common law, they should counsel against its aggressive use. Professor Weinberg in particular seems untroubled by greater use, but activist judicial behavior is a two-edged sword not always likely to favor "the way of integrity in forthright decision [and] the way of narrow holdings."[207] The picture of judges creating expansive new fields of federal law offends the eyes of many beholders, including ourselves, and only intensifies the desire to find significant, principled limitations on federal common law.

The need for uniformity is the principal limitation that Professor Field suggests; Professor Weinberg appears to agree.[208] But a need for uniformity seems inadequate to the tasks of explaining and reining in federal common law. For instance, uniformity would appear to argue for federal common law rules in a number of areas in which no federal common law currently exists—for instance, in criminal law[209] and environmental law.[210] All of us probably have our own favorite areas for which we feel that federal uniformity would be especially desirable—for instance, health care, tax policy, child custody, or product-liability standards.[211] But federal common law exists in none of these areas. Uniformity also seems an inadequate explanation of the federal common law of admiralty—especially the instance cases—given that commerce moving by rail and road is regulated by state tort and contract law. Nor can uniformity explain *Semtek*, which potentially leaves state and federal courts applying different rules of preclusion.

Some of the remaining factors suggested by Professor Field and Professor Weinberg—such as the presence of the United States as a party—are easier to apply than uniformity. But the application of other remaining factors—such as the relative institutional abilities of courts and legislatures to

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[206] Field, *supra* note 14, at 962.

[207] Weinberg, *supra* note 40, at 851.

[208] *Id.* (suggesting that Congress should assure the courts that "the rules of decision are to be uniform federal ones, where uniformity is needed for either substantive or administrative reasons").

[209] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816) (following *Hudson & Goodwin* despite doubts about its holding). *Hudson & Goodwin* did allow some criminal common lawmaking, notably in the area of contempt, 11 U.S. (7 Cranch) at 34, and that tradition is followed today. *See* FALLON ET AL., *supra* note 22, at 689–90.

[210] *Compare* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (authorizing federal common law in interstate pollution dispute), *with* Milwaukee v. Illinois, 451 U.S. 304 (1981) (stating, in the same dispute, that subsequent amendments to Federal Water Pollution Control Act were comprehensive enough to eliminate the use of federal common law).

[211] *Cf.* O'Melveny & Myers v. FDIC, 512 U.S. 79, 88 (1994) (declining to create a federal common law defense and describing uniformity as "that most generic . . . of alleged federal interests").

declare law—is destined to devolve into a debate over unprovable political assertions. Moreover, any broad, multi-factor set of guidelines has an inevitable slipperiness to it, even though clarity in lawmaking roles is usually seen as a benefit.[212]

The claim of broad lawmaking power also matches up poorly with the received law, which distinguishes between the first step of lawmaking power and the second step of discretionary declination of that power. Academic theories are not, of course, slavishly beholden to courts' reasoning, and it is undeniably true that the present two-step analysis is inelegant (especially when the same factors—in particular, the need for uniformity—seem to inform both the first and the second stages of the inquiry). But there is a certain wisdom in a process that sets clear limits on judicial lawmaking and then engages in a second-stage check that balances the benefits and costs of judicial lawmaking in case-specific contexts that arise within those boundaries.

The theory of broad discretionary power fails to match up with the received law in another important respect. In a system of broad discretion, we would expect to see initial instability as lower courts use their discretion to create a wide array of pockets of federal common law, followed by an active dialogue between the district and appellate courts over the proper use of this discretion, followed by a more stable understanding of discretionary common law. Nothing like this expectation has occurred. Certainly a few lower courts have sought to expand the scope of federal common law,[213] but in nearly all instances federal common law has been rejected—not by resort to discretionary considerations but rather because the suggested use failed to fit within one of the standard enclaves of federal common law.[214] Perhaps the most significant case creating a new kind of federal common law due to concerns for uniformity is now more than thirty years old, and its result has been rejected elsewhere.[215] Although it is possible that courts are

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[212] *Cf.* Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) (noting that "malleable standards . . . have a way of turning into vehicles for the implementation of individual judges' policy preferences").

[213] *See, e.g.*, Caudill v. Blue Cross & Blue Shield of N.C., 999 F.2d 74 (4th Cir. 1993); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974); *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1980).

[214] *See, e.g.*, Overseas Nat'l Airways, Inc. v. United States, 766 F.2d 97 (2d Cir. 1985); *In re "Agent Orange,"* 635 F.2d 987.

[215] *Kohr*, 504 F.2d 400 (creating federal common law of contribution in aviation accident). *Kohr* figures prominently in Professor Field's theory of federal common law, *see* Field, *supra* note 14, at 913–15, but almost certainly does not survive the refusal to create a federal common law right of contribution in antitrust cases. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). *But see* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 292 (1993) (creating "ancillary" common law right of contribution in implied Rule 10b-5 right of action). Indeed, within seven years of *Kohr*, even the Seventh Circuit did not think to use federal common law to deal with the complex conundrums of choice of law analysis in an aviation accident. *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594 (7th Cir. 1981).

occasionally making new types of federal common law without saying so,[216] and although the received cases cannot alone determine the merits of a legal theory, the lack of an ongoing, vigorous debate about the shape of the discretion in federal common lawmaking undercuts the theory of broad power.

Like the abolitionist position, the position favoring broad power seems difficult to maintain in light of present reality. The defect in the absolute proscription is that federal common law exists; the defect in the broad prescription is that not much federal common law exists. Nonetheless, just as the abolitionist proscription raised important federalism and separation of powers concerns, the broad prescription contains an important truth: that some circumstances demand a unified national response—even if that response is judge-made law. The question is whether any theory can mediate between these contrasting positions.

C. The Enclave Theories

One way to define federal common law is to describe it as the law made in certain enclaves.[217] These discrete enclaves are just that—discrete. Each enclave is separately and pragmatically justified, and no grand theory unites them. The best that can be said is that each enclave involves "uniquely federal interests"[218] for which federal common law is appropriate. This approach can be combined with *Boyle*'s "significant conflict" coda[219] to explain why it is that in some cases (those without a "significant conflict"), state law is chosen as the federal rule of decision.

Ultimately, however, labels like "uniquely federal interests" and "significant conflict" are conclusions rather than methods of analysis. When pressed about why these federal interests are so unique (as opposed to environmental, telecommunication, financial regulation, and myriad other vital issues for which no federal common law has yet been developed) or about why some of the areas included within federal common law are so unique (for instance, admiralty cases in general, and instance cases in particular), the pragmatic approach struggles for an answer. One answer is the realist's view that these are areas in which judges deciding the cases believe that the balance of state and federal interests tips sharply (or "uniquely") toward federal common law; nothing more can be said. But in a world in which federal common law is determined by such balancing, wouldn't we expect

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[216] *Compare In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 713 (E.D.N.Y. 1984) (Weinstein, J.) (holding that states would look to a "national consensus law" to deal with mass tort product liability cases arising out of use of herbicides during wartime), *with In re* Joint E. & S. Dist. Asbestos Liab. Litig., 129 B.R. 710, 878 (Bankr. E.D.N.Y. 1991) (Weinstein, J.) (refusing to adopt "national consensus law" to deal with national asbestos liability crisis).

[217] *See supra* note 16 and accompanying text.

[218] Boyle v. United Techs. Corp., 487 U.S. 500 (1988); *Tex. Indus.*, 451 U.S. at 640; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

[219] *Boyle*, 487 U.S. at 507.

to see a lot more lawyering trying to convince judges of the strong tip of interests toward federal common law? And wouldn't we see more variability in the cases, as different judges balanced the scales differently?

It is possible to try to put the enclave theory on surer intellectual footing. The first effort, which we might call the "jurisdictional implication" theory, is something of a straw man—a position that some who oppose the enclave theory set up rather than a position that those who believe in it advocate.[220] The theory runs along these lines: One common feature of each of the four traditional enclaves of federal common law is its textual grounding in one of the nine "Cases" or "Controversies" that constitute Article III's "judicial Power."[221] Thus, common law involving the government is implicitly authorized by the extension of "judicial Power" to the fourth jurisdictional grant: "Controversies to which the United States shall be a Party."[222] Common law in interstate disputes is authorized by the fifth grant of jurisdiction: "Controversies between two or more States."[223] Common law in international relations arises from the grant of jurisdiction over the second and ninth jurisdictional grants: "Cases affecting Ambassadors, other public Ministers and Consuls"[224] and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[225] Admiralty common law is implicitly authorized by the extension of "judicial Power" to the third jurisdictional grant: "all Cases of admiralty and maritime Jurisdiction."[226]

The notion that jurisdictional grants can contain an implicit power to create common law has been accepted by the Supreme Court.[227] Thus far, however, the Court has found only that *statutory* grants of jurisdiction imply this power. Under the "jurisdictional implication" theory, the *constitutional* grants of jurisdiction imply the same power. Because the statutory grants typically encompass only a fraction of the full expanse of the constitutional grants,[228] the scope of federal common law rulemaking under this

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[220] *See, e.g.*, Weinberg, *supra* note 40, at 832–33.

[221] U.S. CONST. art. III, § 2, cl. 1.

[222] *Id.*

[223] *Id.*

[224] *Id.* In fact, courts have never created federal common law to deal with cases affecting ambassadors, ministers, and consuls because Congress, from the founding of the Republic, has created positive law to define the rights and liabilities of these foreign dignitaries. *See* Crimes Act of 1790, ch. 9, § 25, 1 Stat. 112, 117–18. *Cf.* Clark, *supra* note 115, at 1311 ("Strictly speaking, 'Cases affecting Ambassadors,' . . . are not governed by federal common law. Rather, such cases are governed by positive federal law . . . .").

[225] U.S. CONST., art. III, § 2, cl. 1.

[226] *Id.*

[227] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (stating that the power to create federal common law derived from statutory grant of jurisdiction); FALLON ET AL., *supra* note 22, at 730–43.

[228] *Compare, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (stating that constitutional federal question jurisdiction extends to any case in which a federal issue forms an original ingredient in the case), *with* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (stating that statutory grant

theory could be vast. Indeed, read this broadly, the "jurisdictional implication" theory converts into Professor Field's theory.[229]

The theory has other flaws, principally that it proves both too little and too much. It proves too little because it is a stretch to extract from jurisdictional grant over cases involving ambassadors or the jurisdictional grant over controversies involving states and their citizens on one side and foreign countries and their citizens on the other the greater power to regulate the field of international relations. The theory proves too much because it cannot explain why federal common lawmaking is limited just to five jurisdictional grants, and why it does not extend as well to the remaining four. Notable among the remaining grants are federal question and diversity.

Begin with the federal-question grant.[230] The constitutional grant of federal-question jurisdiction is usually thought to be very broad.[231] If this jurisdictional grant carries the implicit power to create federal common law, then courts have vast lawmaking authority. One way to avoid this result is to say that federal common law is constrained by other sources independent of the "arising under" grant, such as the Interstate Commerce Clause.[232] But that logic, if extended back to the jurisdictional grants involving the United States, interstate disputes, controversies involving foreigners, and admiralty, would rob the "jurisdictional implication" theory of its force because some source other than the jurisdictional grant becomes the true limit of federal common law. Moreover, this logic cuts as broad a swath for federal common law as Professor Field's implication theory, which the enclave theory attempts to narrow.

With respect to the diversity grants, which are found in the sixth, seventh, and eighth grants of federal judicial power,[233] a right to create federal common law is incoherent. Such a power is far greater than that adopted in *Swift v. Tyson*, which limited federal common law powers to diversity cases in federal court; state courts still applied state common law. But modern

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of federal question jurisdiction extends only to cases where a federal question is asserted on the face of a well-pleaded complaint).

[229] Professor Kramer has tried to create an "enclave-plus" theory, suggesting that federal common law is appropriate both when a case falls within an enclave and when additional common law rules "further an underlying federal enactment." Kramer, *supra* note 75, at 289. The latter half of Professor Kramer's theory follows Professor Field's theory. *See* Field, *supra* note 14.

[230] Federal question jurisdiction extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1.

[231] *Osborn*, 22 U.S. (9 Wheat.) 738. *But see* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004) (arguing that *Osborn* should be read more narrowly).

[232] U.S. CONST. art. I, § 8, cl. 3.

[233] The sixth grant extends federal jurisdiction to "Controversies . . . between a State and Citizens of another State," the seventh grant extends jurisdiction to "Controversies . . . between Citizens of different States," and the eighth extends federal jurisdiction to "Controversies . . . between Citizens of the same State claiming Lands under the Grants of different States." U.S. CONST. art. III, § 2, cl. 1.

federal common law applies in state as well as federal courts.[234] One way to read *Erie* is to say that the import of the case is to remove the diversity grants as a source for creating federal common law.[235] Thus, *Erie* permits reliance only on the nondiversity grants of jurisdiction to create federal common law.

But that argument cannot work. *Erie* involved the question of whether federal courts could create a common law different than the state courts. To hold that federal courts did not have such power does not answer the question of whether the jurisdictional grant provides a common lawmaking power that both federal *and* state courts can invoke. Moreover, the claim for a federal common law of international relations relies heavily on the ninth jurisdictional grant, the grant of jurisdiction in controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[236] But this grant is structurally identical to the sixth and seventh grants, in which diversity jurisdiction is extended to disputes between a state or its citizens and another state or its citizens. How some of these parallel provisions can serve as the source of common law rulemaking and others cannot defies ready explanation.

Assuming that it is worth the effort, one way to try to salvage the "jurisdictional implication" theory is to say that the prohibition on creating federal common law in diversity cases is implicit in the very nature of the diversity grant. But then we must squarely face another problem: explaining *Boyle* and *Semtek*. Both were diversity cases; neither involved the United States as a party, a suit in admiralty, an interstate dispute, or international relations. In both cases, the only font of federal jurisdiction was diversity. In one case, the court created a defense to a state law claim, in the other a procedural rule of preclusion for diversity cases. Therefore, it cannot legitimately be claimed that the diversity grants prohibit *all* federal common lawmaking power in diversity cases.

A final, and probably fatal, flaw in the "jurisdictional implication" theory is the fact that state courts also make and apply federal common law. Implying a power for federal courts to make law from the jurisdictional grants of Article III is one matter, but using federal jurisdictional grants to imply a lawmaking power for state courts is too great a stretch. The equivalent argument would allow state legislatures to establish uniform rules of naturalization and bankruptcy because Article I gives comparable powers to the national legislature.[237]

A second, richer justification for the enclave approach is the "constitutional preemption" theory: that in some enclaves the Constitution preempts

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[234] For an analysis of state cases applying modern federal common law, see Bellia, *supra* note 8, at 832–51.

[235] This is, for instance, Professor Field's reading. *See* Field, *supra* note 14, at 922–23.

[236] *See supra* notes 224–225 and accompanying text.

[237] U.S. CONST. art. I, § 8, cl. 4.

state lawmaking, and that, in the absence of congressional action, federal common law must fill in the gap. Under this view, which was first advanced by Professor Hill,[238] preemption derives from various constitutional texts, some of which are contained in the Article I powers given to Congress, others of which are contained in the Article II powers given to the President, and still others contained in the Article III grants of jurisdiction to federal courts. In some cases, the preemption is express, and in others implied. Unlike the "jurisdictional implication" theory, the "constitutional preemption" theory examines the entire Constitution and its structure to delineate areas that are inappropriate for state lawmaking.

The argument has particular force with respect to the law of international relations: The perceived weakness of the Articles of Confederation government in matters of foreign policy;[239] the presidential power to command the armed forces, to negotiate treaties, and to appoint ambassadors;[240] the congressional power to declare war, ratify treaties, and provide advice and consent on ambassadors;[241] and perhaps even the present status of the United States as a superpower can reasonably be construed to implicitly warn states off the field of lawmaking in international affairs. But even here problems arise. First, implications from constitutional structure are a dangerous business, in large part because they are implicit and their obviousness often depends on the eye of the beholder.[242] Another danger is that state law has never been made completely irrelevant in matters affecting foreign affairs; state law can regulate the behavior of foreign nationals and entities associated with foreign sovereigns.[243] Moreover, a preemption analysis simply prevents the states from enacting law; it does not vest power in the courts to make law. A separate question remains whether the courts, as opposed to Congress or the President, have the capacity to make the law that the states do not. Most of the constitutional texts that can be said to imply that the states have no lawmaking power in matters of international relations seem, as a matter of structure, to deny that power to the courts as well.[244]

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[238] Hill, *supra* note 16, at 1025.

[239] *See* THE FEDERALIST NO. 15 (Alexander Hamilton).

[240] U.S. CONST. art. II, § 2, cl. 1–2.

[241] *Id.* art. II, § 2, cl. 2; *id.*, art. I, § 8, cl. 11.

[242] *Cf.* Alden v. Maine, 527 U.S. 706 (1999) (5–4 decision) (implying from constitutional structure an intention not to make states liable for damages suffered by private individuals due to states' violations of certain federal laws).

[243] Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1978) (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–1611 (2000)); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994).

[244] The one constitutional text provision that might counteract this claim—the power of the federal courts to entertain claims involving "Ambassadors, other public Ministers and Consuls," U.S. CONST. art. III, § 2, cl. 1—reduces to the claim that federal common lawmaking can be implied from a jurisdictional grant. The problems of this claim have already been explored. *See supra* notes 220–236 and accompanying text.

As we move away from international relations, the argument for preemption of state law weakens. A fair case can be made that state law should not define the rights and liabilities of the federal sovereign, especially in light of the belief in current ascendancy that federal law cannot define certain of the rights and liabilities of state sovereigns.[245] But intermingling the law of state sovereign immunity and federal common law is a tricky business, especially in light of the exceptions to state immunity that have no counterpart in the line of cases following *Clearfield Trust.* Given the lack of any mention of admiralty other than in the jurisdictional grant of Article III, the notion that a federal common law of admiralty implicitly preempts state law as a matter of constitutional structure is more difficult to maintain.[246] The argument that states cannot as a matter of constitutional structure create the law that governs disputes among themselves is equally difficult to maintain, especially in light of the immediately preceding claim that the federal government must be able to create the law that governs its disputes with others.

It is still harder, if not impossible, to reconcile *Boyle* and *Semtek* with the preemption theory, which had been crafted by Professor Hill years before either decision. What explicit or implicit constitutional text exempts government *contractors* from some (but not all) of the workings of state product-liability law? And it is similarly difficult to craft a plausible argument that the Constitution's structure *requires* federal courts to create a federal rule of preclusion for diversity (i.e., state law) cases.

The preemption theory does not explain why certain constitutional texts displace state lawmaking and vest power in the courts to create federal common law, other texts displace all state lawmaking but do not necessarily permit the creation of federal common law,[247] other texts act only to limit

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[245] *See, e.g., Alden*, 527 U.S. 706; Seminole Tribe v. Florida, 517 U.S. 44 (1996). The statement in the text is a bit expansive; as *Alden* makes clear, states must still obey federal commands, and their failure to do so can be enforced through any of a number of remedial avenues. *Alden*, 527 U.S. at 754–57. Moreover, in some situations Congress can constitutionally waive a state's immunity from suit. Tennessee v. Lane, 541 U.S. 509 (2004); *id.* at 564 (Scalia, J., dissenting); Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[246] We have already seen that jurisdictional grants, standing alone, provide an insufficient basis to imply federal common law. *See supra* notes 220–236 and accompanying text. Professor Hill, the crafter of the "constitutional preemption" theory, argued for the admiralty enclave solely on the basis of the jurisdictional grant, not on the basis of any other constitutional texts. Hill, *supra* note 16, at 1032–35; *see* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) (indicating that state law was preempted in the admiralty area by Article III); S. Pac. Co. v. Jensen, 244 U.S. 205 (1917) (same). It could be argued that the combination of the Commerce Clause, the various clauses affecting foreign relations, *and* the jurisdictional grant in admiralty combine to give courts the power to make federal common law. The lack of a comparable jurisdictional grant would explain why rail or highway transportation does not receive the "benefit" of federal common law. On such reasoning, however, the Commerce Clause, the various clauses affecting foreign relations, *and* the jurisdictional grant in diversity should give courts the power to fashion a general commercial common law—something that *Erie* forbids.

[247] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

the outer reaches of state lawmaking,[248] and still other texts do not limit state lawmaking at all.

One attempt to salvage the theory, which Professor Hill intimates and *Boyle* makes clear, is to explain the preemptive effect of federal common law through a combination of text and a "peculiarly federal concern"[249] or a "'uniquely federal' interest"[250] with which state law would significantly conflict. But *Boyle* stopped short of suggesting "uniquely federal interests" as a universal mode for analyzing federal common law. Nor did it specify how "peculiar" or "unique" a federal interest must be in order for a court to establish federal common law. As we have already discussed,[251] federal interests are myriad, and their strength difficult to assess. Why is the federal interest in injuries on navigable waterways so unique that federal law must control, while state law is regarded as perfectly adequate for injuries caused by trucks on interstate highways?[252] Why is the congressional interest in regulating medical devices strong enough to preempt state product-liability law that has an indirect regulatory effect[253] but not strong enough to create an enclave of federal product-liability law for medical devices? As suggestive as the "uniquely federal interests" approach is, it seems a conclusion rather than a method of analysis.

A distinct difficulty with the "constitutional preemption" form of the enclave theory is attempting to explain the incorporation of state law as the federal rule of decision.[254] Practically speaking, borrowing state law as the federal rule of decision puts the litigants in the same position as using state law. If the constitutional structure demands courts to make federal law, then this result seems curious, to say the least. It is probably possible to construct an analytical path that leads from constitutional preemption of state law to the voluntary use of that law to define federal obligations, but it is an inelegant route that should be avoided if a straighter path can be found.

These difficulties do not mean that the "jurisdictional implication" and the "constitutional preemption" theories have no explanatory power. *Boyle*, for instance, relies on doctrines developed in the context of federal statutory preemption of state law to justify the creation of a government contractor

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[248] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265–292 (1964) (holding that the First Amendment limits the scope of state libel law).

[249] Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988).

[250] *Id.*

[251] *See supra* text following note 219.

[252] Siegler v. Kuhlman, 502 P. 2d 1181 (Wash. 1972); *cf.* Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990) (applying state law to toxic spill arising in rail yard); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (applying state law to injury occurring along track of railroad engaged in interstate commerce).

[253] *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).

[254] *See supra* notes 10–14, 180 and accompanying text.

defense.[255] The relationship among the four classic enclaves of federal common law and four of the federal courts' jurisdictional grants seems more than coincidental. Likewise, the idea that federal common law should be made in areas of "uniquely federal interest," as fuzzy as that phrase is, has some force.

Therefore, like the abolitionist theory and the theory of broad common law rulemaking, the enclave theories have some attractive features. Perhaps the best that can be said for federal common law is that it is a pragmatic mixture of these features—that no unifying theory of federal common law exists. In the next section, however, we suggest a different conclusion: a theory that borrows from each of the theories on offer, yet tethers the field of federal common law to a single unifying ideal.

IV. A THEORY OF FEDERAL COMMON LAW

A. The Basic Theory

Our theory of federal common law begins with a simple observation: There is reason to doubt the objectivity of state law and state courts in certain matters. Problems of objectivity come in two varieties: objectivity in making law and objectivity in applying law. With respect to making law, legislative, executive, and judicial lawmakers can rationally be expected to make laws favoring well-represented political interests; the converse proposition also holds, and lawmakers can be expected not to favor unrepresented political interests and interests that are systematically underrepresented.[256] In other cases, however, the major concern lies not with lawmaking; the law, as written or announced, is the result of competition among well-represented interests and is therefore perceived as "fair enough." Rather, the major concern is that the law will not be applied neutrally toward those with outsider status.

We do not mean to take sides on the question of whether state lawmaking is in fact biased in either of these two directions. That argument is a corollary of the "parity" debate that has cloven, without clear victor, the cases and standard scholarship in the field.[257] For our purposes, it is enough

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[255] *Boyle*, 487 U.S. at 507–08. *Boyle* created federal common law when a "significant conflict" between state law and "uniquely federal interests" existed. *Id.* *Boyle* stated that the conflict, while needing to be significant, did not need to be as acute as it would have to be for statutory preemption analysis. *Id.*

[256] *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[257] *Compare* Tarble's Case, 80 U.S. (13 Wall.) 397, 408–09 (1871) (holding that state courts lack the power to issue writs of habeas corpus to release persons enlisted in armed forces, the Court said, "[t]he experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void"), *and* Burt Neuborne,

to observe that states *might* be thought to be biased against unrepresented or systematically underrepresented interests. Whatever its truth, the idea is older than our Constitution. The perceived hostility of state courts to creditors of foreign nations and other states was a powerful force in the creation of a national court system.[258] In *The Federalist, Number 80*—which deals with "The Powers of the Judiciary"—Alexander Hamilton undertook to explain why the Article III grants of jurisdiction were the "proper objects" "of the federal judicature."[259] In a telling passage, Hamilton explained the necessity, in a federal system, of establishing federal courts to adjudicate certain kinds of cases:

> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.[260]

Hamilton understood that a state could discriminate in favor of itself or its citizens in both the creation and the application of legal standards. Discussing the ninth grant of subject-matter jurisdiction (in particular, the power to hear disputes involving land granted by different states), he argued that in some situations states might be tempted to stack the deck in favor of themselves or their citizens:

> The laws may have . . . prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.[261]

Writing in the generation following the ratification of the Constitution, Justice Story also argued that doubts about the ability of states to create and apply law objectively was a foundational assumption on which the national court system was based:

> [A]dmitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United

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The Myth of Parity, 90 HARV. L. REV. 1105 (1977) (positing that state courts are in fact inferior to federal courts along several metrics of measurement), *with* Stone v. Powell, 428 U.S. 465, 493–94 n.35 (1976) (holding that Fourth Amendment claims are not cognizable on habeas review, the Court said, "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"). *See also id.* ("[T]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the consideration of Fourth Amendment claims than his neighbor in the state courthouse." (internal quotations omitted)).

[258] Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

[259] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 532.

[260] *Id.* at 536.

[261] *Id.*

> States, (which we cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded on a theory of its own . . . . The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, the regular administration of justice.[262]

Story thought that these questions of state objectivity especially explained the grant of diversity jurisdiction to the federal courts but that jurisdiction over federal questions, cases affecting ambassadors, and admiralty ultimately rested on "reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation."[263]

Generalizing from the concerns of Hamilton and Story, we have at least some reason to worry about the objectivity of the states in both making and applying their laws. Assuming that a court wished to redress the perception of bias, the remedies for bias in lawmaking and law application are different. When a state creates law that systematically favors homespun interests at the expense of those without effective representation, the proper remedy requires courts either to change the structure of lawmaking institutions *or* to create a system of legal rights and obligations independent of the influence of the dominant set of interests. When the question is one of neutral application of law that is on its face "fair enough," the remedy requires courts either to change the structure of local adjudicatory institutions *or* to provide a neutral forum in which local bias is minimized.

In both situations, the first option requires courts to reform the democratic and adjudicatory institutions of the offending states—a daunting task that courts usually accept only under the command of the Constitution or a federal statute.[264] As a practical matter, therefore, in most situations courts that wish to address issues of bias are left with the second set of options: make new, superseding law to address lawmaking bias, and offer a neutral forum to counteract bias in the application of law.

The idea of providing a neutral forum to protect against the bias of state courts in applying state law should ring a familiar bell—it is the most common reason given to explain the grant of diversity jurisdiction to the federal courts.[265] In this situation, existing interests within the state are similarly situated to the interests of the outsider, and therefore can be regarded as adequate representatives of the interests of the outsiders. In other words, the law on the books is "fair enough." For instance, the defendant in a car accident within the state might live in another state, but there are

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[262] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346–47 (1816).

[263] *Id.* at 347.

[264] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1966) (codified at 42 U.S.C. § 1973(b) (2000)); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[265] *See, e.g.*, AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99–110 (1969); CHEMERINSKY, *supra* note 18, § 5.3.2 (discussing arguments on both sides); Friendly, *supra* note 18; Kramer, *supra* note 18, at 102–07, 119–21 (arguing against bias rationale).

plenty of other drivers living in the state with similar interests. Absent special circumstances, there is no reason to worry that the state has made laws that especially burden the out-of-state drivers.[266] There is a concern, however, that the state's courts will be hostile to the out-of-state driver when it comes time to apply its "fair enough" law to the driver. A disinterested forum can allay this concern.

Federal common law redresses the remaining problem of bias: bias against interests that are unrepresented or systematically underrepresented in the creation of state law. Put simply, this reality is the core of our theory of federal common law: Federal common law can be created only when there exists a legitimate concern that, if state law were created to deal with the dispute, state lawmakers likely would discriminate in a systematic and pervasive way in favor of the state or its citizens, and against outsiders whose interests are not likely to be protected in the lawmaking process. Although potential bias in the creation of state law is a necessary condition for federal common law, it is not sufficient. Other "uniquely federal interests," such as the presence of the United States or a compelling need for national uniformity, must also be present. But potential bias in state lawmaking is the *sine qua non* that justifies—in fact requires, in the absence of governing constitutional or statutory authority—federal common lawmaking.

Under this theory, federal common law addresses bias in state lawmaking, and a federal forum addresses bias in the application of state law. Thus, the theory explains one of the apparent paradoxes of federal common law. The reason that federal common law can arise under some of Article III's jurisdictional grants, but not generally under the diversity grants, is that the diversity grants are designed to deal with potential bias in the *application*, rather than the *creation*, of state law—a problem for which a neutral federal forum, rather than federal common law, is the solution.[267]

B. Applying the Theory to the Enclaves of Federal Common Law

The present enclaves of federal common law fit within this account of federal common law.

1. United States as a Party.—The argument for federal common law in this situation is self-evident. It is not difficult to imagine how states could stack the deck in favor of themselves or their citizens in cases involving the rights and liabilities of federal government. The states could evis-

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[266] This does not mean that all drivers within the state regard the driving laws as "fair" in the sense that the laws impose only reasonable obligations on them. The state may be under the influence of the pedestrian lobby and have laws that are, from a driver's perspective, quite "unfair." Our point is only that there are no particular or peculiar laws that unduly burden the behavior of out-of-state drivers. Therefore, the law is "fair enough."

[267] Certain defenses, such as the government contractor defense or claim preclusion, present different considerations that can justify the creation of limited forms of federal common law in cases jurisdictionally grounded on the diversity grants. *See infra* notes 284–286, 308–327 and accompanying text.

cerate or encumber activities and programs of the federal government with which they disagreed. Although federal legislation would preempt such efforts by recalcitrant state governments,[268] no legislation could specify in minute detail all the rights and obligations of federal activities in their intersection with state law.[269] In the absence of a federal statute, it seems natural that federal common law—and not state law—should control.[270]

That controversies in which the federal government is a party could not be left to the states to decide was so obvious to Hamilton that he spent only two sentences on the issue in *The Federalist*. As he said, "Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum."[271] Although the question of forum and the question of source of law are distinct, Hamilton's fears speak equally to the need for a federal rule of decision.

As we have seen, federal common law extends beyond cases in which the rights and obligations of the United States are at stake.[272] This result is explicable under the same rationale. Whether the United States is formally a party or not, a state might be tempted to discriminate in favor of itself or its citizens when the discriminatory effect will ultimately be felt by the federal government.[273]

2. Disputes Between States.—Perhaps even less needs to be said about why, in the absence of a governing constitutional or statutory source, federal common law should apply to controversies between two states.[274] In such disputes, states would be tempted to stack the deck to favor themselves. As Hamilton observed in *The Federalist*,

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[268] The Supremacy Clause would give federal legislation precedence over contrary state law. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[269] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public.").

[270] For one statutory scheme dictating the use of state rather than federal law to determine the liability of the United States, see 28 U.S.C. §§ 1346(b), 2674 (2000). These provisions of the Federal Tort Claims Act prove our point: They make the United States liable only to the extent that "a private individual under like circumstances" would be. Congress excluded tort obligations that a state would be tempted to impose specifically on the government. *Cf.* Indian Towing Co. v. United States, 350 U.S. 61, 64–65 (1955) (noting that the "private individual" language avoids "covertly embedding the casuistries of municipal liability for torts").

[271] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 533.

[272] *See supra* notes 57–59 and accompanying text.

[273] For a variant of this reasoning, see *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506–07 (1988).

[274] This reasoning holds equally in cases where the litigants are private parties but the underlying issues turn on interstate disputes: if the dispute is formally between two states, the states will be tempted to discriminate in favor of themselves; if formally between private citizens, the states will be tempted to discriminate in favor of their citizens.

> [a] method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together. But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witness in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes, that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.[275]

Moreover, this reasoning is equally applicable to the eighth Article III grant, involving citizens of the same state claiming lands under grants of different states. In such cases, no less than in cases of border disputes between states themselves, states would be tempted to pass laws favoring their own grants.[276]

3. International Relations.—Likewise, states might well be tempted unfairly to give advantage to themselves or their citizens in cases involving foreign relations. *Zschernig v. Miller*[277] provides a perfect example. The Oregon law in issue there, which the Supreme Court struck down, purported to deprive foreigners of inheritances unless their home countries granted reciprocal rights for United States citizens. This statute served to deprive foreigners, but not citizens of Oregon, of their otherwise lawful inheritances. Foreign citizens, of course, have virtually no power or representation within Oregon's lawmaking process. If state law were allowed to govern such issues, the possibilities for additional discrimination against unrepresented foreigners to the advantage of a state or its citizens would be numerous. As Hamilton observed in *The Federalist*:

> [T]he peace of the WHOLE [United States] ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.[278]

Thus, courts must apply federal common law in the area of foreign relations.

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[275] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 535.

[276] *Cf.* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (finding, in a suit between two Colorado parties over water rights in a river that divided Colorado from New Mexico, that federal common law applies), discussed *supra* notes 63–74 and accompanying text.

[277] 389 U.S. 429 (1968), discussed *supra* notes 98–106 and accompanying text.

[278] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 533–34.

4. Admiralty (Prize Cases).—With regard to admiralty, at least some federal common lawmaking power is required. Prize cases must be governed by federal law, lest states be tempted to stack the deck in favor of the interests of their own citizens, whether they be seafaring or not. Because prize cases arise in time of war, and the prizes seized are likely to belong to foreign nationals, prize cases must be seen as an aspect of the nation's efforts to conduct its foreign policy. The need for a uniform national law follows, just as it does in other matters of international affairs. As *The Federalist* points out in the context of arguing for federal jurisdiction over these cases, even

> [t]he most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[279]

5. The Hard Cases: Government Contractor Defense, Admiralty (Instance Cases), and Preclusion in Diversity Cases.—Federal common law also exists in three other pockets: the government contractor defense (a "uniquely federal interest" posing a "significant conflict" with state law), instance cases in admiralty, and federal rules of preclusion for diversity cases. These situations do not obviously involve discrimination against unrepresented or underrepresented interests, and therefore require more detailed explanation.

a. Government contractor defense.—We begin with the easiest of the three. Government contractors, which operate in many states and include some of the wealthiest American corporations, would not readily fit the description of unrepresented or underrepresented interests. During the 1980s, in the run-up to *Boyle*, contractors had lobbied legislatures and importuned courts around the country to create a government contract defense.[280] Although their efforts met with mixed success, we cannot in honesty say that they lacked political clout. Under our theory, federal common law cannot be made merely because a participant in state lawmaking loses a political fight; the participant must be an outsider, a person or institution systematically unrepresented or underrepresented in the state lawmaking process.

As the Court's five-to-four division reflects, the issue is close. But we believe that *Boyle* represents a legitimate application of the theory. The key to the common law power lies in *Boyle*'s observation that the party ulti-

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[279] *Id.* at 536.

[280] *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 515 n.1 (Brennan, J., dissenting) (detailing failed congressional efforts to create a contractor defense through legislation); *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982) (recognizing a government contractor defense).

mately affected by the government contractor defense is the United States itself.[281] If no such defense existed, rational contractors would charge an additional amount to cover the cost of anticipated injuries or the cost of insuring against those injuries. The federal government would therefore ultimately bear the cost of injuries, and states would often have little incentive to create law immunizing the federal government at the expense of their own citizens. Even if some states did so,[282] others would not, and savvy attorneys could in many cases obtain the benefit of those states' law through manipulation of forum selection and choice of law rules.

Note that *Boyle*'s federal common lawmaking authority ends precisely where the government's unrepresented interests end. *Boyle* did not create a general federal law of products liability for government contractors; there was no need of that because contractors are capable of participating in states' political processes to shape tort law. Rather the structure of *Boyle*'s contractor defense—which requires that the government create or approve reasonably precise specifications and that the contractors comply with those specifications[283]—means that it is the government's decisionmaking, and only the government's decisionmaking, that the defense protects. Just as federal common law protects the interests of the United States when it is a party,[284] so the contractor defense protects the United States when the government is not a party.[285] That fact rescues *Boyle* from one of the conundrums over which the enclave theory stumbles: how to explain the creation of a federal common law defense in a case decided under the diversity grant.[286]

b. Admiralty (instance cases).—Instance cases in admiralty raise thornier issues of explanation. In instance cases, it is tempting to say that the courts have not created common law at all—at least as we have defined the term. Under our definition, federal common law excludes common law made under a congressional grant of authority.[287] Arguably federal common law in instance cases derives from the jurisdictional grant of § 1333.[288] The

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[281] *See Boyle*, 487 U.S. at 507, 511–12.

[282] Of course, some states might have created a government contractor defense either to shield their own state or local governments, or to advance the interests of well-represented contractors. For one pre-*Boyle* recognition of the defense at the state level, see *Sanner v. Ford Motor Co.*, 381 A.2d 805 (N.J. Super. Ct. App. Div. 1977).

[283] *Boyle*, 487 U.S. at 512.

[284] *See supra* notes 268–273 and accompanying text.

[285] *See Boyle*, 487 U.S. at 507 (arguing that "the interests of the United States will be *directly* affected" by holding contractors accountable (emphasis added)).

[286] *See supra* notes 233–236, 247–255 and accompanying text.

[287] *See supra* notes 24–28 and accompanying text.

[288] 28 U.S.C. § 1333 (2000) provides in relevant part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." For a brief discussion of the "saving to suitors" clause, see *supra* notes 144–145 and accompanying text.

"saving to suitors" clause provides an option to those injured in instance cases to bring, in some situations, state law claims. That language implies, rather strongly, that some law other than state law also might apply to "suitors." But Congress has never legislated rules of decision to govern instance cases. Therefore, once we accept the (debatable) claim that instance cases lie within the cognizance of admiralty law,[289] we are led to the conclusion that Congress has implicitly authorized federal courts to create a federal common law of instance cases. Because this is not the type of federal common law with which this Article is concerned, however, it can be excluded from further discussion.

Prudence cautions us to stop there,[290] but we think that our theory actually has something to say about instance cases. Admiralty has long been seen as a distinctive body of law, separate from both common law and equity.[291] It is difficult today to understand exactly how distinctive and unique admiralty was. During the Middle Ages, England, like most European countries of the time, established a special set of courts to deal with admiralty matters—a fact demonstrating the unique place that oceangoing commerce occupied in English and international life.[292] A separate system of admiralty courts was carried over to the American colonies.[293] Even during the ascendancy of the Articles of Confederation, when no national judiciary existed, national courts of admiralty were convened on an ad hoc basis.[294] At the Constitutional Convention, there was no question that admiralty was a national interest, or that the national courts created by Article III would encompass admiralty cases. The New England states derived substantial revenue from sailing interests, and the Southern states depended largely on the ships of foreign countries to carry their raw materials across the seas, and their slaves back.[295] Even more generally, shipping by water was the lifeblood of the young country; roads were poor, and railroads lay decades

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[289] On the debatable nature of this form of admiralty law, see *supra* notes 133–145 and accompanying text.

[290] Others who have assayed theories of federal common law have used a similar technique and justified exclusion of some of the common law categories as simply not being true instances of federal common law. *See, e.g.*, Hill, *supra* note 16, at 1026–30. Because the Court says that it is applying federal common law, however, we think that a theory has at least some burden of explanation.

[291] STEPHEN F. FRIEDELL, BENEDICT ON ADMIRALTY §§ 2–15, 21–36, 41–51 (7th ed. 2005).

[292] *Id.* §§ 21–22. For Justice Story's history on the law of English admiralty, told in an effort to convince the reader of admiralty's unique position in the new American government, see *De Lovio v. Boit*, 7 F. Cas. 418, 426 (C.C.D. Mass. 1815) (No. 3,776), discussed *supra* notes 136–137 and accompanying text.

[293] FRIEDELL, *supra* note 291, § 61.

[294] FALLON ET AL., *supra* note 22, at 6–7 & n.33.

[295] *See* Thomas P. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 327–28 & n.279 (2005); *see also* Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 8 (1870) (reporting counsel's argument that the colony of Massachusetts Bay, which encompassed Massachusetts, Maine, and Nova Scotia, "was, before the Revolution, probably more largely engaged in commerce than any other, and the records of the Courts of Admiralty held in it would be likely to contain more maritime decisions than would be found elsewhere").

in the future. Therefore, the only issue was how far such admiralty jurisdiction would extend.[296]

Moreover, the law of admiralty, which had descended from Roman law, was different than the law that the states applied in analogous common law litigation, and was frankly in significant friction with the common law.[297] "Its system of procedure has been established for ages, and is essentially founded . . . on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law . . . ."[298]

In this environment, it is easy to understand the fear that outsider interests—whether they be the interests of a Southerner in a New England court or a New Englander or a foreigner in a Southern court—would receive insufficient attention under a state's common law.[299] Indeed, that concern makes instance cases in admiralty law appear simply to be a specific application of the reasons that federal common law has been thought necessary in interstate and international disputes—to reduce the friction arising from biased state lawmaking. And that is precisely the understanding with which the Supreme Court operated as it expanded admiralty jurisdiction in the nineteenth century. In *The Genesee Chief*, Chief Justice Taney extended admiralty jurisdiction to navigation on inland lakes (the Great Lakes, under the facts of the case). He observed:

> Different States border on [the Great Lakes] on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation . . . .
>
> The union is formed upon the basis of equal rights among all the states. Courts of admiralty have been found necessary in all commercial countries,

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[296] *See supra* notes 112–115 and accompanying text.

[297] *See* William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering*, 35 J. MAR. L. & COM. 561, 610 (2004) ("The English admiralty courts, where all the lawyers and judges were civilian and trained in the Roman law tradition, applied civil law and procedure. The English common law courts, however, were determined to restrict the admiralty court's jurisdiction . . . ." (footnotes omitted)). In many regards, the law of admiralty was centuries ahead of its time, and it anticipated changes in the common law that would not come into full effect until the twentieth century. For instance, the concept of seaworthiness and libel anticipated the doctrine of negligence. *Compare* The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) (suit for negligent management of a ship), *with* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850) (adopting the idea of negligence, but still using the analytical categories of the writ system). Contracts of insurance were enforced in admiralty by 1601; such a contract was at that time "unknown to the common law; and the common law remedies, when applied to it, were . . . inadequate and clumsy." *Dunham*, 78 U.S. (11 Wall.) at 31. The idea of general average contribution, which was well established by the seventeenth century, anticipated both the twentieth-century doctrine of necessity and, more generally, an economic approach to questions of injury. Likewise, admiralty had developed rules of contribution centuries before the common law had. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 52, 369–70 (7th ed. 2000).

[298] *Dunham*, 78 U.S. (11 Wall.) at 23.

[299] *See* Holt, *supra* note 258, at 1427–29.

> . . . for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin . . . .
>
> . . . [E]xperience in England has proved that a wider range of jurisdiction was necessary for the benefit of commerce and navigation; and that they needed courts acting more promptly than courts of common law, and not entangled with the niceties and strictness of common-law pleadings and proceedings.[300]

Admitting that federal common law might have been necessary in some instance cases, however, is different than saying it should be available in all. Bias against unrepresented or underrepresented outsiders would not be present in every instance case; in *The Genesee Chief*, for instance, both the libellants and the respondents were citizens of New York.[301] Instance jurisdiction surely casts too broad a net, but like many rules that overreach their purposes, breadth was needed to ensure that the right cases were swept up.

A slightly different objection to the use of federal common law is to leapfrog to modern times. Today the doctrines of admiralty law are not remarkably different from those of the common law, in either contract or tort.[302] The procedural rules used in admiralty cases have nearly collapsed into the rules used in other federal litigation.[303] The regionalism of the early republic has evaporated, at least insofar as we worry about bias for or against the maritime industry. Large shipping interests would not appear to have any limitations on participating in the lawmaking process of states; to the extent they do, similar business interests seem to be able to represent their concerns vicariously and well.

Some arguments to justify the continued use of federal common law in instance cases exist. In 2001, 53.9% of all waterborne cargo shipped into, around, or from the United States was carried in a ship flying under a foreign flag, an increase of 11.1% since 1983.[304] A great number of the seamen aboard those ships, whether flying under an American or a foreign

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[300] *Genesee Chief*, 53 U.S. (12 How.) at 453–54, 459; *see also* The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875) (explaining that state law in admiralty "would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states").

[301] *Genesee Chief*, 53 U.S. (12 How.) at 444.

[302] For some comparisons, see *supra* note 297.

[303] In 1938, the Federal Rules of Civil Procedure merged the procedures used in former common law and equity cases, *see* FED. R. CIV. P. 2, but a separate set of Admiralty Rules still existed. In 1966, the Federal Rules finally united admiralty and other civil cases, *see* FED. R. CIV. P., SUPP. R. FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS advisory committee's notes (1966), although a separate set of Supplemental Rules is still used to handle some unique features of admiralty practice, *see* FED. R. CIV. P., SUPP. R. FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS.

[304] U.S. Maritime Admin., *U.S. Waterborne Commerce*, MARAD.DOT.GOV, April 7, 2005, http://www.marad.dot.gov/MARAD_statistics/WBC_1983_2003.pdf.

flag, are foreign citizens.[305] Therefore, concerns about biased state law might not have entirely abated.

Nonetheless, we will not make the claim that the maritime industry would collapse without the use of federal common law in instance cases, or that the need for uniformity in the maritime industry is significantly more acute or unique than the need for uniformity in other large commercial sectors, such as manufacturing or transportation. Absent a showing that sailors, ships, shippers, insurers, or others involved with the maritime industry cannot today protect themselves in the rough and tumble of state lawmaking—a showing that we are not prepared to make—we also submit that it would be appropriate to apply state law to instance cases. Federal common law in instance cases may be an historical curiosity, a dinosaur that has outlived the reasons for its existence. Legal rules are often like that, and our theory suggests that instance cases could today leave the federal common law fold.[306] Of course, the "saving to suitors" clause may get in the way of any move toward the adoption of state law, and courts may feel compelled to create and apply federal common law under its terms. If they do, that simply confirms what we have also suggested—that federal common law in instance cases is legislatively directed, and therefore not the type of free-standing common law that we are discussing in this Article.[307]

c. Preclusion in diversity cases.—That leaves *Semtek*, by far the hardest case to explain. As with instance cases, an argument can be made that *Semtek* does not involve the free-standing federal common law to which our theory applies. *Semtek* appears to create federal common law of a most extraordinary kind—the *Swift v. Tyson* type of common law supposedly abolished by *Erie*. *Semtek* creates a federal rule of preclusive effect that operates *only* on judgments entered in federal court; the case nowhere suggests that federal common law determines the preclusive effect of a state law judgment entered in state court. It is tempting to dismiss *Semtek* because it is not the classic form of federal common law our theory addresses.

But it is not so simple. As the facts of *Semtek* reveal, an enforcing state court is also required to use and implement the federal common law rule of the rendering federal court. Therefore, *Semtek* does in fact create a rule of law enforceable in both federal and state courts, and does not return federal courts to the world of *Swift v. Tyson*.

As with the government contractor and instance cases, we believe that our theory justifies *Semtek*. On its face, this claim seems extraordinary. We know of no evidence suggesting that, when *Semtek* was decided in

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[305] William R. Hawkins, *Losing Command of the Sea (Part I)*, AMERICANECONOMICALERT.ORG, Dec. 3, 2002, http://tradealert.us/view_art.asp?Prod_ID=704.

[306] An interim step would be to make a move that the Court has made in other cases: to incorporate state law as the federal rule of decision. *See supra* notes 10–14, 180 and accompanying text; *infra* notes 332–346 and accompanying text.

[307] *See supra* notes 287–289 and accompanying text.

2001, state courts were establishing rules on the preclusive effects of judgments in a manner that disadvantaged outsiders or favored insiders. California's rule denying preclusive effect to a judgment dismissing a case on statute-of-limitations grounds could as easily benefit an outsider as an insider; moreover, California insiders with reason to argue for greater preclusive effect would have adequately represented the interests of similarly situated outsiders. The same can be said of the rules applied in Maryland courts. Therefore, our theory may appear to suggest that *Semtek* was wrongly decided.

Perhaps, but we strongly believe that *Semtek* was correctly decided, and that it further demonstrates the validity of our theory. The proof of this claim, however, is lengthy and intricate. Step away for a minute from the particular question of the preclusive effect of a diversity judgment. Begin by assuming that the Constitution includes no Full Faith and Credit Clause,[308] and Congress has passed no full faith and credit statute.[309] Assume as well the following facts, suggested by the facts of *Semtek*: Smith, a citizen of California, sues Jones, a citizen of Maryland, in a state court in California on a state law claim. Jones obtains a favorable judgment on the statute of limitations. California courts do not regard a dismissal on statute-of-limitations grounds as a judgment on the merits and would accord this judgment no preclusive effect. Smith now re-files the case in Maryland, which has a longer statute of limitations but which also regards dismissals on statute-of-limitations grounds as dismissals on the merits. Jones wants to argue that the California judgment precludes the second suit, using Maryland's law of preclusion.

According to our theory, these facts require the application of federal common law—albeit not in precisely the way that it might seem. Although Jones is an outsider in California, and he has had no opportunity to participate in the framing of California's unfavorable (to him) law of preclusion, these facts alone do not give license to create federal common law. Jones was virtually represented by "insider" Californians who had the same interest in achieving broad preclusive effects for California judgments. Under our theory, Jones has no right to expect federal common law to determine the preclusive effect of a statute-of-limitations dismissal; California is free to decide that question on its own.

When Smith re-files in Maryland, however, a problem of adequate representation arises. Smith needs California's law of preclusive effect for statute-of-limitation dismissals to carry over to Maryland in order for her case to succeed against Jones. Maryland courts, however, have little incentive to apply another state's law on preclusion. It is the California courts' interests in having their judgments enforced according to California law

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[308] Which it does: U.S. CONST. art. IV, § 1.

[309] Which it has: 28 U.S.C. § 1738 (2000). The statute, first passed in somewhat different form in 1790, is sometimes called the Federal Res Judicata Act. 18B WRIGHT ET AL., *supra* note 165, § 4467.

that finds no representation in Maryland. The fact that Smith is a citizen of California—and therefore an outsider in Maryland—certainly does not help the situation, but the real difficulty is that there exist no checks on the self-dealing tendency of Maryland's courts to choose their own law of preclusion to determine the preclusive effect of a judgment obtained in another state—either in all cases, or in cases in which they can create advantages for their own citizens. The problem is akin to the problem that is presented in interstate disputes; each state has an incentive to choose its own law.[310]

The point was obvious enough that even the Articles of Confederation contained a full faith and credit clause that required only modest strengthening in the Constitution.[311] James Madison recognized as much; he devoted only a bit of time to justifying the Full Faith and Credit Clause:

> The power of prescribing by general laws, the manner in which . . . judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. . . . The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States . . . .[312]

In the absence of the Full Faith and Credit Clause and statute, concerns for self-regarding behavior and interstate friction create, under our theory, a classic case for the use of federal common law to determine the preclusive effect of a judgment rendered in another state.

Still assuming the absence of the Full Faith and Credit Clause and statute, the next question is the exact content of the federal common law rule. At least four rules are possible: (1) according the judgment the preclusive effect it would have had under the law of the state in which the judgment was obtained (on our facts, California); (2) according the judgment the preclusive effect it would have under the state in which enforcement occurs (on our facts, Maryland); (3) on the particular facts of statute-of-limitations dismissals, requiring the enforcing state (Maryland) to apply the statute of limitations of the rendering state (California); or (4) developing a federal body of rules on the preclusive effect of judgments (e.g., "Dismissals on statute-of-limitations grounds bar subsequent litigation on the same

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[310] *See supra* notes 274–276 and accompanying text.

[311] Article IV of the Articles of Confederation stated in relevant part: "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." ARTICLES OF CONFEDERATION art. IV. The Full Faith and Credit Clause of Article IV of the Constitution strengthened this clause by, inter alia, authorizing Congress to enact legislation prescribing the manner for proving the public acts, records, and judicial proceedings subject to full faith and credit and prescribing the effect that these acts, records, and proceedings would have.

[312] THE FEDERALIST NO. 42 (James Madison), *supra* note 18, at 285–86. Madison's quoted comments related only to the Constitution's strengthening of the Articles of Confederation's full faith and credit clause, discussed *supra* note 311. He did not think it necessary to explain the reason for the basic idea of full faith and credit.

claim."[313]), and then requiring all enforcing state courts to follow this uniform rule.

Of the four possibilities, the second—mutual disrespect for other states' judgments—must be rejected out of hand, for it does not solve the problem of interstate friction that gave rise to the need for federal common law in the first instance. The fourth possibility also seems undesirable. Assume that the chosen federal rule of preclusive effect was the same as that of Maryland. If the second lawsuit was filed in a California state court, then California would presumably still be free to apply its own rule of preclusive effect. If the second case were filed in any other state court, however, the Maryland-like rule would apply. It is again hard to see how this approach avoids the friction that animates, at least in part, the need for federal common law. The inequity and inducement to shop for forums—the policy concerns that also underpin *Erie*—are patent. Therefore, only the first and the third possibilities remain as realistic options.

Because of the Full Faith and Credit Clause and the implementing full faith and credit statute, we need no federal common law to deal with this situation. The Full Faith and Credit Clause and statute generally require that every state court accord the California judgment the same effect it would have in California—the first of the four possibilities described above. There is a nice question about whether, in the particular context of a statute-of-limitations dismissal, the Clause and statute require the third rule, so that the second state (Maryland) must use the statute of limitations from the first state (California) when the case is re-filed in the second state. The answer is uncertain,[314] and the "no" answer implicitly given by the Maryland courts set up the *Semtek* problem.[315] Concerns for equity and elimination of forum shopping suggest that the answer probably should be "yes," thus obviating the *Semtek* problem when the first case is filed in state court. Ultimately, however, the answer must be derived from an interpretation of the Full Faith and Credit Clause and statute; it is not a question for which federal common law provides a direct answer. The critical points to grasp are, first, that the Full Faith and Credit Clause and statute supplant a field that would otherwise be governed by federal common law, and second, that the sub-

[313] Of course, the uniform federal rule could also be the opposite: "Dismissals on statute-of-limitations grounds do not bar subsequent litigation on the same claim." The difference between this option and the first three is that this option specifies the content of the preclusion rule; the first three refer to the extant law of the rendering or enforcing forum.

[314] For a discussion of the uncertainty of whether Maryland must give a California dismissal on statute-of-limitations grounds the same preclusive effect as a California court would, see SHAPIRO, *supra* note 36, at 126–27 & n.11.

[315] In *Semtek*, of course, the California court was a federal court, not a state court as in our hypothetical. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001). The "*Semtek* problem," however, is one of deciding how much of the California judgment "carried forward." If the Maryland court had been required to carry forward the California statute of limitations, then it would have dismissed the case. It is only because the California statute of limitations did not travel with the California judgment that the second-level question of the preclusive effect of the California judgment—the "*Semtek* problem"—came into play.

stance of the constitutional and statutory rules is consonant with our theory of federal common law.

Matters are otherwise once federal courts enter the picture. The Full Faith and Credit Clause neither applies to federal courts nor compels an enforcing state or federal court to give any preclusive effect to a judgment rendered in federal court.[316] The full faith and credit statute requires enforcing state (or federal) courts to give full faith and credit to the judgments of the rendering federal court,[317] but the statute does not determine either the source (state or federal law) or the substance of the rendering federal court's preclusion law. The Supremacy Clause requires state (but not federal) courts to accept federal law as the "supreme Law of the Land,"[318] and some courts and commentators have suggested that state courts' obligation to enforce a federal judgment can be derived from this clause in conjunction with either the Article I's "necessary and proper" clause or Article III itself.[319] But that approach fails to answer the critical questions: What are the source and substance of the "law" that state courts must respect?[320]

The answers lie in the federal common law that remains after the "rendering state court, enforcing state court" piece has been supplanted by the Full Faith and Credit Clause and statute. In the "rendering federal court, enforcing state court" scenario, the need for federal common law is at least as compelling as in the "rendering state court, enforcing state court" scenario. Similar concerns exist about the enforcing state court's self-regarding behavior in the face of the unrepresented interests of the rendering federal court. So do concerns for destructive friction. Indeed, in the context of a federal diversity judgment, the friction is multiplied; not only would there be interstate friction when one state court refuses to enforce a judgment based on the law of another state, but there would also be the intersystem friction when a state court enforced a federal judgment according to the state court's own terms.[321] Therefore, a federal common law of preclusion must be adopted to avoid the self-regarding behavior of enforcing state courts.

If the source of the rule is federal common law, the next question is the substance of the federal rule. The four choices that we suggested above still seem to apply, albeit with some modification.[322] The choices are as follows:

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[316] *See, e.g.*, Univ. of Tenn. v. Elliott, 478 U.S. 788 (1986); Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982).

[317] *See* 18B WRIGHT ET AL., *supra* note 165, §§ 4468, 4469.

[318] U.S. CONST. art. VI, cl. 2.

[319] *See, e.g.*, Embry v. Palmer, 107 U.S. 3, 9 (1883); 18B WRIGHT ET AL., *supra* note 165, § 4468.

[320] *See Semtek*, 531 U.S. at 507 ("And no . . . federal textual provision, neither of the Constitution nor of any statute, addresses the claim-preclusive effect of a judgment in a federal diversity action.").

[321] *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (rejecting the idea that the United States Supreme Court has no jurisdiction to entertain appeals on federal questions taken from a state supreme court).

[322] *See supra* note 313 and accompanying text.

(1) according the judgment the effect it would have had under the preclusion law of the state in which the federal court renders the judgment (on our facts, California); (2) according the judgment the preclusive effect it would have under the state in which enforcement occurs (on our facts, Maryland); (3) requiring the enforcing state (Maryland) to apply the statute of limitations applied by the rendering federal court (on our facts, California's statute of limitation); or (4) developing a body of federal rules on the preclusive effect of federal courts' judgments. Once again, the second option is not desirable; allowing an enforcing state court to choose its own law to determine the preclusive effect of a federal judgment does nothing to assuage the concerns that animate the creation of federal common law. The fourth choice—creating a body of federal common law rules of preclusion—makes more sense in the context of a rendering federal court than in the context of a rendering state court. Nonetheless, symmetry, as well as *Erie*-esque concerns for the equitable administration of the laws and the prevention of forum shopping,[323] suggest that a wiser choice would be to adopt the same rules on preclusive effect as the state court—at least for a claim based on state law.[324] No a priori argument can determine the choice between the first and third options. As long as we construe the Full Faith and Credit Clause and statute to choose the first option, however, symmetry and *Erie*-esque concerns suggest that the first option is preferable.

The "rendering federal court, enforcing federal court" scenario involves less friction and, due to the unitary nature of the federal courts, perhaps less concern for self-regarding behavior. But little is gained by allowing an enforcing federal court to give whatever preclusive effect it desires to the rendering federal court's judgment. Indeed, in the context of state law claims, the potential for intersystem friction remains, with the state court, rather than the federal court, now in the position of the unrepresented interest.[325] Again, federal common law provides the source for determining the preclusive effect of a federal judgment.[326]

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[323] *See Semtek*, 531 U.S. at 508–09 (discussing *Erie*-related concerns inherent in choosing a rule on the preclusive effect of a diversity judgment).

[324] A claim based on federal law presents other issues. The use of federal common law to determine the preclusive effect of a federal judgment deciding a federal question is beyond cavil. Stoll v. Gottlieb, 305 U.S. 165 (1938); *see Semtek*, 531 U.S. at 507. What the substance of that common law rule should be is a separate issue. Ultimately, our theory is designed to determine whether federal common law should apply, not to determine the substance of that law.

[325] An interesting, and surprising, consequence of our account of federal common law is that there are extra reasons for a federal court to apply federal common law in the context of a diversity case. The need to avoid intersystem friction does not pertain to a federal question case in which the enforcement of a federal court's judgment is left to another federal court, but the need does arise when the federal judgment is based on state law. Therefore, federal common law must apply in the context of the enforcement of a federal court's diversity judgments.

[326] To complete the picture, in the "rendering state court, enforcing federal court" context, the full faith and credit statute requires enforcing federal courts to give the same effect to a state court's judgment that the rendering state court would give. When the state court renders a judgment on a federal question, however,

Therefore, the federal common law that operates in federal courts after *Semtek* is not the forbidden *Swift v. Tyson* sort of federal common law. Rather, this common law would apply equally to state and federal courts but for the operation of the Full Faith and Credit Clause and statute. The Clause and statute displace common law in the context of the "rendering state court, enforcing state court" situation, but leave common law undisturbed in other scenarios. Like all federal common law, this common law is subject to displacement, should Congress ever enact constitutionally appropriate legislation requiring a particular preclusive effect.[327] The problem with which federal common law is concerned is bias in the creation of state law. When Congress creates uniform federal rules, a necessary condition for creating federal common law is lacking.

C. *Bias in the Creation of State Law: A Necessary but Insufficient Condition*

Our theory is immediately subject to an important criticism. At various times, and with unfortunate frequency, states have demonstrated indifference to the plight of systemically underrepresented groups (for instance, enacting laws against miscegenation[328] or integrated school systems,[329] or refusing to strike down racially restrictive covenants[330]). Despite the discriminatory potential of state law, courts have never created a federal common law of marriage, education, housing, or, more generally, race or gender relations.[331] These areas seem far more significant places to estab-

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the Supreme Court has never decided whether state law or federal common law is the source of the rule determining the preclusive effect of the state judgment. *See* SHAPIRO, *supra* note 36, at 135–44; 18B WRIGHT ET AL., *supra* note 165, § 4469. Notions of symmetry point toward the use of federal common law, as would *Erie*-esque considerations of equity and prevention of forum shopping.

[327] *See Semtek*, 531 U.S. at 506–07 (suggesting congressional role in creating a federal statute on preclusive effect). Congress has arguably done so in the past. *See* Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196 (1873), popularly known as the Conformity Act of 1872. The Act was interpreted in *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1875), to require that a federal court apply state law to determine the preclusive effect of a federal diversity judgment. *See supra* notes 167–169 and accompanying text.

[328] *Cf.* Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional Virginia's antimiscegenation statute).

[329] *Cf.* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding unconstitutional de jure segregation in four states).

[330] *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding racially restrictive covenants unconstitutional); Hansberry v. Lee, 311 U.S. 32 (1940) (invalidating judgment seeking to bind inadequately represented African American class members to prior judgment upholding a restrictive covenant).

[331] A possible exception to this last statement in federal Native American law. The Supreme Court has never stated that the source of the law applicable to Native American tribes is federal common law; but, to the extent that no treaty or statute directly controls an outcome, Native American law feels like federal common law. In logic strikingly similar to that which we have advanced, the Court has stated:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with

lish federal law than most of the areas in which federal common law has been established. Why, then, has federal common law arisen in—and so far, only in—these discrete pockets?

This criticism allows us to make an important point about the limited nature of our theory. The criticism would be most telling if our theory purported to be a comprehensive account of when courts should create federal common law—if we claimed, in other words, that courts must create federal common law whenever state law has or might advantage well-represented in-state interests. But that is not our claim. To be clear, potential bias in the creation of state law may be a necessary condition, but it is not a sufficient condition for creating federal common law.

Once potential bias exists, other reasons must then be found to create federal common law. We believe that Professor Field's work provides an excellent description of the factors that, at least so far, have moved courts to create federal common law. The need for uniformity and the potentially negative effect of state law on the interests of the United States have understandably emerged as dominant reasons, but other reasons, such as the capacity of courts to make law in light of separation of powers and federalism concerns, are also relevant.

In the examples of marriage, education, and housing, we do not need federal common law as long as the fundamental law of the state is nondiscriminatory. For instance, the basic rules for marriage (licensing requirements, fees, etc.) do not discriminate against unrepresented or systematically underrepresented interests. But a discriminatory coda on the basic requirements (e.g., "Racially mixed couples cannot enjoy the benefits of marriage") also exists. Once the Equal Protection Clause strikes the coda, only the nondiscriminatory requirements for marriage remain. As a result, a federal common law of marriage becomes unnecessary—regardless of how much we might think that uniform federal standards for marriage would be desirable. In fact, the Equal Protection Clause removes many instances of state law discrimination against unrepresented or underrepresented interests, and thus limits the circumstances in which federal common law is a necessary remedy for state law bias. Nor does federal common law come into play unless other conditions—such as a compelling need for uniformity or the presence of the United States as a party—also exist.

The theory is nearly complete. As we have seen, courts sometimes incorporate state law as the federal common law rule.[332] In order for our the-

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them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383–84 (1886). On the general question of the sources of federal power to regulate Native Americans, see MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN 122–37 (2d ed. 1983). We are indebted to Joseph Singer for this insight.

[332] *See supra* notes 10–14, 180 and accompanying text.

ory to be successful, we must finally account for the circumstances in which courts can incorporate state law as the federal common law rule of decision.

D. Explaining the Incorporation of State Law as the Federal Common Law Rule

Once a court has decided that (1) states would be tempted to favor through their laws either themselves or their own citizens and (2) other compelling reasons (such as uniformity) exist, it should choose federal common law. The question remains, though, what the substance of the federal common law rule should be. To answer that question, we must ask and answer another: Can federal courts create federal common law rules without reference to the state law that the federal common law is displacing, or should they instead incorporate the state law into the federal rule?

One point is obvious: If federal common law always adopted state law as its substance, then federal common law would not vindicate the reasons for its existence. But that fact merely proves that federal law should not always adopt state law, not that federal law can never adopt state law.

The Supreme Court recognized as much in *Boyle*. After deciding that the case involved "uniquely federal interests," and that federal common law should therefore apply, it went on to discuss whether federal common law should displace state law.[333] Noting that its inquiry in determining whether federal common law would displace state law did not end with the determination that the case involved "uniquely federal interests," the Court explained that such a determination "merely establishes a necessary, not a sufficient, condition for the displacement of state law."[334] Displacement will only occur where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'"[335] Expanding on this requirement of conflict, the Court continued, "[i]n some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules."[336] In others, "the conflict is more narrow, and only particular elements of state law are superseded."[337]

The Court saw no reason to distinguish between displacement of state law by federal common law and displacement of incorporated (or adopted) state law by a purely federal rule in cases where federal common law applies.[338] Similarly, Professor Field has questioned whether a two-step proc-

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[333] Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

[334] *Id.* at 507.

[335] *Id.* (citations omitted).

[336] *Id.* at 508 (citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366–367 (1943)).

[337] *Id.* (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 595 (1973)).

[338] The Court stated, in footnoted dicta:

> We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to re-

ess of creating federal law, and then determining whether to incorporate state law as the federal rule, makes sense.[339] In our view, such a distinction is required. The first step determines whether federal common law *must* govern. As we have seen, federal common law governs when the potential for bias in creating state law exists and other good reasons for creating federal law (such as uniformity) favor creating federal common law. The second step is different; given that federal common law *must* apply, it asks whether the substance of the rule should be a new, federal rule, or whether the state rule on the issue will suffice.

On this latter question, it is important to note that states do not *actually* discriminate in every instance in which they might be *tempted* to do so. Nor will the remaining reasons for creating federal common law—such as the need for uniformity—be implicated on the facts of all cases. Therefore, in some cases—those in which (1) state laws that would operate in the absence of federal common law do not in fact discriminate against the unrepresented or underrepresented interests, and (2) other factors (such as uniformity or the presence of the United States as a party) are not strongly present—state rules may be adopted as the applicable federal common law rule.[340] These two criteria are often indirectly linked. On some matters, the need for national uniformity is simply the flip side of the fear that states will give too much weight to parochial interests. *Clearfield Trust* made this point clearly:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[341]

> gard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to "borro[w]" . . . or "incorporate[e]" or "adopt" . . . state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

Id. at 507 n.3 (citations omitted). *See also* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) (noting that difference between applying state law of its own force or adopting it as the federal rule of decision "is of only theoretical interest").

[339] *See* Field, *supra* note 14, at 950–53.

[340] *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) ("Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules. . . . Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests." (footnotes and citations omitted)).

[341] *Clearfield Trust*, 318 U.S. at 367.

If the area is one in which the state law on point actually discriminates in favor of the state or its citizens, then state law must be displaced by federal common law; courts cannot incorporate biased state law. A good example is *Boyle*. The Court found that a federal rule was needed to implement the defense because "the state-imposed duty of care that is the asserted basis of the contractor's liability . . . is precisely contrary to the duty imposed by the Government contract . . . ."[342] Consequently, the Court concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."[343] The same reasoning militates in favor of a uniform, federal law in admiralty prize cases and in cases involving foreign relations. In these areas, the risk is great that a state, understandably focusing on the interests within its boundaries, will give insufficient weight to the larger national and international interests, and that each state, left to its own devices, will choose varying rules of decision.[344]

In other cases, however, there may be no evidence that state law is biased, and no other compelling reason to create a federal rule of decision. For example, in *Kimbell Foods*,[345] the Court held that federal common law was the source of law for determining priority among creditors when a federal agency is one of the creditors. Nonetheless, the Court observed, that determination does not mean that a federal rule is required:

> We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes "furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s]," . . . we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.[346]

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[342] *Boyle*, 487 U.S. at 509.

[343] *Id.* at 512.

[344] *But see In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 701 (E.D.N.Y. 1984) (predicting that, in the context of lawsuits brought by military personnel injured in foreign conflict, each state would choose to adopt a "national consensus" of state laws to determine government contractors' liability).

[345] United States v. Kimbell Foods, 440 U.S. 715 (1979).

[346] *Id.* at 729 (citation omitted). On this reasoning, *Clearfield Trust* might be decided differently today. In *Clearfield Trust*'s day, the law of commercial paper was in a shambles; an older uniform act, the Uniform Negotiable Instruments Law, had been adopted in 1896, and was no longer functioning well or uniformly in the states—a fact well known by the mid-1940s, when work on Article 3 of the Uniform Commercial Code began. *See* U.C.C. § 3-101 cmt. (1957); ALI, COMMERCIAL CODE (GROUP NO. 1) 1–5 (Tentative Draft No. 2, Article III, 1947). Today, the Uniform Commercial Code makes uniform, in all states but Louisiana, state laws regarding commercial paper, so that the problems of national disuniformity and outsider discrimination are no longer relevant in many contexts. Federal common law might still be required to deal with problems around the margin—for instance, resolving interpretive questions arising under the UCC on which states have taken different positions—but in the main it seems that greater overall uniformity would be created by adopting the UCC as the federal common law of commercial paper. *Cf.* Friendly, *supra* note 11, at

Thus, the fear of discrimination against federal interests (when joined with the status of the United States as a party) required that federal common law be applied, but the lack of evidence that the state law in fact discriminated against federal interests and the lack of a compelling argument for federal uniformity permitted the Court to incorporate state law as the substance of the governing federal common law.

CONCLUSION: JUSTIFYING FEDERAL COMMON LAW

We began with the task of creating a descriptive theory of federal common law—of explaining those enclaves in which the Supreme Court itself acknowledges that it is creating federal common law. Important normative arguments militate against the existence of any federal common law. Separation of powers concerns (Congress and not courts should make national law) and federalism concerns (federal common law is a hydra that can swallow state lawmaking) head the list. At one level, our theory has not grappled with those concerns, because we wanted only to account for the phenomenon of federal common law, whatever its normative merits or demerits. At a different level, however, grounding federal common law in the protection of interests unrepresented or systematically underrepresented in the creation of state law undeniably has a normative component. All theories of federal common law inevitably mediate between the fact (and maybe the necessity) of federal common law and the limits that must be placed on it in order that it not become a constitutional embarrassment.

Grounding federal common law in the protection of unrepresented or systematically underrepresented interests links federal common law to significant thematic elements within the Constitution. Similar concerns against discrimination find vent in numerous features of the Constitution beyond Article III—among them the dormant Commerce Clause,[347] the Full Faith and Credit Clause,[348] the Privileges and Immunities Clause,[349] the Supremacy Clause,[350] the Privileges or Immunities Clause,[351] and the Equal

409–11 (suggesting that *Clearfield Trust* could have adopted state law as the rule of decision). Indeed, the choice between a unique federal common law rule and the adoption of state law is fluid, and might be changed as the circumstances of state lawmaking change.

[347] The Dormant Commerce Clause is derived by implication from the text of the Commerce Clause itself, *see* U.S. CONST. art I, § 8, cl. 3, and prohibits state rules that discriminate against or unduly burden interstate commerce in relation to intrastate commercial activity. Granholm v. Heald, 125 S. Ct. 1885, 1895 (2005).

[348] U.S. CONST. art IV, § 1.

[349] *Id.* art IV, § 2, cl. 1.

[350] *Id.* art VI, cl. 2. In particular, the doctrine of preemption sometimes is used to prevent the enforcement of narrow parochial interests against the unrepresented. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[351] U.S. CONST. amend. XIV, § 1.

Protection Clause.[352] The idea also finds resonance with *Carolene Product*'s efforts to protect "discrete and insular minorities" that are shut out of the political process,[353] and with process-oriented theories of judicial review.[354] As we earlier suggested,[355] in many cases the discriminatory effects of state law can be dealt with by enjoining the application of the offending law and leaving nondiscriminatory background law in place; here federal common law is unnecessary. Federal common law needs to be developed only when no neutral background law exists, and the states' competence to develop that law is debatable.

For now, we do not wish to press on the connections between federal common law and these other doctrines too much. We raise them suggestively, to show that the reasons for and the limits on federal common law travel along well-worn analytical paths, and to adumbrate more fruitful connections between federal common law and the remainder of the Constitution than are typically described in the literature. Because it connects to the norms of political participation inherent in our system of government, our theory assuages somewhat the antidemocratic and antifederalist impulses that undeniably undergird federal common law. It explains why courts *must* create federal common law, while setting boundaries on their power to do so.

Our theory can nonetheless be criticized for its vagueness, and perhaps for its undue simplicity. As to vagueness, "lack of representation" or "under-representation" in the political process are ideas that are hardly self-defining.[356] We do not offer a definition of political representation, or a means for distinguishing the systematically underrepresented from the adequately represented losers of particular political fights. Indeed, some notion of virtual representation of interests must operate in order for our theory to work. In other words, even though Microsoft is not a citizen of the State of Illinois, it is not automatically entitled to have federal common law, rather than the law of Illinois, govern its rights and responsibilities. As long as similarly situated entities have adequate participatory rights in Illinois, Microsoft has no grounds to request federal common law. The idea of virtual representation simply shifts the ambiguity over one space, as courts now

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[352] *Id.*; *cf.* Bolling v. Sharpe, 347 U.S. 497 (1954) (incorporating equal protection principles into Due Process Clause of Fifth Amendment).

[353] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (arguing for heightened judicial review of governmental actions when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities"). *Carolene Products* was decided on the same day as *Erie*.

[354] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); *cf.* Merrill, *supra* note 39 (suggesting links between federal common law and theories of judicial review).

[355] *See supra* notes 328–332 and accompanying text.

[356] For recent critiques of the process-oriented theory of judicial review with which our own theory has some sympathy, see Symposium, *On Democratic Ground: New Perspectives on John Hart Ely*, 114 YALE L.J. 1193 (2005).

must consider how comparable the interests of Microsoft are to those of adequately represented entities. Admittedly, a gray area lurks around the edges of our theory.

A related vagueness concern is the seemingly infinite malleability of the theory. Because arguments of bias and inadequate political representation can be made in many cases, does our theory meaningfully exclude any subjects from the potential scope of federal common law? In one sense, we can provide no categorical answer, because we cannot pretend to know every imaginable political permutation in the states. Under our theory, the question of the power to create federal common law is often fact-bound, a reality that allows for subjective values to creep into close cases.[357] The debatable outcomes of the instance cases,[358] *Boyle*,[359] and perhaps *Semtek*,[360] show that the theory is not always self-applying.

Nonetheless, the theory is capable of excluding significant areas from the reach of federal common law. Barring a unique factor such as the presence of the United States as a party, certain types of legal disputes are unlikely to result in federal common law: contracts, torts, property, corporate law, and a host of other doctrinal categories in which the participation of adequately represented parties at the state level is likely to be active. The limited enclaves of federal common law suggest that the presumption probably lies against a finding of inadequate representation.

Indeed, two recent cases in which the Supreme Court has chosen *not* to create federal common law—*O'Melveny & Myers v. FDIC*[361] and *Atherton v. FDIC*[362]—show the theory's teeth. In *O'Melveny & Myers*, the FDIC, acting in its capacity as receiver of a failed bank, brought a state law claim against the bank's attorneys. The attorneys defended the case by claiming that the bank (and thus the FDIC, as the bank's successor in interest) was already aware of the fraud that led to the bank's failure. The Court rejected the FDIC's argument that the imputation of corporate officers' knowledge of the fraud to the corporation should be determined as a matter of federal law. The Court characterized the argument that federal common law should generally govern the imputation of an officer's knowledge to a corporation as "so plainly wrong."[363] It devoted more time to the argument that a fed-

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[357] *Cf.* Michael C. Dorf, *The Coherentism of* Democracy and Distrust, 114 YALE L.J. 1237, 1238 (2005) (noting that representation-reinforcing theories of judicial review are "laden with controversial value judgments"); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1282 (2005) (noting that such theories are "indeterminate").

[358] *See supra* notes 306–307 and accompanying text.

[359] *See supra* notes 281–286 and accompanying text.

[360] *See supra* text following note 307.

[361] 512 U.S. 79 (1994).

[362] 519 U.S. 213 (1997).

[363] *O'Melveny & Myers*, 512 U.S. at 83.

eral rule of decision, rather than the state's law on imputation, should apply when the FDIC is a party, but ultimately held against the FDIC:

> The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules.[364]

O'Melveny & Myers correctly saw no reason to override state corporate law, when private interests were presumptively adequately represented in the state lawmaking process and a federal agency was acting only to enforce one of those interests.

Even more instructive is *Atherton*, in which the Court considered the creation of a federal common law standard of care owed by the officers of federally chartered financial institutions. Under our theory, such a standard would be appropriate only if it appeared likely that the interests of federally chartered institutions or the federal government, which insures them, would be discriminated against in state lawmaking. That question was precisely the inquiry that the Court made. It traced the history of federally chartered banks, noting the overt discrimination that the federal banks faced in the nineteenth century. The Court noted that the argument for federal common law, "with little more, might have seemed a strong one during most of the first century of our Nation's history, for then state-chartered banks were the norm and federally-chartered banks an exception—and federal banks often encountered hostility and deleterious state laws."[365] But such was no longer the case,[366] and with it the need for federal common law collapsed. The Court couched its analysis in terms of a lack of "a significant conflict or a threat to a federal interest,"[367] a concern which was distinct from the desire for national uniformity.[368] As the Court's analysis shows, the "significant conflict or threat to a federal interest" thought necessary to create federal common law is invidious discrimination against those poorly represented in state lawmaking.

As for undue simplicity, federal common law is hydra-headed. It is a fair point to wonder whether all of its manifestations can be explained in a single formula. Perhaps, a critic might contend, no more can be said about

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[364] *Id.* at 88.

[365] *Atherton*, 519 U.S. at 221.

[366] The Court suggested that the tide of state hostility to federal financial institutions turned shortly after the Civil War, *id.* at 222, and noted that, in 1989, the number of federally chartered institutions actually exceeded the number of state-chartered institutions, *id.* at 220.

[367] *Id.* at 224.

[368] *See id.* at 220 ("To invoke the concept of 'uniformity,' however, is not to prove its need.").

federal common law than the Court said in *Boyle*—that federal common law exists whenever uniquely federal interests demand it. Like "inadequate representation," however, "uniquely federal interests" is not self-defining, and equally fails to escape the criticism of vagueness. More fundamentally, however, the protection of the unrepresented and systematically underrepresented from bias in the lawmaking process is a quintessential—perhaps *the* quintessential—federal interest with which courts must concern themselves.[369]

Of course, having (at least in most cases) an unelected federal judge make law that only Congress or a constitutional amendment can change is still problematic for any democrat. Moreover, a federal common law claim creates federal jurisdiction. If one of the fears of state lawmaking is that "the State tribunals cannot be supposed to be impartial" and that "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias,"[370] then putting a federal judge (at least in most cases) in charge of determining the substance of federal common law is also an imperfect solution.[371] We do not think these concerns are immaterial. We accept Professor Field's idea that the competence of courts to make law is one of the factors that should bear on a court's judgment of whether a situation warrants federal common law, and whether state law should be incorporated to determine the substance of federal common law.

We do not for now tread further into the arguments about the legitimacy of common law in a democratic society. Our burden has been only to demonstrate that *Semtek*, *Boyle*, and the "enclaves" represent not separate areas of federal common lawmaking power, but examples of a single phenomenon—of areas in which states, if allowed to prescribe the governing rules, would be tempted to stack the deck in favor of themselves or their citizens. Once a theory of federal common law has been created, the merits of federal common law can be fully debated. Only through this discernment process can it be understood when courts must create federal common law and what its substance should be—and only through creation and application of federal common law in appropriate areas can the courts ensure, in

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[369] *See* ELY, *supra* note 354.

[370] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 536.

[371] With the exception of cases between two states and cases involving admiralty, *see* 28 U.S.C. §§ 1251(a), 1333 (2000), cases in which federal common law is applied do not typically involve exclusive federal jurisdiction. Moreover, because of the operation of the well-pleaded complaint rule, federal courts would have jurisdiction over the government contractor defense only if diversity jurisdiction were present. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908). Therefore, state courts will on some occasions have the opportunity to participate in the development of federal common law rules and thereby reduce the risk of bias and ideological capture inherent in a single court's exclusive determination of its own law. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

the present imperfect world, that "the peace of the WHOLE . . . [is] not . . . left at the disposal of a PART."[372]

[372] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 18, at 533–34.