2005

State Courts and the Making of Federal Common Law

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Anthony J. Bellia, *State Courts and the Making of Federal Common Law*, 153 U. Pa. L. Rev. 825 (2004-2005).

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University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 153

JANUARY 2005

NO. 3

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INTRODUCTION

Justice Brandeis famously wrote for the Supreme Court in *Erie Railroad Co. v. Tompkins*¹ that "[t]here is no federal general common law."² On the day that the Court handed down *Erie*, it handed down another opinion written by Justice Brandeis resolving that the rule of decision in an interstate boundary dispute was, notwithstanding *Erie*, "federal common law."³ Since that day, the Court has carved out various enclaves in which courts may apply so-called federal common law as a rule of decision.⁴ These enclaves include "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."⁵ In operation, the doctrine of federal common law is a ramshackle one. The boundaries of the enclaves in which it may operate are uncertain, its propriety is disputed, and the distinction between it and statutory and constitutional interpretation is elusive.⁶ Legal scholars

¹ 304 U.S. 64 (1938).

² *Id.* at 78.

³ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁴ It was Justice Harlan who, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), first used the term "enclaves" to describe the operation of federal common law: "[T]here are enclaves of federal judge-made law which bind the States." *Id.* at 426.

⁵ *Tex. Indus., v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted).

⁶ See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248 n.7 (1996) ("In practice . . . the distinction between federal common lawmaking and statutory (or constitutional) interpretation is often difficult to

have propounded several theories that attempt to justify the existence and scope of federal common law. Most theories fall into two categories: (1) those that argue that federal courts have inherent power to make federal common law in certain circumstances; and (2) those that argue that federal courts have power to make federal common law only if Congress has delegated power to them to do so.⁷ Recently, there has been a flurry of renewed interest in various aspects of federal common law.⁸

A fact that has received little attention in discussions of the power of federal courts to make federal common law is that state courts routinely make federal common law in as real a sense as federal courts make it. A few scholars have observed in passing that federal common

discern.”); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 892 (1986) (setting forth a definition of federal common law that “includes rules that a court develops to fit within a scheme derived largely from constitutional or statutory sources, and . . . decisions that could as easily be explained as constitutional or statutory interpretation”); Henry P. Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) (“[A]ny distinction between constitutional exegesis and common law cannot be analytically precise, representing, as it does, differences of degree.”); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) (“The difference between ‘common law’ and ‘statutory interpretation’ is a difference in emphasis rather than a difference in kind.”).

⁷ These theories are not necessarily mutually exclusive. Certain scholars argue that one category explains the legitimacy (or lack thereof) of all federal common law. See, e.g., Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. L. REV. 761, 762-64 (1989) (arguing that the making of federal common law is unjustified unless Congress has expressly delegated power to courts to do so); Louise Weinberg, *Federal Common Law*, 83 NW. L. REV. 805, 851-52 (1989) (setting forth an inherent power theory to justify all federal common law lawmaking by federal courts). Other scholars invoke both inherent and delegated power theories to argue that different categories of federal common law lawmaking are or are not justified. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36-46 (1985) (invoking inherent power theory to justify certain kinds of federal common law lawmaking exercises of federal courts, delegated power theory to justify others, and no power theory to argue that others are unjustified). For present purposes, it suffices to consider each theory individually, as this Article analyzes whether *either* theory, as articulated by its proponents, can justify the making of federal common law by state courts in any instance. See *infra* Part III.B.

⁸ See, e.g., Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 428-30 (2004) (exploring lower courts’ failure to follow the Supreme Court’s direction in identifying rules of decision in the face of statutory silence); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 894 (2004) (discussing treaties as a valid source of federal law, mentioned in the Supremacy Clause but not *Erie*); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 174-75 (2004) (finding the roots of personal jurisdiction rules in federal common law rather than in the Due Process Clause).

law operates in state courts⁹ and have attributed this fact to the Supremacy Clause.¹⁰ Specifically, they have observed that if the Supreme Court of the United States¹¹ makes federal common law pursuant to the Constitution, that federal common law is the supreme law of the land, and state judges are bound to follow it.¹² It is not the case, however, that state courts merely follow federal common law that the Supreme Court has made; rather, state courts regularly participate in the development of federal common law themselves—in other words, they make federal common law too.

This Article takes up the following question: what, if anything, justifies the making of federal common law by state courts? The Article has four main purposes. The first purpose is to bring to light the fact that state courts routinely make federal common law in as real a sense as federal courts make it. The second purpose is to demonstrate that theories that focus on whether the making of federal common law by federal courts is justified are inadequate to explain whether the making of federal common law by state courts is justified. The third purpose is to offer an account of what, if anything, justifies the making of federal common law by state courts. The fourth purpose is to identify the implications of this account for the operation of federal common law in federal courts.

It is a common premise of theories explaining the operation of federal common law in federal courts that if federal courts are justified in making federal common law, they are justified in making it on the basis of the kinds of reasons that move Congress to enact federal statutes.¹³ This premise is problematic in an analysis of the operation

⁹ These scholars include Martha Field, *supra* note 6, at 897; Thomas Merrill, *supra* note 7, at 6; and Judge Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

¹⁰ U.S. CONST. art. VI, cl. 2.

¹¹ This Article will refer to the Supreme Court of the United States as the "Supreme Court" or the "Court"; it will refer to the supreme court of a state by its full name.

¹² See Field, *supra* note 6, at 897 ("[A] federal common law rule, once made, has precisely the same force and effect as any other federal rule."); Merrill, *supra* note 7, at 6 (arguing that "the Supreme Court is the final arbiter" of the content of federal common law, "and the resulting rules are binding on state courts under the supremacy clause of the Constitution"); see also Friendly, *supra* note 9, at 405 (describing federal common law as "truly uniform because, under the supremacy clause, it is binding in every forum"); cf. Weinberg, *supra* note 7, at 838 (arguing that "national policy concerns" are supreme and "[t]hus, the fashioning of federal common law, as our dual-law system has evolved, not only cannot be illegitimate, but rather is within the clear contemplation of the supremacy clause").

¹³ See *infra* notes 14-17 and accompanying text.

of federal common law in state courts. Indeed, analyzing the operation of federal common law in state courts reveals grounds for rethinking whether this premise is valid even in analyses of the operation of federal common law in federal courts.

The Article proceeds as follows. Part I explains how state courts make federal common law. State courts regularly must determine whether federal common law provides the rule of decision in a particular dispute and, if it does, what the substance of that rule is. In making these determinations, state courts do not in all instances mechanically apply or follow law that the Supreme Court has made; often, they participate in the making of federal common law themselves. When, for example, state courts encounter gaps in federal regulatory schemes or must decide whether to extend federal common law rules to novel claims or factual situations, their decisions may make federal law in the same way that federal court decisions may make federal common law in such circumstances. Indeed, in several instances, state court decisions have made federal common law rules that are in conflict with federal common law rules that federal court decisions have made.

Part II examines whether inherent and delegated power theories of federal common law are adequate to explain the making of federal common law by state courts. These theories, which focus primarily on the power of federal courts to make federal common law, share a common premise. They generally begin with the assumption that federal courts make federal common law on the basis of the same kinds of judgments that Congress makes when it enacts a statute: "fundamental policy judgments,"¹⁴ judgments about "national substantive policy,"¹⁵ judgments accounting for interests that Congress "takes into account,"¹⁶ or simply "unguided normative judgments."¹⁷ They proceed to attempt to justify this manner of judicial lawmaking. As a preliminary matter, Part II explains, the Supremacy Clause is inadequate to explain the making of federal common law by state courts in this way. The Supremacy Clause provides that state judges are bound by federal law;¹⁸ it does not provide that they have inherent power to make the law to which the Clause renders them "bound," nor that an

¹⁴ Redish, *supra* note 7, at 798.

¹⁵ Weinberg, *supra* note 7, at 851.

¹⁶ Field, *supra* note 6, at 957.

¹⁷ Merrill, *supra* note 7, at 72.

¹⁸ "[T]he Judges in every State shall be bound [by federal law]." U.S. CONST. art. VI, cl. 2.

act of Congress delegating legislative power to them to make federal law would be one "made in Pursuance" of the Constitution. Part II proceeds to examine whether inherent and delegated power theories that legal scholars have developed to explain whether and when federal courts are justified in making federal common law are adequate to explain whether and when state courts are justified in making federal common law. It concludes that each theory, applied on its own terms, is inadequate to do so.

Part III proceeds to offer, by means of a case study, an explanation of the making of federal common law by state courts that accounts for historical practice, constitutional structure, and certain normative considerations about the way in which courts can and ought to make law. First, Part III explains, it is sometimes necessary for state courts to make federal common law in order to render decisions in cases that they have a constitutional duty to decide. Even if a federal statute or constitutional amendment divested state courts of all power to make federal common law, state courts still would, in a sense, have to make federal common law in order to decide certain cases within their jurisdictions. State courts could no more comply with a command that they adjudicate claims arising under federal law but make no new federal law with respect to them than they could comply with a command that they both decide a case and not decide it. When it is necessary for a state court to make federal common law in order to enforce federal law that it has a duty to enforce, the court is justified in making a federal common law rule by which to decide the case. That a state court is justified in such cases in making *some* federal common law rule, however, does not mean that a state court is justified in making *any* federal common law rule.

It is a common premise in writings on federal common law that if a court is justified in making federal common law governing a matter (because it has an inherent or delegated power to do so), the court is justified in making it on the basis of the kinds of forward-looking policy considerations that might move Congress to enact a statute governing the matter. In the case of state courts, this premise lies in tension not only with the way in which state courts historically have made federal common law, but also with the Supremacy Clause and certain normative claims about the way in which courts ought to make law.

As a general practice, state courts historically have not claimed to make federal common law¹⁹ for the kinds of reasons that move legislatures to make law. Rather, they have represented themselves as rendering decisions that comport with the requirements of existing federal law. If we take them at their word, state courts have made federal common law not with the intent to set national policy on a new course, but as a necessary consequence of their best efforts to discern and apply existing principles of national law. This manner of lawmaking differs from the manner in which scholars have presumed that courts make federal common law and the manner in which the Supreme Court has self-consciously made federal common law in certain cases.²⁰ Even if state judges in reality have based their decisions on purely forward-looking policy considerations, in exceptional cases or as a general practice, the fact that they have professed to comply as much as possible with the requirements of existing law suggests an understanding that this has been the legitimate way for them to proceed.

This manner of lawmaking more easily comports with the Supremacy Clause than the “legislative” manner. The Supremacy Clause provides that federal law shall be the “supreme Law of the Land” and that state judges are “bound” to enforce it.²¹ A primary purpose of the Clause is to protect federal lawmaking authority from its diffusion by the states. A power in state courts to make the “supreme Law of the Land” in the manner in which Congress makes it (and in certain cases the Supreme Court has made it) is incompatible with supremacy principles regarding the nature of federal law and the duty of state judges to enforce it.

Moreover, the manner in which state courts historically have professed to enforce federal common law accords with the normative claim that a judge ought to treat litigants as far as is possible in the same way that any other judge applying the same governing law in the same realm on the same day would treat them.

Finally, Part IV offers preliminary thoughts on the implications of this analysis for federal courts. It identifies similarities and differences

¹⁹ This includes principles of law that historically occupied some of the field that modern courts describe as federal common law. See *infra* notes 295-304 and accompanying text.

²⁰ See *infra* notes 405-08 and accompanying text (explaining how the Supreme Court has self-consciously made federal common law based on purely forward-looking policy considerations).

²¹ U.S. CONST. art. VI, cl. 2.

between federal and state courts that are relevant to an analysis of whether the Supreme Court or other federal courts should be understood to have a greater power to make federal common law than the one that, this Article argues, state courts have.

I. HOW STATE COURTS MAKE FEDERAL COMMON LAW

Before explaining how state courts make federal common law, it is necessary to specify what is meant here by "federal common law." A common definition is "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."²² Legal scholars typically understand federal common law to begin where statutory and constitutional interpretation end.²³ The line that separates the interpretation of a federal enactment from the making of federal common law is elusive, to be sure. There is, however, general acceptance that courts have decided cases according to federal rules of decision that defy categorization as either constitutional or statutory interpretation. A famous example is the Supreme Court's application in *Clearfield Trust Co. v. United States*²⁴ of a rule of decision that it fashioned "according to [its] own standards."²⁵

It is worth noting the breadth of this definition of federal common law. "[F]ederal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands"²⁶ is broad enough to encompass certain judicial

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

²³ See, e.g., Clark, *supra* note 6, at 1247 (describing federal common law as "federal judge-made law—that is, rules of decision adopted and applied by federal courts that have the force and effect of positive federal law, but whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command" (footnote and internal quotation marks omitted)); Field, *supra* note 6, at 890 (using "federal common law" to refer to any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional*" (footnote omitted)); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 267 (1992) ("[T]he common law includes any rule articulated by a court that is not easily found on the face of an applicable statute."); Merrill, *supra* note 7, at 5 (using "federal common law" to mean "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").

²⁴ 318 U.S. 363 (1943).

²⁵ *Id.* at 367.

²⁶ FALLON ET AL., *supra* note 22, at 685.

determinations about the propriety of different methods of interpretation and manners of formulating legal principle (for example, categorical rule versus balancing test). Judges frequently dispute and resolve such matters without any pretense of appeal to federal statutory or constitutional provisions.

As used here, the phrase "federal common law" denotes rules of decision not only that judges have made in a way that defies categorization as constitutional or statutory interpretation, but also that, at some level of generality, claim to operate uniformly within the jurisdiction of the United States. There are at least three levels at which courts have made federal common law determinations. A court proceeds to each subsequent level only if it answers affirmatively the question posed at the prior level. Level One is whether federal common law provides the rule of decision in a given case; Level Two is whether the content of a federal common law rule of decision should be uniform throughout the jurisdiction of the United States (as opposed to incorporating state law); and Level Three is what the content of a uniform federal common law rule of decision should be.

Consider Level Three first. When a court applies a federal common law rule of decision with content that displaces the laws of the several states, it is applying a rule that purportedly all courts in the Union would apply in the same circumstances. The following passage from *Clearfield Trust* is illustrative: "The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . The desirability of a uniform rule is plain."²⁷

Consider next Level Two. Even when courts characterize the content of federal common law as incorporating state law, the federal determination that federal common law should incorporate state law is governed by a federal common law standard that purports to have uniform national content. In *United States v. Kimbell Foods, Inc.*,²⁸ for example, the Court determined whether the content of federal common law, which governed because certain rights of the United States were involved, should be uniform or rather should incorporate state law.²⁹ The Court invoked a standard that would govern the question in any court in the Union: the Court assessed whether there was a "need for a nationally uniform body of law," whether "application of

²⁷ *Clearfield Trust*, 318 U.S. at 366-67.

²⁸ 440 U.S. 715 (1979).

²⁹ *Id.* at 727-28.

state law would frustrate specific objectives of the federal programs," and whether "application of a federal rule would disrupt commercial relationships predicated on state law."³⁰

Consider, finally, Level One. A standard that determines whether federal common law governs a dispute at all, which can qualify, itself, as federal common law,³¹ operates as though it has uniform content throughout the jurisdiction of the United States. In *Texas Industries v. Radcliff Materials, Inc.*,³² for example, the Court applied a standard that it claimed any court in the Union resolving the same issue would apply: was federal common law "necessary to protect uniquely federal interests"?³³

Whether there is any meaningful practical distinction between these levels is open to question.³⁴ As a practical matter, it seems that these three questions—whether federal common law applies; if so, whether federal common law should incorporate state law or have nationally uniform content; and, if federal common law should have nationally uniform content, what that content should be—boil down to one: is there a national interest that no federal constitutional or statutory rule of decision affirmatively effects or protects from state law in a given case but that a federal rule of decision *should* effect or protect?³⁵

³⁰ *Id.* at 728-29.

³¹ See, e.g., Merrill, *supra* note 7, at 36 (describing the decision as to whether federal common law displaces state law as the first step of "preemptive lawmaking," a "type of federal common law").

³² 451 U.S. 630 (1981).

³³ *Id.* at 640 (internal quotation marks omitted) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

³⁴ For commentary by the Supreme Court relating to this question, see *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The Court stated that

[s]ome of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to borrow or incorporate 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

Id. at 507 n.3 (internal quotation marks, alterations, and citations omitted).

³⁵ In many cases, this question would render indistinct the question whether federal common law rather than state law applies from the question whether federal law preempts state law. With a judicial determination that a federal rule of decision protecting national interests should be applied, state law is simultaneously preempted. In *Boyle*, for example, the Court had to decide whether the plaintiff could sue a helicopter manufacturer for the wrongful death of his son, a Marine, who died in the crash of a helicopter manufactured by the defendant. *Id.* at 502. The Court held that the defendant could not be sued, reasoning that the liability of a federal military contractor is a question "so committed by the Constitution and laws of the United States to federal

The judicial application of a rule of decision that will effect or protect that interest is essentially the operation of federal common law. The greater the extent to which the Constitution and Congress are thought to specify the national interests that courts are to effect or protect in this way, the lesser the scope of federal common law.³⁶ The greater the extent to which other sources of law are thought capable of identifying the national interests that courts may effect or protect in this way, the greater the scope of federal common law.³⁷

It is worth noting that there is no obvious line distinguishing judicial acts that make federal common law from judicial acts that merely apply preexisting federal law. Indeed, distinguishing between making and applying law has been notoriously difficult for courts. A familiar context in which courts have attempted to distinguish such acts is illustrative. Under *Teague v. Lane*,³⁸ federal courts have had to determine whether particular decisions constitute the making of “new rules” or the application of “old rules” for purposes of determining whether a rule applies retroactively on habeas corpus review: old rules apply retroactively on habeas review while new rules do not.³⁹ The plurality in *Teague* conceded that while it is “often difficult to determine when a case announces a new rule . . . [i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.”⁴⁰ In a related subsequent case, *Stringer v. Black*,⁴¹ the Court explained that courts make new rules “by the invocation of a rule that was not dictated by

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*.’” *Id.* at 504 (emphasis added).

³⁶ See, e.g., Merrill, *supra* note 7, at 36, 40 (stating that a court may make law when it “finds that the adoption of state law as the rule of decision would unduly frustrate or undermine a federal policy as to which there is a specific intention on the part of the enacting body” or when Congress or the Constitution has determined that the national interest requires that courts have power “to fashion federal rules of decision in order to round out or complete a constitutional or statutory scheme”); see also Clark, *supra* note 6, at 1251 (arguing that a federal common law rule is justified only if it “operate[s] to further some basic aspect of the constitutional scheme”).

³⁷ See, e.g., Weinberg, *supra* note 7, at 813-27 (arguing that apart from jurisdictional limitations, there are no limits on the power of courts to make law “when the national interest so requires,” with courts having power to “decide whatever federal issues properly come before them along the whole continuum of national policy concerns”).

³⁸ 489 U.S. 288 (1989).

³⁹ *Id.* at 308-10 (plurality portion of opinion).

⁴⁰ *Id.* at 301.

⁴¹ 503 U.S. 222 (1992).

precedent" or "by the application of an old rule in a manner that was not dictated by precedent."⁴²

Federal courts have had to make similar determinations in enforcing 28 U.S.C. § 2254(d)(1), a provision of the Antiterrorism and Effective Death Penalty Act of 1996⁴³ that subsumed the *Teague* analysis in many cases. Under the statute federal courts may not grant a habeas petition filed by a state prisoner with respect to any claim that a state court adjudicated on the merits unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."⁴⁴ In *Williams v. Taylor*,⁴⁵ the Court explained that generally "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)."⁴⁶ Recently, in applying this standard to a state court decision, the Supreme Court recognized that "the difference between applying a rule and extending it is not always clear."⁴⁷ On the one hand, the Court observed, "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."⁴⁸ On the other hand, the Court explained, there is "force to th[e] argument" that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision."⁴⁹ In such cases, courts may be making new rules "under the guise of extensions to existing law."⁵⁰

There is no need for present purposes to draw a line distinguishing between the application of old law and the making of new law, if indeed such a line can meaningfully be drawn. Suffice it to say that to the extent that federal courts "make" new rules of federal common law, state courts do as well. State courts exercise concurrent jurisdic-

⁴² *Id.* at 228.

⁴³ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 19, 21, 22, 28, 42, and 49 U.S.C.).

⁴⁴ 28 U.S.C. § 2254(d)(1) (2000).

⁴⁵ 529 U.S. 362 (2000).

⁴⁶ *Id.* at 412. "The one caveat . . . is that § 2254(d)(1) restricts the source of clearly established law" to the jurisprudence of the Supreme Court. *Id.*

⁴⁷ *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2151 (2004).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2150-51.

⁵⁰ *Id.* at 2151 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

tion with federal courts over most civil federal claims⁵¹ and must recognize valid federal defenses in cases over which inferior federal courts lack jurisdiction.⁵² Accordingly, state courts have sufficient opportunity to make federal common law in as real a sense as federal courts make it. In fact, state courts, like federal courts, have made judgments about the application or meaning of federal common law principles that by all appearances were not the only judgments that they could have justified in light of existing law. The making of such a judgment by State Court A can operate as an authoritative rule of decision against individuals within the jurisdiction of State Court A. Moreover, the making of such a judgment by State Court A can operate to foreclose courts that are bound to rule in accordance with the decision of State Court A from making a judgment about the requirements of federal common law that was justifiable before State Court A ruled but is no longer so by virtue of the judgment of State Court A. In this way, at least, it is beyond question that state courts make federal common law.

The Supreme Court has said little about the operation of federal common law in state courts—only that where it applies state courts must apply it.⁵³ It is not difficult to find cases in which a federal common law rule that the Supreme Court has set forth appears to warrant

⁵¹ See *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990) (explaining that the Court has “consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States,” though “[t]his deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim”).

⁵² Under 28 U.S.C. § 1331 (2000), federal district courts “have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”; as the Court has interpreted this statute, federal district courts lack jurisdiction over countless cases in which federal questions are involved, most notably over those in which an assertion of federal law does not form part of the plaintiff’s well-pleaded complaint. In *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908), the Court held that “a suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.” In other words, as the Court explained more recently, “[a] defense that raises a federal question is inadequate to confer federal jurisdiction.” *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citing *Mottley*). In such cases, state courts will have exclusive jurisdiction and an obligation under the Supremacy Clause to recognize federal defenses.

⁵³ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (explaining with respect to the “act of state” doctrine that state courts are “not left free to develop their own doctrines”); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962) (explaining that “in a case such as this [involving a strike], incompatible doctrines of local law must give way to principles of federal labor law”).

one and only one resolution of an issue raised in state court. Consider, for example, the recent Missouri state court case of *Butler v. Burlington Northern & Santa Fe Railway Co.*⁵⁴ The plaintiff in *Butler* sued the defendant railroad under the Federal Employers' Liability Act (FELA)⁵⁵ for negligent infliction of emotional distress.⁵⁶ He alleged that the railroad required him to attend a party at which two female police officers (or so it appeared to him) handcuffed and hit a co-worker, who that very evening had received a "Man of the Year" award.⁵⁷ The "officers" in fact were strippers. The plaintiff alleged that the spectacle of the "officers" hitting the "Man of the Year" triggered in him "a post-traumatic 'flashback'" to his prior arrests.⁵⁸ In considering his claim for emotional distress, the Missouri Court of Appeals applied the federal common law "zone of danger" test.⁵⁹ The Supreme Court has held that this test governs claims for negligent infliction of emotional distress under FELA.⁶⁰ The parties and the court in *Butler* all agreed that the "zone of danger" test was the governing standard. This test "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct."⁶¹ Because the plaintiff failed to allege a physical impact, and there was no evidence that he was in any risk of physical harm, his claim failed.⁶² "[T]o recognize his claim under the actual circumstances presented in this case," the Missouri court explained, "would be to stretch the federal common law zone of danger test well beyond the bounds laid down by the United States Supreme Court."⁶³ Given how the plaintiff framed his claim and presented facts in support of it, it appears that one and only one determination of his claim was warranted under Supreme Court precedent.

The requirements of Supreme Court precedent in cases in which state courts apply federal common law rules of decision are not always so clear. In some cases, state courts appear to be not merely applying

⁵⁴ 119 S.W.3d 620 (Mo. Ct. App. 2003).

⁵⁵ 45 U.S.C. §§ 51-60 (2000).

⁵⁶ *Butler*, 119 S.W.3d at 621.

⁵⁷ *Id.* at 623.

⁵⁸ *Id.*

⁵⁹ *Id.* at 626.

⁶⁰ *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 554 (1994).

⁶¹ *Butler*, 119 S.W.3d at 624 (quoting *Consol. Rail Corp.*, 512 U.S. at 547-48).

⁶² *Id.* at 626-27.

⁶³ *Id.* at 627.

federal common law rules of decision but participating in their development. While state courts consider themselves bound by Supreme Court decisions, most state courts do not view themselves as generally bound by the decisions of any particular inferior federal court on matters of federal law, even of the United States court of appeals encompassing a court's state.⁶⁴ When consulted, inferior federal court decisions may be in conflict with each other or fail to convey federal common law rules of decision to a degree of specificity that would enable a state court to apply them without participating in their development. In some instances, state courts have expressly rejected federal common law rules that inferior federal courts have developed in favor of rules that they believed to be better reasoned. Where federal common law governs an issue in state court but Supreme Court precedents do not establish a rule of decision that warrants one and only one resolution of that issue, state courts have recognized that they may have to determine how "federal common law should be developed."⁶⁵

This Part illustrates how state courts participate in the development of federal common law. It uses examples of the operation of federal common law rules in state court from the various enclaves in which federal common law operates, including admiralty cases;⁶⁶ disputes in which the operation of state law would improperly interfere

⁶⁴ Donald Zeigler has summarized state court precedent in this regard as follows: "Virtually all state courts agree that they are bound by U.S. Supreme Court decisions interpreting federal law," but "[s]tate courts vary greatly in the weight they give to lower federal court decisions." Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1143 (1999) (footnote omitted). In cataloguing cases in support of these conclusions, he reports that "some state courts consider themselves bound by lower federal court decisions when the lower federal courts are in agreement," but not when there is conflict in the federal courts. *Id.* at 1153-54. Some state courts give greater weight to the federal court of appeals encompassing the state, while others do not. *Id.* at 1156-57. Some states will follow federal court decisions interpreting statutes but not those interpreting the Constitution. *Id.* at 1155. The Supreme Court has never squarely addressed these matters. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[S]tate courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.").

⁶⁵ *Keen v. Weaver*, 121 S.W.3d 721, 726 (Tex.), *cert. denied*, 540 U.S. 1047 (2003).

⁶⁶ In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the Court described "general maritime law," as the Court has long described it, as "a species of judge-made federal common law." *Id.* at 206.

with federal interests;⁶⁷ and disputes implicating the rights and obligations of the United States.⁶⁸ State courts have made federal common law at all three levels at which courts and scholars have described federal common law as operating: (1) whether federal common law provides the rule of decision; (2) whether the content of a federal common law rule should be nationally uniform or rather incorporate state law; and (3) what the content of a nationally uniform federal common law rule should be.

A. Whether Federal Common Law Provides the Rule of Decision

First, state courts have developed federal law on the question whether federal common law provides the rule of decision in a particular case. Consider a contested issue of federal law in admiralty cases that has received scholarly attention: whether, in a maritime case, a court may award attorneys' fees under state law.⁶⁹ The Supreme Court has stated that state law applies in maritime cases unless "it contravenes the essential purpose expressed by an act of Congress, or works 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."⁷⁰ This standard is generally interpreted to involve a balancing of state and federal interests.⁷¹ The Washington Court of Appeals recently held in

⁶⁷ In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the court explained that "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.'" *Id.* at 504 (citation omitted).

⁶⁸ See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (explaining that "[t]he duties [of] the United States and the rights acquired by it as a result of the issuance" of a check by the United States "find their roots in the same federal sources" and that "[i]n absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards").

⁶⁹ See generally David W. Robertson, *Court-Awarded Attorneys' Fees in Maritime Cases: The 'American Rule' in Admiralty*, 27 J. MAR. L. & COM. 507 (1996) (discussing this question).

⁷⁰ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

⁷¹ As the First Circuit has noted:

Where substantive law is involved [in a maritime case], we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions however couched reflect a balancing of the state and federal interests in any given case.

*Axess International Ltd. v. Intercargo Insurance Co.*⁷² that, under this standard, state law, rather than federal common law, governs whether a party is entitled to recover attorneys' fees in a maritime case.⁷³ After considering federal precedent, the Washington court resolved that "the harmony and uniformity of maritime law does not mandate preemption of the attorney fees determination."⁷⁴ It reasoned that the State of Washington had a strong interest in providing attorneys' fees to parties like the plaintiff ("insureds who must resort to litigation to establish coverage"),⁷⁵ and that the federal interest in a nationally uniform law was "not apparent."⁷⁶ In one sense, the Washington court merely applied Supreme Court precedent to resolve this contested issue of law. As Supreme Court precedent required, the Washington court determined whether state law would interfere with the "proper harmony and uniformity" of maritime law. In another sense, however, the Washington court made law on this question. To be sure, the Supreme Court had set forth the standard that the Washington court applied—whether state law "interfere[d] with the proper harmony and uniformity" of general maritime law. The Supreme Court had not explicitly set forth, however, any particular metric for determining the propriety of a given level of harmony or uniformity or the relative importance to ascribe to particular state and federal interests. To apply the Supreme Court's standard, the Washington court necessarily made judgments that rendered it a participant in the development of federal common law rules. Significantly, certain federal courts, contrary to the Washington court, have determined that there is a uniform federal law governing attorneys' fees in maritime cases, and that

Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 628 (1st Cir. 1994) (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-42 (1961); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-48 (1960)); see also *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1424 (9th Cir. 1990) ("Whether Aubry's application of California's overtime provisions unduly disrupts federal maritime harmony in violation of the Constitution depends on the balance of federal and state interests involved in application of the overtime provisions.").

As for procedural law applied in maritime cases, the Supreme Court has suggested that there is no preemption of state law. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) ("Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, [because] it is procedural rather than substantive, and it is most unlikely to produce uniform results.").

⁷² 30 P.3d 1 (Wash. Ct. App. 2001).

⁷³ *Id.* at 8.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

therefore state law cannot apply.⁷⁷ Indeed, there is a split of authority in the United States Courts of Appeals on this very question.⁷⁸ Ultimately, the Washington court discerned and applied a federal rule of decision that state law governed the attorneys' fees question before it, while certain inferior federal courts have discerned and applied a federal rule of decision that federal maritime law, not state law, governs such attorneys' fees questions. The judgment that the Washington court made forecloses future courts that are bound to rule in accordance with its judgment from making the different judgment that certain federal courts have made on this very question. In a real sense, then, the Washington court decision made federal law on the question whether the rule of decision in a given case should be state law or federal common law.

There is another way in which state courts have participated in the development of federal law on the question whether state law or federal common law supplies the rule of decision in a particular category of cases. In several instances, state courts have applied state law to determine an issue without regard to the fact that federal courts have held that federal common law governs that same issue. A few examples suffice to illustrate this phenomenon. Federal courts routinely have held that federal common law governs the enforceability and interpretation of agreements settling claims arising under federal statutes, e.g., claims arising under FELA,⁷⁹ § 1983,⁸⁰ Title VII,⁸¹ ERISA,⁸²

⁷⁷ See, e.g., *Am. Nat'l Fire Ins. Co. v. Kenealy*, 72 F.3d 264, 270 (2d Cir. 1995) (holding that prior precedent "suffices to 'establish' a federal admiralty rule, which now must be followed instead of state law").

⁷⁸ Compare *Kenealy*, 72 F.3d at 270 (holding that general maritime law prohibits attorneys' fees), with *All Underwriters v. Weisberg*, 222 F.3d 1309, 1314-15 (11th Cir. 2000) (rejecting "a unitary and uniform federal rule respecting attorney's fees in maritime insurance litigation").

⁷⁹ Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2000). In *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952), the Supreme Court held that the "validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law." *Id.* at 361.

⁸⁰ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)); see also *Hill v. City of Cleveland*, 12 F.3d 575, 577 (6th Cir. 1993) (holding that "[t]he question whether the policies underlying section 1983 may in some circumstances render [such an agreement] unenforceable is a question of federal law" (alteration in original) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (plurality opinion))) ; *Oliver v. City of Berkley*, 261 F. Supp. 2d 870, 876-77 (E.D. Mich. 2003) (applying *Rumery* and other federal law to determine enforceability of a release in a § 1983 claim).

⁸¹ Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000); see also *Snider v. Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991) (holding that "[f]ederal common law governs the enforcement and interpretation of [Title VII settlement]

and the Energy Reorganization Act of 1974.⁸³ Notwithstanding this federal precedent, state courts have, in several cases, applied state law to resolve the enforceability or interpretation of settlement agreements of claims arising under federal law. In particular, state courts have applied state law to the following questions: whether a settlement agreement of various federal claims foreclosed a claim for back pay;⁸⁴ whether a release agreement of, *inter alia*, a § 1983 claim included a confidentiality provision;⁸⁵ whether settlement agreements of various federal claims reserved certain rights in plaintiffs;⁸⁶ and whether the settlement of an ERISA claim precluded an employee from participating in a stock distribution.⁸⁷ Another issue that certain state courts have decided according to state law notwithstanding federal court precedent to the contrary is whether (and at what rate) the prevailing party on a federal claim is entitled to prejudgment interest. Certain federal courts have held that “[t]he award of prejudgment interest for a federal law violation is governed by federal common law”⁸⁸ (for instance, for an ERISA⁸⁹ or federal securities law⁹⁰ violation). Sev-

agreements” and citing cases from other circuits holding same). *But see* *Dhaliwal v. Woods Div., Hesston Corp.*, 930 F.2d 547, 548 (7th Cir. 1991) (expressing “doubts that Title VII settlement agreements are in fact covered by general law—federal common law—rather than by state contract law”).

⁸² Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000); *see also* *Morais v. Cent. Beverage Corp. Union Employees’ Supp. Ret. Plan*, 167 F.3d 709, 711 (1st Cir. 1999) (stating that it is “well settled” that federal common law applies to settlement agreement of ERISA-based claims).

⁸³ Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (2000); *see also* *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997) (holding that if a “settlement agreement involves a right to sue derived from a federal statute . . . federal common law principles govern construction of the contract”).

⁸⁴ *See Moon v. Terrell County*, 579 S.E.2d 845, 846-47 (Ga. Ct. App. 2003) (applying state law precedent to determine whether a settlement of federal claims forecloses claims for back pay in a state action and whether plaintiff had standing to assert such claims).

⁸⁵ *See Loe v. Town of Thomaston*, 600 A.2d 1090, 1092 (Me. 1991) (applying Maine contract law to interpret a release agreement in a § 1983 claim).

⁸⁶ *See Anderson v. Curators of the Univ. of Mo.*, 103 S.W.3d 394, 398-400 (Mo. Ct. App. 2003) (applying Missouri law to interpret a settlement agreement between professors and the university).

⁸⁷ *See Prof'l Med. Ins. Co. v. Lakin*, 88 S.W.3d 471, 476-79 (Mo. Ct. App. 2002) (applying Missouri law to uphold a settlement agreement excluding plaintiff from an employee stock ownership program).

⁸⁸ *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991).

⁸⁹ *See Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 616-20 (6th Cir. 1998) (holding that the award of prejudgment interest on an ERISA claim may be governed by a uniform rule of federal common law).

eral state courts, notwithstanding this federal precedent, have applied state law to claims for prejudgment interest on claims arising under federal law.⁹¹

At first glance, these examples may appear to prove only that in certain instances state courts have applied state law to a particular question because they were unaware of the real possibility that federal law might govern it, not that state courts *made* any federal law in applying state law. A court that squarely faces a federal-state choice of law question in a future case might deem these cases to have no precedential effect on the question whether federal or state law applies. But that will not necessarily be the case. A court facing such a question might cite such cases as precedent supporting a conclusion that state law applies. Courts commonly cite prior cases for what they *did* rather than for what they may or may not have *said*. A decision by State Court A applying state law without explanation may lend support in a future case to Court B (or State Court A, for that matter) applying state law in the face of an argument that Court B should apply federal common law.⁹² Whether Court B finds the decision of State Court A

⁹⁰ See *Koch v. Koch Indus.*, 996 F. Supp. 1273, 1279 (D. Kan. 1998) (holding that "[f]ederal law governs an award of prejudgment interest on a federal securities law claim").

⁹¹ See, e.g., *Paul R. Peterson Constr. v. Ariz. State Carpenters Health & Welfare Trust Fund*, 880 P.2d 694, 704-06 (Ariz. Ct. App. 1994) (applying state law to questions of prejudgment interest in an ERISA action); *Shideler v. Conn. Gen. Life Ins.*, 563 So. 2d 1082, 1083 (Fla. Dist. Ct. App. 1990) (applying state law to determine availability of prejudgment interest in an ERISA action); *Mayes v. City of Columbus*, 706 N.E.2d 402, 406 (Ohio Ct. App. 1997) (applying state law to a question of prejudgment interest on a § 1983 claim); *City of Alamo v. Casas*, 960 S.W.2d 240, 260 (Tex. Ct. App. 1997) (applying state law to questions of prejudgment interest on a § 1983 claim).

There are examples of state courts disregarding Supreme Court precedent in this regard as well. The Supreme Court has observed that "[t]he proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as *Erie* itself." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988). There are cases, however, in which state courts have applied state law to discern the rights and obligations of the United States under its contracts. See, e.g., *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 510 S.E.2d 764, 787-89 (W. Va. 1998) (applying state contract law to ascertain whether a contract existed between the United States Office of Personnel Management and a private entity).

⁹² For example, in *American Nonwovens, Inc. v. Non Wovens Engineering, S.R.L.*, 648 So. 2d 565 (Ala. 1994), the court stated:

While these cases are certainly not controlling, because in them the choice of law issue was not argued and because they are products-liability cases, they are examples of cases in which we have applied Alabama law to determine whether a nonresident corporation is liable as a corporate successor on claims arising under Alabama law.

to compel that judgment (if, say, Court *B* is an inferior court to State Court *A*) or merely to support it, Court *B* will cite that decision as law—law that in a real sense State Court *A* would have made when it applied state law without explanation.

B. Whether the Content of Federal Common Law Is State or Federal Law

If federal common law provides a rule of decision, a court may have to decide whether the substance of that rule is state law or a uniform federal rule. State courts have made federal common law on this question in the same way that they have made it in determining questions of whether federal common law applies at all. The decision of the Court of Appeals of Texas in *Glen Ridge I Condominiums, Ltd. v. Federal Savings & Loan Insurance Corp.*⁹³ provides an example. In *Glen Ridge*, the debtor of a failed savings and loan association filed suit to enjoin the Federal Savings and Loan Insurance Corporation (FSLIC), as receiver of the failed savings and loan, from foreclosing on its property.⁹⁴ A question before the Texas court was whether federal common law governed the case as a nationally uniform rule or by incorporating state law. The court began its analysis by explaining that the case “involves the rights of the United States arising under a nationwide federal program and will be governed by a juridical construct to be formally called ‘federal law.’”⁹⁵ It continued: “When a court must decide whether the federal rule of decision will adopt state law or fashion a nationally uniform federal common-law rule, it must ad-

Id. at 570. It is not uncommon for courts, including the Supreme Court, to cite cases in support of a legal proposition that those cases never decided if they include similar circumstances and actions consistent with that proposition. For a recent example, see *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2253 (2004), citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), in support of the proposition that the Foreign Sovereign Immunities Act of 1976 (FSIA) applies to conduct that occurred prior to its enactment because *Verlinden* “involved a dispute over a contract that predated the Act” even though *Verlinden* did not address FSIA’s retroactivity. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), provides an older example of the same principle: “Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench” *Id.* at 88. However, judicial treatment of “implied” holdings is scattershot. Compare *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498 (1973) (“[W]e have held, if only implicitly, that the petitioners’ absence from the district does not present a jurisdictional obstacle to the consideration of the claim.”), with *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (“[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.”).

⁹³ 734 S.W.2d 374 (Tex. Ct. App. 1986).

⁹⁴ *Id.* at 376.

⁹⁵ *Id.* at 381.

here to the analysis of the United States Supreme Court in *Kimbell*.⁹⁶ The court proceeded to provide a thorough analysis of the three factors set forth in *United States v. Kimbell Foods, Inc.*⁹⁷

The *Glen Ridge* Court made more than one judgment that arguably resulted in the making of law; the first will suffice to illustrate. The first question the court asked under *Kimbell* was whether a nationally uniform body of law was necessary to deal with the conflict at hand. The court stated the governing standard, based on federal court precedent, as follows: "A nationally uniform body of common law is crafted in those situations where its absence would threaten the functioning of those processes that the federal program is chiefly designed to promote."⁹⁸ Accordingly, the court proceeded to determine whether this case involved "those processes that the [FSLIC] was chiefly designed to promote."⁹⁹ Because no precedent addressed, let alone established, what processes the FSLIC was "chiefly designed to promote," the court resolved this question without any citation of authority. It simply resolved that the FSLIC was chiefly designed to pay insurance to depositors, order priorities of third-party creditors, sell failed thrifts, and liquidate assets of failed thrifts.¹⁰⁰ The FSLIC, in the court's opinion, was not chiefly designed to exercise a failed thrift's power of foreclosure.¹⁰¹ A contrary judgment articulating good reasons why exercising a failed thrift's power of foreclosure was among its chief processes conceivably could have been as much in line with precedent as was the judgment that the court, in fact, made. In future cases, however, courts that are bound to take account of *Glen Ridge* will be foreclosed from making this contrary judgment.

C. *What the Content of Uniform Federal Common Law Is*

If a court determines that the substance of federal common law is a uniform federal rule, it must proceed to determine what that rule is. In doing so, state courts often must decide whether to define the reach of a federal common law principle as limited to or extending beyond specific circumstances of cases in which they have operated

⁹⁶ *Id.* (citation omitted).

⁹⁷ 440 U.S. 715 (1979); see *supra* notes 28-30 and accompanying text (describing the *Kimbell* factors).

⁹⁸ *Glen Ridge*, 734 S.W.2d at 382 (citing *Int'l Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

previously. In making such decisions, state courts participate in the development of uniform rules of federal common law. A few recent cases are illustrative.

In *Boyle v. United Technologies Corp.*,¹⁰² the Supreme Court applied a federal common law rule of decision that state courts subsequently could not apply in certain cases without themselves making federal common law. In *Boyle*, the Court held, as a matter of federal common law, that a military contractor that provided helicopters to the federal government was immune from liability for the death of a United States Marine helicopter copilot in a crash allegedly caused by a design defect in the helicopter.¹⁰³ The Court explained that federal common law will displace state law in areas involving “uniquely federal interests” where there is a “significant conflict” between federal policy and the operation of state law.¹⁰⁴ In the circumstances before it, the Court first found “the civil liabilities arising out of the performance of federal procurement contracts” to be of “uniquely federal interest.”¹⁰⁵ It found, moreover, that the “state law which holds Government contractors liable for design defects in military equipment” presented “a ‘significant conflict’ with federal policy and must be displaced.”¹⁰⁶ In particular, the application of state law would permit “second-guessing” of judgments “as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.”¹⁰⁷ Moreover, the “financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States.”¹⁰⁸ Accordingly, the Court formulated the following federal common law rule of decision:

Liability for design defects in military equipment cannot be imposed, pursuant to state law when (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.¹⁰⁹

¹⁰² 487 U.S. 500 (1988).

¹⁰³ *Id.* at 512.

¹⁰⁴ *Id.* at 504-07 (internal quotation marks omitted).

¹⁰⁵ *Id.* at 505-06 (internal quotation marks omitted).

¹⁰⁶ *Id.* at 512.

¹⁰⁷ *Id.* at 511 (internal quotation marks omitted).

¹⁰⁸ *Id.* at 511-12.

¹⁰⁹ *Id.* at 512.

The scope of the "*Boyle* defense" was recently at issue in the New Jersey case of *Silverstein v. Northrop Grumman Corp.*¹¹⁰ In *Silverstein*, a postal worker sued government contractors, alleging that a design defect in a postal vehicle that the contractors produced caused the vehicle to roll over, injuring the postal worker.¹¹¹ The contractors defended on the ground that the court could not hold them liable under *Boyle*.¹¹² The Appellate Division of the New Jersey Superior Court had to decide whether the *Boyle* defense was limited to military contractors or extended to nonmilitary government contractors as well. The *Boyle* Court, as the New Jersey court observed, "did not directly comment upon whether the government contractor defense would be applicable in the context of nonmilitary contracts."¹¹³ The New Jersey court held that the *Boyle* defense applied to nonmilitary contractors by characterizing the principles underlying the defense as extending beyond the military context: "Though government contracts for nonmilitary products do not involve considerations of combat effectiveness, all of the other policy reasons cited by the [*Boyle*] Court in support of the government contractor defense are equally applicable to military and nonmilitary procurements."¹¹⁴ In particular, the court explained, the government must have flexibility to trade safety for economic considerations in *all* of its contracts; *all* government contractors might pass on financial burdens from litigation to the public; and there is a risk that state tort law applied to *any* government contract will interfere with federal policy.¹¹⁵

While this decision accords with some federal courts' characterizations of *Boyle*, it contradicts other federal courts' characterizations of *Boyle* that limited *Boyle* to the military context.¹¹⁶ In *In re Hawaii Federal Asbestos Cases*,¹¹⁷ for example, the Ninth Circuit concluded that the concerns behind the *Boyle* defense only apply to military contractors that provide military equipment to the federal government, since "[t]hese same concerns do not exist in respect to products readily available on the commercial market."¹¹⁸ *Boyle* did not set forth the rule

¹¹⁰ 842 A.2d 881 (N.J. Super. Ct. App. Div. 2004).

¹¹¹ *Id.* at 883.

¹¹² *Id.*

¹¹³ *Id.* at 888.

¹¹⁴ *Id.* (alteration in original) (citing *Carley v. Wheeled Coach*, 991 F.2d 1117, 1121-22 (3d Cir. 1993)).

¹¹⁵ *Id.* at 889.

¹¹⁶ *See id.* at 888 (citing cases limiting *Boyle* to the military context).

¹¹⁷ 960 F.2d 806 (9th Cir. 1992).

¹¹⁸ *Id.* at 811.

of decision it formulated with sufficient specificity to indicate whether the need to protect a military judgment regarding combat effectiveness was a necessary condition for the defense to apply, or rather one factor that, taken together with others, was sufficient to warrant application of the defense. In determining that the availability of the *Boyle* defense is not limited to military contractors providing military equipment, the *Silverstein* court made a judgment that resulted in the application of a different federal rule of decision than certain inferior federal courts have applied. Post-*Silverstein*, courts bound to follow its holding will be foreclosed from making the more restrictive judgment that the Ninth Circuit made limiting the *Boyle* defense to the military context.

The recent Minnesota case of *Johns v. Harborage I, Ltd.*¹¹⁹ provides another example of how state courts make purportedly uniform federal rules of decision. In *Johns*, the Supreme Court of Minnesota applied the federal common law doctrine of successor-employer liability.¹²⁰ The issue before the court was whether a Title VII plaintiff who had been awarded a judgment against her former employer could collect on it from the corporation that now held her former employer's assets.¹²¹ The facts of the case were novel insofar as the successor corporation had acquired the assets of the employer from an entity that had been exonerated in the underlying litigation but had also entered into a separate contract with the responsible party in the underlying litigation to employ certain of its employees.¹²² To determine whether there should be successor-employer liability, the Minnesota court invoked the following principle that the Supreme Court had set forth: "Continuity of business is a key factor in determining whether an em-

¹¹⁹ 664 N.W.2d 291 (Minn. 2003) (en banc).

¹²⁰ *Id.* at 297-99.

¹²¹ *Id.* at 293, 296-97. As an initial matter, the Minnesota court observed that the Supreme Court had not "addressed the doctrine of successor-employer liability in a Title VII case." *Id.* at 298. The Minnesota court then proceeded to hold that in Title VII cases the federal common law successor-employer liability doctrine that the Supreme Court had recognized in NLRA cases applies, rather than state law. *Id.* at 298; see, e.g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170 (1973) (addressing successor-employer liability in NLRA cases). Certain federal courts of appeals had already extended this doctrine to Title VII in a similar way, see, e.g., *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1090 (6th Cir. 1974) (holding that the successor doctrine of NLRB cases applies in Title VII cases), and the Minnesota Supreme Court recognized this. *Johns*, 664 N.W.2d at 298.

¹²² *Johns*, 664 N.W.2d at 294.

ployer is a successor-employer for liability purposes.”¹²³ Applying this standard, the court held, as a matter of uniform federal common law, that a successor corporation can be held liable even though the legal entity from which it acquired the relevant assets was exonerated in the underlying litigation.¹²⁴ A dissenting opinion disagreed with the court’s application of the general standard. It observed that “the federal courts . . . have never bundled together an exonerated seller of assets with a separate management company found to have violated employment laws.”¹²⁵ In the dissent’s view, “[a] new legal theory has been created in Minnesota”—a “major new proposition.”¹²⁶ To the extent that the Minnesota Supreme Court was the first court ever to find that there could be “continuity of business” where the seller of assets had been exonerated, it made a judgment that resulted in the expansion of the scope of a federal common law rule of decision.

Just as a state court can make federal common law by *expansively* characterizing a federal common law principle, it can make federal common law by *restrictively* characterizing such a principle. The recent California case of *Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians*¹²⁷ is illustrative. The California Fair Political Practices Commission sued the Agua Caliente Indian tribe in California Superior Court, alleging that the tribe violated the California Political Reform Act (PRA) by failing to make certain campaign-related disclosures. The tribe defended on the ground that it was immune from suit under the federal common law doctrine of tribal sovereign immunity. The California court rejected this defense by discerning a limiting principle in the federal common law doctrine of tribal sovereign immunity: “Pertinent decisions recognizing the doctrine have concerned activities affecting tribal self-governance and economic development, not activities affecting the governance and development of another sovereign.”¹²⁸ “No case,” the court explained, “has held that a tribe is immune from suit for activities that, instead of promoting tribal self-governance and development, are intended to influence a

¹²³ *Id.* at 299 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964)).

¹²⁴ *Id.* at 298-99.

¹²⁵ *Id.* at 302 (Gilbert, J., dissenting).

¹²⁶ *Id.* at 301.

¹²⁷ No. 02AS04545, 2003 WL 733094 (Cal. Super. Ct. Feb. 27, 2003), *aff’d*, *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 10 Cal. Rptr. 3d 679 (Ct. App. 2004), *cert. granted*, 92 P.3d 310 (Cal. 2004).

¹²⁸ *Id.* at *5.

sovereign State's electoral and legislative processes."¹²⁹ By characterizing the principle underlying the federal common law doctrine of sovereign immunity as protecting only the activities that prior cases specifically involved—namely self-governance and economic development—but citing no case limiting the application of the doctrine on principle to those activities, the California court made a judgment that resulted in the refinement of the federal common law doctrine of tribal sovereign immunity.¹³⁰

From each of these examples, it is evident that state courts have made federal common law in as real a sense as federal courts have made it. The question is whether this practice is justified. Part II addresses whether theories that attempt to justify the making of federal common law primarily with reference to whether federal courts have inherent or delegated power to make it are sufficient to explain whether and when the making of federal common law by state courts is justified.

II. WHY INHERENT AND DELEGATED POWER THEORIES ARE INADEQUATE TO EXPLAIN THE MAKING OF FEDERAL COMMON LAW BY STATE COURTS

That state courts make federal common law does not in itself demonstrate that they are justified in doing so. Several scholars have propounded theories of federal common law that focus primarily on federal courts; none has devoted sustained attention to the operation of federal common law in state courts. An explicit or implicit premise of the theories that this Part will consider is that when a federal court is justified in making federal common law, the court is justified in making it on the basis of the kinds of national policy considerations

¹²⁹ *Id.*

¹³⁰ An alternative holding of the court was that "were any federal law to extend the doctrine of tribal immunity to state laws like the PRA, it would impermissibly conflict with the Tenth Amendment and Guarantee Clause of the United States Constitution." *Id.* at *6. The California Court of Appeal affirmed on this ground, holding that the state's constitutional right under the Guarantee Clause "trumps the Tribe's common law immunity." *Agua Caliente*, 10 Cal. Rptr. 3d at 690. At the time of this writing, the California Supreme Court had granted review of this case. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 92 P.3d 310 (Cal. 2004). No matter how the California Supreme Court resolves this case, the trial court's opinion will remain a useful example of how state courts—even the lowest state courts—can decide cases based on federal common law that, in a real sense, they make.

that might move Congress to enact a federal statute.¹³¹ Such theories commonly attribute the operation of federal common law in state courts to the Supremacy Clause.¹³² The Supremacy Clause may very well require state courts to apply federal common law rules of decision that Supreme Court precedent establishes. As the first section of this Part explains, however, the Supremacy Clause does not itself empower state courts to make federal law in the way that Congress makes federal law. A more complete account of the operation of federal common law in state courts is necessary. Accordingly, the second section proceeds to consider whether the reasons offered by theorists to explain whether and when the making of federal common law by federal courts is justified are adequate to explain whether and when the making of federal common by state courts is justified. It concludes that these reasons, specifically geared as they are toward federal courts, are inadequate to account for the making of federal common law by state courts.

A. *The Limitations of the Supremacy Clause*

Does the Supremacy Clause in itself justify the making of federal common law by state courts? Scholars have argued that if the Supreme Court makes federal common law, which they believe it may do in variously described circumstances, it is the supreme law of the land, and state courts are bound to follow it under the Supremacy Clause.¹³³ That may well be true, as far as it goes. The Supremacy Clause provides that the "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 . . ."¹³⁴ The Clause obliges state courts to follow federal common law that the Supreme Court has made, assuming that such law qualifies as law made "in Pursuance" of the Constitution. The Clause does not, however, speak to the question of whether state courts may devise federal law on the basis of national policy considerations. To say that state judges "shall be bound" to law made "in Pursuance" of the Constitution—the "supreme Law of the Land"—is not to say that state judges

¹³¹ See *supra* notes 14-17 and accompanying text (discussing the kinds of purely forward-looking policy considerations that Congress takes into account when it legislates).

¹³² U.S. CONST. art. VI, cl. 2.

¹³³ See *supra* note 12 (noting such arguments).

¹³⁴ U.S. CONST. art. VI, cl. 2.

may create the “supreme Law of the Land.” As a California Court of Appeals recently put it, “[t]he supremacy clause tells us that federal law trumps state law, but it does not provide textual support for adoption of the law in the first place.”¹³⁵ Indeed, it would be strange to read the Clause as authorizing state judges, the *objects* of the supremacy dictate, to create the law to which the Clause dictates they are bound. Moreover, the Clause does not speak to whether an act of Congress delegating legislative power to state courts to devise federal law would be one “made in Pursuance” of the Constitution.

There may be something to infer from the Supremacy Clause about the way in which state courts are justified in making federal common law, if indeed they are justified in making it at all—a matter addressed in Part III.C of this Article. Suffice it to say for now, however, that the Clause in itself does not justify state courts in making federal common law based on their assessment of what national policy should be.

B. *Inherent and Delegated Power Theories*

Scholars who understand federal courts to be justified in making federal common law for the kinds of reasons that might move Congress to make federal law have attempted to reconcile that understanding with a Constitution that vests enumerated national lawmaking powers in Congress, leaving the remainder of lawmaking power to the states. Their theories fall into two categories: first, theories that argue that federal courts have *inherent power* to make federal common law in certain circumstances; and, second, theories that argue that federal courts may make federal common law when the Constitution or Congress has *delegated power* to them to do so. The purpose of this section is not to provide a general critique of these theories; it is, rather, to analyze whether each theory by its own methodology is applicable to state courts. It warrants emphasis that none of the theories addressed here gives sustained treatment to the operation of federal common law in state courts. The question for consideration is whether the principles that each articulates primarily to explain the making of federal common law by federal courts apply as well to explain the making of federal common law by state courts. This section concludes that none of these theories, as articulated by their propo-

¹³⁵ Fair Political Practices Comm’n v. Santa Rosa Indian Cmty., 20 Cal. Rptr. 3d 292, 298 (2004), *review granted*, 2005 Cal. LEXIS 110 (Cal. Jan. 12, 2005).

nents, is adequate to explain whether or when state courts are justified in making federal common law.

1. Inherent Judicial Power to Make Federal Common Law

Louise Weinberg has articulated an expansive theory of federal common law premised upon an inherent judicial power in federal courts to make it.¹³⁶ She analyzes the operation of federal common law in light of twelve "clusters of ideas" (including, for example, "empowerment and interest," "federalism," "positivism," and "the history").¹³⁷ In essence, Weinberg asserts that "[t]he judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon."¹³⁸ In adjudicating such matters, she argues, federal courts have inherent power to make federal law coordinate to the lawmaking powers of the legislature and executive. "[T]he *source* of sovereign lawmaking power," in her view, "is the sovereign's sphere of legitimate governmental interest."¹³⁹ As courts are institutions of "coordinate powers," they inherently have power, she claims, to choose to make law whenever it serves the sovereign's legitimate governmental interests.¹⁴⁰ The only limits on this power are jurisdictional. "Courts must act, of course, within their constitutional and statutory jurisdiction,"¹⁴¹ she explains, but, other than that, "there are no fundamental constraints on the fashioning of federal rules of decision."¹⁴² Ultimately, what justifies the making of federal common law in Weinberg's view "is the existence of a legitimate national governmental interest."¹⁴³ When a court is justified in making federal common law, under her theory, the court may make it on the basis of "national substantive policy" concerns.¹⁴⁴

¹³⁶ In her view, "there are no fundamental constraints on the fashioning of federal rules of decision." Weinberg, *supra* note 7, at 805.

¹³⁷ *Id.* at 809.

¹³⁸ *Id.* at 813.

¹³⁹ *Id.* at 809-10.

¹⁴⁰ *Id.* at 813.

¹⁴¹ *Id.*

¹⁴² *Id.* at 805.

¹⁴³ *Id.* at 813.

¹⁴⁴ In particular, "[i]f a federal common-law remedy is withheld . . . [or] [i]f a federal common-law claim is fashioned . . . [or] [i]f a federal common-law defense is created, displacing state rights, let it be because carefully considered national substantive policy is, on balance, thought to be better served . . ." *Id.* at 851 (footnote omitted).

Weinberg's theory of federal common law purports to cover the operation of federal common law "in all courts."¹⁴⁵ However, her analysis focuses primarily on federal courts. What follows is an attempt to apply more fully the principles of that analysis to state courts. If we characterize state courts to be, as Weinberg characterizes federal courts to be, (a) federal lawmaking authorities coordinate to Congress and the President, (b) with the power to make federal law whenever they believe it would serve the national interest, three problems arise. The first relates to Weinberg's attempt to account for federalism concerns in her analysis.¹⁴⁶ Fully extending her theory to state courts would appear to defy the basic federal-state lawmaking structure that the Constitution provides. The Constitution sets forth the federal legislative, executive, and judicial powers in Articles I, II, and III, respectively.¹⁴⁷ The Tenth Amendment "reserve[s] to the States" those "powers not delegated to the United States by the Constitution."¹⁴⁸ The delegation of powers in Articles I, II, and III to the federal legislature, executive, and judiciary and the reservation to the states of powers "*not delegated*" would appear to foreclose an argument that state courts have an inherent power to make federal law whenever *they* believe it would serve national interests.

The second problem relates to Weinberg's argument that courts are justified in making federal common law because such lawmaking serves to empower the federal sovereign.¹⁴⁹ If state courts may make federal common law whenever they believe it would serve the national interest, state courts would have power to make federal common law in more expansive circumstances than those in which federal courts would have power to make federal common law. The only extrajudicial limitation on the power of the courts of a sovereign to make the law of that sovereign that Weinberg recognizes is the courts' jurisdiction; "no other 'authorization' is required."¹⁵⁰ State governments create state courts and generally control the kinds of cases in which the powers of their courts can be exercised. Indeed, Henry Hart took it as a constitutional maxim that "federal law takes the state courts as it

¹⁴⁵ *Id.* at 827; see also Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 862 (1989) (asserting that "federal common law is supreme in both sets of courts").

¹⁴⁶ Weinberg, *supra* note 7, at 814-19.

¹⁴⁷ U.S. CONST. arts. I-III.

¹⁴⁸ *Id.* amend. X.

¹⁴⁹ Weinberg, *supra* note 7, at 809-14.

¹⁵⁰ *Id.* at 813.

finds them.”¹⁵¹ The Supreme Court has long presumed that Congress generally lacks authority to regulate state court jurisdiction.¹⁵² As courts of general jurisdiction, state courts have jurisdiction over a vast expanse of cases that fall outside the jurisdiction of federal courts. If a state court has inherent power to choose to fashion federal rules of decision whenever it believes that doing so would serve a “legitimate governmental interest” of the federal government, it is a power that state courts have far more opportunities to exercise than federal courts have.

Under current federal jurisdictional law, state courts have exclusive jurisdiction over cases in which federal law does not form a part of the plaintiff’s well-pleaded complaint.¹⁵³ In such cases, a state court might determine during the course of litigation that a federal rule of decision would best serve the national interest. For example, a state court might find that the making of a federal rule of decision serves the national interest in a routine bike theft, divorce, or landlord/tenant case. The only ways for Congress to effectively control the inherent power of state courts to make federal rules of decision would be to legislate against such decisions as state courts make them, require the Supreme Court to review cases in which state courts exercise this power, or give federal courts exclusive jurisdiction over all cases in which federal law provides the rule of decision and to mandate removal whenever it becomes apparent that federal law will be providing a rule of decision. To recognize in fifty different state court systems, absent such drastic federal action, greater opportunities—and thus power—than federal courts have to choose to fashion substan-

¹⁵¹ Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

¹⁵² See *Alden v. Maine*, 527 U.S. 706, 752 (1999) (explaining that Congress “may require state courts of adequate and appropriate jurisdiction to enforce federal prescriptions, insofar as those prescriptions relate to matters appropriate for the judicial power”) (internal quotation marks; citations, and brackets omitted); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that Rhode Island courts must enforce a federal law the state deemed penal but noting that the state court had “jurisdiction adequate and appropriate under established local law to adjudicate this action”); *Mondou v. N.Y., New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 56 (1912) (holding that rights of action arising under FELA are enforceable in the state courts but noting that Congress had not attempted in FELA “to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure”); *Claffin v. Houseman*, 93 U.S. 130, 137 (1876) (holding that federal rights of action are enforceable in state court, so long as the state court is “competent to decide rights of the like character and class”).

¹⁵³ See *supra* note 52.

tive national policy would not appear to empower the national sovereign.

The third problem with applying Weinberg's analysis to state courts is that state courts do not have adequate jurisdiction to exercise a lawmaking power coordinate to that of Congress and the executive. State courts, unlike Congress and the executive, lack jurisdiction to make law that is authoritative throughout the United States. It is true that, pursuant to the Full Faith and Credit Clause, a state court judgment based upon a determination of federal law generally will be enforceable nationally against a party to the case in which such a determination is made.¹⁵⁴ But inasmuch as a state is incapable of legislating for the nation as a whole,¹⁵⁵ a state court is incapable, whether as a matter of territorial sovereignty¹⁵⁶ or due process,¹⁵⁷ of making law that

¹⁵⁴ The Full Faith and Credit Clause requires each state to give "Full Faith and Credit" to the "judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. There are limitations to this, however. One state, for instance, need enforce the judgment of another state "only as 'laws [of the enforcing forum] may permit.'" *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998) (quoting *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839)).

¹⁵⁵ In *New York Life Insurance Co. v. Head*, 234 U.S. 149 (1914), the Supreme Court explained:

[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

Id. at 161. For a more recent exposition of this principle, see *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), where the Supreme Court explained that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred," for "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 421-22; see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.").

¹⁵⁶ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) ("The sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

¹⁵⁷ See, e.g., *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (explaining that the federalism component of personal jurisdiction "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause").

creates obligations in nonparties (or even in parties with respect to unrelated transactions or occurrences) operating within the United States but outside the jurisdiction of that court. Though Weinberg asserts that state courts "can decide whatever federal issues properly come before them along the whole continuum of national policy concerns,"¹⁵⁸ she implicitly recognizes the jurisdictional limitations of state institutions. In defining "the sphere of legitimate national governmental interest" (i.e., the scope, in her view, of the power of federal courts to make federal common law), she observes that "[t]he nation is empowered to provide for the general welfare."¹⁵⁹ Thus, "the legislature of Pennsylvania [cannot] enact[] laws purporting to govern the nation In the nature of things, Pennsylvania has no power to provide for the general welfare of non-Pennsylvanians."¹⁶⁰ The same logic would apply to a state court, which has no jurisdiction beyond that given to it by a state. Though a state court may purport to make and apply uniform federal law in a given case, it lacks the power both to prescribe a rule of decision that governs the entire jurisdiction of the United States and to enforce such a rule of decision against nonlitigants outside the jurisdiction of the state.¹⁶¹ For all of these reasons, Weinberg's theory of federal common law, with its primary focus on federal courts, does not on its own terms sufficiently explain whether and when the making of federal common law by state courts is justified.

Larry Kramer has also articulated an inherent power theory of the making of federal common law by federal courts. He argues that the effectiveness of such lawmaking justifies recognition of a "judicial prerogative"¹⁶² to make federal common law whenever it is "necessary and proper" to implement a congressional act.¹⁶³ He describes the limits of this judicial prerogative as follows: "[T]he occasion for making federal common law must be to improve the effectiveness of a statute,

¹⁵⁸ Weinberg, *supra* note 7, at 827.

¹⁵⁹ *Id.* at 810-11 (footnote omitted).

¹⁶⁰ *Id.* at 811.

¹⁶¹ Professor David Robertson has argued that "[w]hen a state court makes new law, it is going to be state law no matter what the court chooses to call it." David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 368 (1995). Henry Hart observed as well that based on the inherent limitations on state lawmaking authority, "[i]n no view did any single state have legislative jurisdiction to deal authoritatively with problems of maritime law generally." Hart, *supra* note 151, at 531.

¹⁶² Kramer, *supra* note 23, at 268.

¹⁶³ *Id.* at 288.

but the court need not locate the source of its rules 'in' the statute";¹⁶⁴ rather, the "lawmaking power" of the federal courts is "broad enough to encompass any rule consistent with the general purposes of the statute on which it is based."¹⁶⁵ The justification for this judicial prerogative, as he explains it, lies in "what works."¹⁶⁶ As an empirical matter, he claims that the making of federal common law in this way is "exceedingly useful" insofar as it: (1) expands the governing capacity of the federal government; (2) resolves hard questions that Congress might otherwise avoid; and (3) involves another lawmaker in the resolution of societal problems.¹⁶⁷ Implicit in each of these purposes is an understanding that state courts will devise federal common law rules on the basis of forward-looking policy considerations.

Kramer addresses the authority of only federal courts, not state courts, to make federal common law.¹⁶⁸ Do the principles that he applies to justify the making of federal common law by federal courts apply as well to justify the making of federal common law by state courts? It does not follow from the fact that the making of federal common law by federal courts serves certain purposes that the making of federal common law by state courts serves those same purposes. There are fifty different state court systems. State courts generally may have less expertise in dealing with federal law than federal courts have.¹⁶⁹ It is not obvious that having fifty different court systems, each with a different jurisprudential heritage and presumably less familiarity with the fabric of federal law than federal courts, making federal law would improve the federal lawmaking enterprise. In fact, state courts often make federal common law differently than federal courts make it. To the extent that Kramer's theory describes federal common law lawmaking as a judicial prerogative of federal courts, justified by apparent empirical effects of federal common law lawmaking by federal courts, it does not resolve on its own terms whether recognizing a judicial prerogative in state courts to make federal common law would be justified.

¹⁶⁴ *Id.* at 289.

¹⁶⁵ *Id.* at 288.

¹⁶⁶ *Id.* at 301.

¹⁶⁷ *Id.* at 270-71. Kramer acknowledges that his empirical claims cannot be proven. *Id.* at 271.

¹⁶⁸ *Id.* at 265.

¹⁶⁹ See, e.g., AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-65 (1969) ("The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts.").

It could be argued that Kramer's methodology, if not his specific conclusions, can be applied to state courts. Under his methodology, state courts would be justified in making federal common law if such lawmaking served its own purposes with apparent effectiveness. An analysis of this argument is not possible without some critique of Kramer's methodology.¹⁷⁰ Unlike Weinberg, who assesses whether the making of federal common law is justified with reference to independent metrics of analysis, Kramer purports to assess whether the making of federal common law is justified in light of the practice *as it exists*.¹⁷¹ Under Kramer's methodology, we would assess whether the making of federal common law by state courts is "useful." A problem with this analysis is that it presupposes that we should assess what courts *ought* to do by what *is* done by them with apparent effectiveness. Kramer's argument—that courts ought to make federal common law because they already make federal common law in a way that effectively serves certain purposes—begs the question: are these purposes that *ought* to be served?

It is not self-evident that the purposes that Kramer argues the making of federal common law by federal courts effectively serves are purposes that federal judicial action ought to serve. In particular, it is not self-evident (1) that the lawmaking capacity of both courts and Congress ought to remain as large as possible; (2) that Congress ought to avoid deciding hard questions; or (3) that different lawmakers ought to be addressing the same problems. Indeed, arguments (1) that the sphere of federal lawmaking ought to be limited;¹⁷² (2) that legislatures ought to decide hard questions rather than punting them to courts;¹⁷³ and (3) that different lawmakers ought not to be

¹⁷⁰ The purpose of this section, as explained, is not to provide a general critique of theories of federal common law that focus primarily on federal courts; rather, it is to analyze whether such theories apply equally well on their own terms to state courts. Here, however, an exception is necessary.

¹⁷¹ See generally Weinberg, *supra* note 7.

¹⁷² See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design" (citations omitted)).

¹⁷³ See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2673 (2004) (Scalia, J., dissenting) (explaining that the problem with judges making what in their view constitutes good policy "is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people"); see also Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995) (arguing that the effect of expansive judicial review on the felt responsibilities of legislators deserves se-

making multifarious pronouncements on the same subject matter¹⁷⁴ are commonplace in legal discourse. An empirical analysis of the making of federal common law by state courts might prove such lawmaking to serve the following purposes: biased decision making against federal interests, systematic undermining of federal rights, or greater confusion in the dictates of federal law. To prove that the making of federal common law by state courts effectively serves certain purposes does not justify the making of federal common law without a further demonstration that those purposes are ones that it ought to serve.

Finally, any attempt to apply Kramer's theory to state courts would encounter the same fundamental problem faced by Weinberg's inherent power theory of federal common law: state courts by definition do not have adequate jurisdiction to effectively exercise federal lawmaking power. The authority of a state court extends only so far as its jurisdiction; state courts do not have authority to make law governing across the entire jurisdiction of the United States.¹⁷⁵ For these rea-

rious attention); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 588-89 (1983) (observing the "danger" that "by passing the hard questions to the courts, Congress is able to divert political pressure from itself").

¹⁷⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating the principle that courts should refrain from deciding certain issues due to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

¹⁷⁵ It is worth noting one other inherent power theory regarding the making of federal common law by federal courts. Thomas Merrill invokes an inherent power theory to justify a narrow category of federal common law lawmaking by federal courts. See generally Merrill, *supra* note 7. (He recognizes other categories of such lawmaking to be legitimate under a delegated-power theory also, as the next section explains.) See *infra* note 373 (discussing this theory). In his view, federal courts have the inherent power "to adopt their own provisions governing the conduct of litigation and internal operations," absent congressional action governing such matters. Merrill, *supra* note 7, at 24. As a matter of the federal separation of powers, he explains, "the promulgation of 'house keeping' rules that would have no impact on congressional policies is consistent with the constitutional division of powers." *Id.* He addresses this theory exclusively to the power of federal courts, not state courts.

Interestingly, in practice, there are instances of state courts making federal law regarding the conduct of litigation of federal claims. The line between laws that govern the conduct of litigation ("procedure") and other laws ("substance") is of course drawn differently for different purposes and, for any purpose, not easily drawn. See Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 341-43 (1933) (identifying at least eight areas of law that in 1933 drew different distinctions between "substance" and "procedure"). Consider, for example, the question of whether a court should award prejudgment interest to the prevailing party on a federal claim. Some states consider this question to be one of procedure rather than substance for certain purposes. See, e.g., *Maddox v. Am. Airlines, Inc.*, 298 F.3d 694, 698 (8th Cir. 2002) ("Oklahoma courts consider prejudgment interest to be proce-

sons, Kramer's theory of federal common law, with its focus on federal courts, appears inadequate to explain whether and when the making of federal common law by state courts is justified.

2. Delegated Power to Make Federal Common Law

Rather than rely on inherent powers or judicial prerogatives, other theories seek to justify the making of federal common law by federal courts with reference to whether an authoritative source of law

dural only, and not a substantive right."). See generally Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. CHI. L. REV. 705 (2002) (explaining that whether prejudgment interest is procedural or substantive law for conflicts purposes is a debated question).

State courts, nonetheless, have made federal common law regarding the standard for awarding prejudgment interest to the prevailing party on a federal claim. Recently, a New Jersey court adopted a four-factor test for determining when courts should award prejudgment interest on a claim under 42 U.S.C. § 1983. See *Maudsley v. State*, 816 A.2d 189, 212 (N.J. Super. Ct. App. Div. 2003) (instructing the trial court to apply the test used by the Second Circuit in *Gierlinger v. Gleason*, 160 F.3d 858, 873 (2d Cir. 1998)). The Supreme Court has set forth no such test, and inferior federal courts have set forth different tests governing the award of prejudgment interest in § 1983 cases. See *id.* at 211 ("A majority of circuit courts that have considered the issue of the availability of prejudgment interest in a § 1983 case have held that prejudgment interest is available, although they differ over the legal basis and the proper legal standard to apply."). If federal courts can be said to have made federal common law on this arguably procedural matter, so too has the New Jersey court.

The claim that federal courts have inherent power to make federal common law regarding procedural matters does not resolve the question whether state courts also have inherent power to make federal procedural law. First, courts traditionally have explained matters of procedure to be within the sovereign power of the forum jurisdiction. See Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 980 (2001) ("[A] state has exclusive control over court 'procedure' even as against the federal government."). With the enactment of the Rules Enabling Act and the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), uniform federal procedural rules generally govern proceedings in federal courts. That federal courts may have inherent power to make procedural rules to fill gaps in the federal procedural fabric does not in itself mean that state courts have the same power. Indeed, federal law generally "takes state courts as it finds them," *Felder v. Casey*, 487 U.S. 131, 150 (1988), and state law generally takes federal courts as it finds them. *Erie*, 304 U.S. at 64 (1938) (establishing the principle that even if state law provides the rule of decision in federal court, the federal court may apply federal procedures to adjudicate the claim). Second, state courts do not have adequate jurisdiction to exercise an inherent power to make federal procedural law. Interestingly, Joseph Story rejected any possibility of state court power (including any delegated power) to interfere with federal court procedures. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1752, at 625-26 (Fred B. Rothman & Co. 1991) (1833) (arguing that state courts cannot have "the slightest right to interfere" with federal court procedures, "and congress are not even capable of delegating the right to them").

has delegated to them power to make federal law.¹⁷⁶ Thomas Merrill has argued that federal courts have power to make federal common law “when Congress or the framers of the Constitution have conferred power on the federal courts to fashion federal rules of decision in order to round out or complete a constitutional or statutory scheme.”¹⁷⁷ Martha Field has articulated a theory of federal common law that similarly is grounded in the need for an authoritative legal source to have enabled federal courts to make federal common law. She argues that a court may make federal common law if it can “point to a federal en-

¹⁷⁶ This section will focus on the theories of Thomas Merrill and Martha Field. It is worth noting, however, that Martin Redish, who generally argues that there is no valid federal common law, has expressed the view that there is no constitutional impediment to courts “engaging in creative lawmaking pursuant to a clear legislative delegation.” Redish, *supra* note 7, at 794. He would classify such lawmaking as interpretation rather than common law lawmaking. See also *id.* at 798 (explaining that a legitimate category of “statutory construction consists of those statutes in which the legislature has implicitly or formally delegated to the judiciary the power to create law—in other words, to make fundamental policy judgments”). His methodology is one of statutory interpretation, specifically interpretation of the federal Rules of Decision Act. The Rules of Decision Act provides: “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). Redish argues that insofar as the Rules of Decision Act sets forth four sources of law as operative in the federal courts—the federal Constitution, federal treaties, federal Acts, and state laws—it is illegitimate for federal courts to add a fifth source of law, namely judge-made federal common law. Redish, *supra* note 7, at 766-67; see also Merrill, *supra* note 7, at 28 (explaining that “the Rules of Decision Act appears to be a severe restriction on lawmaking by federal courts”).

This statutory analysis has curious implications for the operation of federal common law in state courts. The Rules of Decision Act by its terms governs only “the courts of the United States”, 28 U.S.C. § 1652; it does not govern state courts. Louise Weinberg has made this point. See Weinberg, *supra* note 145, at 862 (observing that the Rules of Decision Act is “limited in application by its own language to *federal courts only*”). If it is illegitimate for state courts to make federal common law, it is not by virtue of the Rules of Decision Act. The “difficult constitutional issue” that Redish’s statutory analysis bypasses, Redish, *supra* note 7, at 766—whether federal common law lawmaking is politically legitimate—is thus unavoidable as it arises with respect to state courts. Interestingly, if it is constitutionally permissible in certain circumstances for federal and state courts to make federal common law, the Rules of Decision Act, under Redish’s theory, would operate to prohibit federal courts from making federal common law in those circumstances while allowing state courts to do so. In this analysis, a litigant who sought a particular federal outcome that neither the Constitution nor a federal statute required (according to any recognized interpretive theory) but that federal common law might properly provide would have to pursue that outcome in state court, not in federal court. Suffice it to say for present purposes that the Rules of Decision Act does not resolve the question whether the making of federal common law by state courts is legitimate.

¹⁷⁷ Merrill, *supra* note 7, at 40.

actment, constitutional or statutory, that it interprets as authorizing the federal common law rule."¹⁷⁸ "Deciding whether common law can be made in any given case," she explains, "is a matter of interpreting each possible enabling authority to see whether or not it supports federal common law."¹⁷⁹ Both claims view the legitimacy of federal common law to be a matter of delegated power.

In Merrill's view, "the question of the *power* of federal courts to make law should precede questions about the content of that law."¹⁸⁰ For him, constitutional principles of federalism, separation of powers, and electoral accountability require a delegation of power to federal courts for their making of federal common law to be justified.¹⁸¹ In Field's view, "there must be a source of authority for any given exercise of federal common law power."¹⁸² "This limit," she explains, "flows from the proposition that authority must exist for any exercise of federal power, coupled with the proposition that there is no enactment giving federal courts power to make common law generally."¹⁸³

Merrill and Field each employ a positivistic methodology in formulating their respective theories. Merrill applies "a norm of legitimacy drawn from positive law: the existing set of legal principles that participants in our legal system consider binding and authoritative."¹⁸⁴ He explains the "fundamental elements" of this norm to be "structural principles, embodied in the federal Constitution, that allocate law-making powers among the branches of government."¹⁸⁵ Field formulates her theory, too, from positive legal pronouncements. Her "'suggested formulation' is proposed primarily as a way of reconciling and explaining Supreme Court pronouncements in this highly confused area. It does not purport to improve upon what courts, in the main, are doing, as much as to articulate what they are doing in order to reflect upon it."¹⁸⁶

Merrill and Field's theories differ significantly over when there has been a legitimate delegation of power to federal courts to make

¹⁷⁸ Field, *supra* note 6, at 887.

¹⁷⁹ *Id.* at 928.

¹⁸⁰ Merrill, *supra* note 7, at 11.

¹⁸¹ *Id.* at 12-27.

¹⁸² Field, *supra* note 6, at 899.

¹⁸³ *Id.*

¹⁸⁴ Merrill, *supra* note 7, at 8.

¹⁸⁵ *Id.*

¹⁸⁶ Field, *supra* note 6, at 927-28.

federal common law. Merrill argues that a legitimate delegation must be "specifically intended" and the scope of the delegation "reasonably circumscribed."¹⁸⁷ Field takes a broader approach, one that "does not in fact require any particular form of authorization."¹⁸⁸ Her theory leaves it to courts to decide "whether a directive is implicit in any particular enactment."¹⁸⁹ Field makes clear that when a federal court is authorized to make federal common law, it has broad discretion to consider the national policy interests that Congress considers when it makes law.¹⁹⁰

Merrill does not take as definite a position on how courts, authorized to make federal common law, are justified in making it. On the one hand, he describes a delegated power in courts to construe open-textured provisions "in the manner they deem most congruent with the general purposes of the enactment,"¹⁹¹ or to build upon common law "through the incremental case-by-case process."¹⁹² On the other hand, he acknowledges that "the concept of delegated lawmaking . . . does not get around the fact that largely unguided normative judgments will have to be made by judges in the development of . . .

¹⁸⁷ Merrill, *supra* note 7, at 41. Merrill distinguishes delegated lawmaking from "preemptive lawmaking" by federal courts, which he also argues to be constitutional. A court engages in preemptive lawmaking not when a delegation of lawmaking power is specifically intended, but when lawmaking is necessary to protect or effectuate "specifically intended federal policies." *Id.* at 36-37. For present purposes, there is no need to distinguish his theory of preemptive lawmaking from his theory of delegated lawmaking. In either case, he views the lawmaking power to reside exclusively with Congress, a power that federal courts may exercise only when Congress has delegated it to them. As he explains, "[w]hen a court engages in preemptive lawmaking, it still may be said to be carrying out the original intentions of the enacting body." *Id.* at 36.

¹⁸⁸ Field, *supra* note 6, at 942.

¹⁸⁹ *Id.* In this regard, there is a significant inherent power component to Field's theory as well. On the one hand, she argues, the Constitution or Congress must enable courts to make federal common law, but, on the other hand, she argues, that since no particular form of authorization is required, the judiciary "effectively decides whether federal common law is appropriate under all the circumstances." *Id.* Her ultimate argument is that "*federal law can apply whenever federal interests require a federal solution.*" *Id.* at 983.

¹⁹⁰ In particular, Field states that "judicial discretion, governed by a presumption in favor of using state law, is really the only limit on federal common law." *Id.* at 950. In the following passage, she suggests that, in making federal common law, courts should be able to take into account many of the same considerations that Congress takes into account when it makes federal law: "Congress, when it legislates, thus takes into account interests other than those of its government, narrowly defined, as do state legislatures. Courts as lawmakers should be able to do no less." *Id.* at 957 (footnote omitted).

¹⁹¹ Merrill, *supra* note 7, at 43.

¹⁹² *Id.* at 45.

precedent.”¹⁹³ As a general matter, it is with reference to a delegation of legislative power that Merrill justifies whether federal courts are justified in making federal common law. It seems fair to infer that a premise of his general thesis—that a delegation of *legislative* power is what justifies the making of federal common law—is that, to some extent, federal courts will make federal common law based on the kind of normative judgments that move Congress to make federal law.

Neither Merrill nor Field takes up at length the particular phenomenon of the making of federal common law by state courts.¹⁹⁴ The question for consideration here is whether a delegation theory—formulated narrowly (Merrill) or broadly (Field)—suffices to explain the legitimacy or illegitimacy of federal common law lawmaking by state courts. The analysis of this question will proceed as it has with respect to the other theories thus far addressed: it will consider whether these theories on their own terms are adequate to explain the legitimacy of the making of federal common law by state courts. As the Merrill and Field theories focus on positive legal pronouncements, so too will this analysis. Specifically, the question for consideration is whether Congress, consistent with structural constitutional principles as evident in positive legal materials, may delegate authority to state courts to make federal common law. As an initial matter, it is important to keep this question distinct from two others: (1) whether Congress may adopt state law as federal law, and (2) whether Congress may consent to states making otherwise unconstitutional laws. Distinguishing these questions from the one at hand will bring into focus potential constitutional problems, evident in positive legal materials, with Congress delegating its lawmaking power to state courts.

First, the question whether Congress may delegate federal lawmaking power to state courts is distinct from the question whether Congress may adopt state law as federal law—for example, adopt state court procedures as federal court procedures (which Congress generally did for cases at law from 1789 until 1938), or adopt state crimes as federal crimes in federal enclaves (which Congress continues to do

¹⁹³ *Id.* at 72.

¹⁹⁴ Each simply describes how federal common law applies in state courts by virtue of the Supremacy Clause. Field, *supra* note 6, at 897; Merrill, *supra* note 7, at 6. Merrill adds that his analysis is limited “to lawmaking by federal courts.” Merrill, *supra* note 7, at 7 n.26.

today).¹⁹⁵ For Congress to delegate power to state courts to make federal common law is not for Congress to adopt state law as federal law.

First, the federal common law that state courts make does not purport to be state law; it purports to be federal law. It is one thing

¹⁹⁵ There is no question that Congress may adopt state law as federal law if Congress is adopting state law as it exists at a given point in time as federal law. A more difficult question is whether Congress may adopt, as federal law, state law as it will develop in the future. In the Process Act of 1789, Congress directed that a federal court should apply “the forms of writs and executions” and “modes of process” as were used in the supreme court of the state in which it sat, Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1792), and generally reaffirmed this directive in 1792, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872). In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), Chief Justice Marshall read these acts as adopting state law as it existed in 1789, not as it would subsequently develop. *Id.* at 32. To adopt state law as it existed at a given point in time was, in his view, constitutional. To adopt state law as it would develop in the future, however, was problematic. Chief Justice Marshall believed that an act adopting state procedural law as it would develop in the future as governing proceedings in federal courts would be unconstitutional; in his view, it would amount to states regulating the procedures governing federal courts. *Id.* at 49-50. In 1872, Congress directed that federal courts must conform their procedures to state court procedures as they may develop. Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934). Effectively, this meant that a state, by changing the procedures that governed practice in its courts, would be changing the procedures that governed practice in federal courts sitting in that state. Interestingly, the constitutionality of this dynamic conformity was never questioned in the courts, see Charles Warren, *Federal Process and State Legislation* (pt. 2), 16 VA. L. REV. 546, 562-64 (1930) (noting that the Supreme Court in 1872, 1875, and 1887 did not question the Act’s constitutionality but rather saw it as reducing the inconvenience of having to follow different procedures in state and federal courts of the same locality), and many examples of Congress prospectively adopting state law as federal law have developed since.

It is a federal crime, for example, to conduct a gambling business which is “a violation of the law of a State or political subdivision in which it is conducted.” 18 U.S.C. § 1955 (2000). The Assimilative Crimes Act incorporates certain state criminal laws as federal law governing federal enclaves within those states. 18 U.S.C. § 13(a) (2000). It was argued in *United States v. Sharpnack*, 355 U.S. 286 (1958), that this dynamic incorporation of state law was an unconstitutional delegation of Congress’s legislative power to the states. The Court rejected this argument, explaining that “[r]ather than being a delegation by Congress of its legislative authority to the States, [the Act] is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishment as shall have been already put in effect by the respective States for their own government.” *Id.* at 293-94. While the Court has never held a prospective incorporation of state law by Congress to be unconstitutional, scholars have argued that there are theoretical and historical considerations that render the point far from settled. See Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1371 (1996) (noting that in *Sharpnack*, dissenting Justices Douglas and Black argued that “prospective adoption” of state laws was equivalent “to an unconstitutional abdication of federal legislative authority.”); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1484-85 (2000) (explaining that one of these considerations is the “nondelegation doctrine”).

for Congress to adopt laws that a state properly makes within its institutional and jurisdictional competence; it is another for Congress to empower state institutions to make law that purports to govern within the jurisdiction of the entire United States. Federal common law by definition purports to be law that at an appropriate level of generality governs not only the sphere of the state's lawmaking jurisdiction but the nation as a whole.¹⁹⁶

Second, congressional delegation of power to state courts to make federal common law is different from congressional incorporation of state law insofar as the latter federalizes law that a state has *voluntarily* made within the proper bounds of its lawmaking authority. Empowering state courts to make federal common law effectively *obliges* state courts to make federal law. Merrill offers the Sherman Act as an example of a federal statute delegating power to federal courts to make federal common law. In cases in which the Sherman Act provides the rule of decision, he argues, Congress has empowered courts to make federal law regarding what are lawful and unlawful "restraint[s] of trade."¹⁹⁷ If the Sherman Act provides the rule of decision in a case in federal court, the court must enforce the Sherman Act and, where necessary, make federal law to do so. It would not be within the court's discretion to refuse and simply apply state law. In other words, any delegation of power that the court receives from the Sherman Act to make federal law is a delegation of power that the court must exercise where necessary to decide a case under the Sherman Act. The same analysis applies to state courts. In *Testa v. Katt*,¹⁹⁸ the Supreme Court held that state courts generally cannot refuse enforcement of federal claims. Thus, state courts must enforce the Sherman Act and, where necessary, make federal law to do so.

Indeed, a permissive delegation of authority to state courts to make federal common law would be nonsensical. Imagine a federal act providing: "State and federal courts are hereby directed to make federal common law with respect to matter X, if in their discretion they see fit to do so." By definition, federal common law purports to be national in scope. If a state court had discretion to make *federal*

¹⁹⁶ See *supra* notes 27-33 and accompanying text. For example, even where federal common law incorporates state law, and its substance thus varies from state to state, the determination that federal common law should incorporate state standards purports to be a uniform federal determination.

¹⁹⁷ Merrill, *supra* note 7, at 44 (quoting Sherman Antitrust Act, Pub. L. No. 103-325, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7)).

¹⁹⁸ 330 U.S. 386 (1947).

common law, the choice to make it would not operate as a choice to make law governing within the jurisdiction of the United States because other courts might exercise their discretion to choose not to make federal common law. If Congress in fact has delegated power to state and federal courts in the Sherman Act to make federal law regulating restraints of trade, it would defy the federal prohibition against unlawful restraints of trade for a court to refuse to exercise the power on the ground that the delegation is "permissive."

In contrast, congressional adoption of state law is adoption of law that a state has voluntarily chosen to make. The fact that a delegation of authority to make federal common law would be a *mandate* to a state court to make law purporting to impose obligations *throughout the jurisdiction of the United States* distinguishes such a delegation from the adoption by Congress of a state law that a state *voluntarily* has made and that purports to impose obligations only *within the jurisdiction of the state*. The significance of this distinction will become evident below.

The question whether Congress may delegate power to state courts to make federal common law is also distinct from the question whether Congress may consent to states making laws that otherwise would be unconstitutional. The consent question has arisen most famously with respect to state laws that impose burdens on interstate commerce. In *Gibbons v. Ogden*,¹⁹⁹ Chief Justice John Marshall famously rejected in dicta the argument that the first Congress had consented to states regulating pilots in their ports.²⁰⁰ Chief Justice Marshall reasoned that "Congress cannot enable a state to legislate" when the Constitution prohibits state legislation because Congress cannot "delegate" its legislative powers to the states.²⁰¹

Notwithstanding the clarity of Marshall's views in this regard, it has since become settled that Congress may enable states to regulate commerce in a way that would be unconstitutional absent such congressional action.²⁰² In *Prudential Insurance Co. v. Benjamin*,²⁰³ the Court addressed whether a South Carolina tax on foreign insurance companies that presumably would have violated the dormant Com-

¹⁹⁹ 22 U.S. (9 Wheat.) 1 (1824).

²⁰⁰ *Id.* at 116-17 (citing Act of Aug. 7, 1789, § 4, 1 Stat. 54).

²⁰¹ *Id.*

²⁰² See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982) ("It is indeed well settled that Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" (alteration in original) (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980))).

²⁰³ 328 U.S. 408 (1946).

merce Clause absent congressional authorization was constitutional on the ground that Congress had authorized it.²⁰⁴ The Court held that the tax was constitutional on the broad grounds that Congress may exercise the commerce power "alone . . . or in conjunction with coordinated action by the states."²⁰⁵ As scholars have pointed out, the *Prudential* Court effectively rejected Marshall's reasoning in *Gibbons*, recognizing that Congress may consent, even prospectively, to state regulation of something that otherwise would be the proper object of congressional regulation alone.²⁰⁶

If Congress delegates authority to state courts to make federal common law, is Congress merely consenting to states making laws that otherwise would be unconstitutional? At first glance, it might appear that it is. If delegation theorists of federal common law are correct that the federal lawmaking power generally resides in the first instance with Congress, not the courts, it would seem to violate constitutional federalism principles for state courts to make federal law on their own; nonetheless, if Congress delegates its lawmaking power to a state court, the constitutional infirmity, it might appear, is cured. The matter, however, is not this simple.

First, the cases recognizing that Congress may allow states to restrict the flow of interstate commerce involved legal restrictions that the states imposed within their own jurisdiction to regulate. In *Gibbons*, New York was not attempting to regulate pilots within the jurisdiction of the entire United States; it was regulating them within the jurisdiction of New York.²⁰⁷ In *Prudential*, South Carolina was not imposing a tax on insurance companies doing business throughout the jurisdiction of the United States; it was taxing those seeking to do business in South Carolina.²⁰⁸ It is true that the Dormant Commerce Clause problem with each law was that it imposed a burden on out-of-state actions. These were burdens, however, that resulted from the operation of a law that purported to impose obligations only on those whom the state had jurisdiction to regulate. Thus, the question in both cases was whether a state had properly made *state* law. The dele-

²⁰⁴ *Id.* at 410-12.

²⁰⁵ *Id.* at 434, 436.

²⁰⁶ See Amar, *supra* note 195, at 1375 (arguing that Congress has the power to authorize states to regulate when it has the power to regulate alone); William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 400 (1983) (same).

²⁰⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 4 (1824).

²⁰⁸ *Prudential*, 328 U.S. at 411 nn.1-2.

gation question is whether Congress may authorize state institutions to make law that purports to impose obligations on individuals and relating to activities within the jurisdiction of the United States *as a whole*.

Second, congressional authorization to states to make laws that the Constitution otherwise forbids them from making is not a congressional mandate to states to make law; it is permission that they may make law. If Congress delegates authority to state courts to make federal common law, state courts have no choice but to make it when necessary to decide a case that they have a constitutional duty to decide. That a delegation of authority to make federal common law would be a *mandate* to state courts to make law purporting to impose obligations *within the jurisdiction of the United States* distinguishes such a delegation from congressional consent to states *voluntarily* making laws that impose obligations that are *within the regulatory jurisdiction of the state*.

These distinctions are significant. Consider first the notion of Congress delegating to state courts legislative power to make law that purports to be governing law throughout the entire jurisdiction of the United States. This would be the functional equivalent of Congress creating fifty commissions (state courts) to regulate interstate commerce in certain respects throughout the United States, each having authority to enforce its regulations only with respect to certain transactions and none having authority to enforce its regulations within the jurisdiction of the entire United States. One super-commission (the Supreme Court) would have discretion to revise any such regulations in a way that would create national uniformity should an individual with standing ask it to do so.

If there is any such thing as an unconstitutional delegation of congressional power, this might qualify. Chief Justice Marshall made clear in *Gibbons v. Ogden* his view that Congress could not delegate its powers back to the states.²⁰⁹ As William Cohen has observed, “[m]ost of the cases permitting Congress to validate unconstitutional state laws have been careful to avoid the uncomfortable conclusion that Congress can directly delegate power to the states.”²¹⁰ In the early twentieth century, the Court twice held that federal laws permitting state regulation of matters that maritime law otherwise governed were unconstitutional.²¹¹ It explained that “Congress cannot transfer its legis-

²⁰⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 33-34.

²¹⁰ Cohen, *supra* note 206, at 395.

²¹¹ See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924) (holding unconstitutional a state law which altered “maritime rights and obligations” within that

lative power to the states—by nature this is nondelegable.”²¹² Of course, since 1935 the Supreme Court has not struck down a federal statute as an unconstitutional delegation of power under the “intelligible principle” test.²¹³ That said, a congressional delegation of power to the courts of fifty different states, each incapable of enforcing the “uniform” national law that it was required to create, would qualify as one of the more eccentric delegation schemes enacted in the last eighty years. At a minimum, such a scheme would give rise to a constitutional delegation question warranting very serious examination.

There is a second constitutional question to which a congressional delegation of power to state courts to make federal common law would give rise: would such a delegation be an unconstitutional commandeering of state institutions by Congress? As explained, a delegation of authority to state courts to make federal common law is a mandate that they in fact make it. There has been no question since 1947, when the Supreme Court decided *Testa v. Katt*,²¹⁴ that under the Supremacy Clause state courts generally must enforce claims arising under federal law; in the Court’s words, state courts may not “deny enforcement to claims growing out of a valid federal law.”²¹⁵ The principle that state courts must enforce valid federal claims does not necessarily imply, however, that Congress may require state courts to exercise a delegated federal legislative power to make the law that governs them.

The Court’s recent anti-commandeering cases—*New York v. United States*²¹⁶ and *Printz v. United States*²¹⁷—suggest that there may be limits on congressional authority to require state courts to make federal law.

state); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-64 (1920) (holding as “beyond the power of Congress” an act designed to apply state worker’s compensation laws to harm occurring under maritime jurisdiction). Both of these cases have been superseded by the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-44. *Guilles v. Sea-Land Serv., Inc.*, 12 F.3d 381, 383-84 (2d Cir. 1993).

²¹² *Knickerbocker Ice Co.*, 253 U.S. at 164; see also *W.C. Dawson & Co.*, 264 U.S. at 227 (“Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power . . . may not be delegated to the several states.”).

²¹³ See *Loving v. United States*, 517 U.S. 748, 771 (1996) (“Though in 1935 we struck two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms.” (citations omitted)).

²¹⁴ 330 U.S. 386 (1947).

²¹⁵ *Id.* at 394.

²¹⁶ 505 U.S. 144 (1992).

²¹⁷ 521 U.S. 898 (1997).

In *New York*, the Court held unconstitutional a congressional act that required states to take title to radioactive waste generated within their borders if they failed to make laws providing for its disposal.²¹⁸ The Court explained that “the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation.”²¹⁹ The Court recognized in *New York* the “well established power of Congress to pass laws *enforceable* in state court,” citing *Testa* and other cases.²²⁰ “These cases,” however, as the *New York* Court characterized them, “involve no more than an application of the Supremacy Clause’s provision that federal law ‘shall be the supreme Law of the Land,’ enforceable in every State.”²²¹ “More to the point,” the Court continued, “all involve congressional regulation of individuals, not congressional requirements that States regulate.”²²²

That Congress may pass laws regulating individuals that state courts must enforce does not mean that Congress may pass laws requiring state courts to set federal policies for the regulation of individuals. Imagine that Congress, to cure the constitutional infirmity that the *New York* court identified, created a cause of action for an injunction enforceable only in state court in favor of any citizen against any generator of radioactive waste within the state, to be governed by reasonable standards of liability that the state court would create. Such an act, requiring state courts rather than state legislatures to regulate radioactive waste, would not necessarily have cured the constitutional infirmity that the *New York* Court identified.

In *Printz*, the Court held unconstitutional a congressional act requiring local law enforcement officials to conduct background checks on prospective purchasers of handguns.²²³ The Court explained that for the same reason that Congress may not order states to legislate, it may not order “the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”²²⁴ The Court was careful in *Printz* to distinguish congressional power with respect to state executives from congressional power with respect to

²¹⁸ *New York v. United States*, 505 U.S. at 149.

²¹⁹ *Id.* at 178.

²²⁰ *Id.* (emphasis added).

²²¹ *Id.*

²²² *Id.*

²²³ *Printz v. United States*, 521 U.S. 898, 933 (1997).

²²⁴ *Id.* at 935.

state judges. The Court characterized *Testa* as standing for “the proposition that state courts cannot refuse to *apply* federal law—a conclusion mandated by the terms of the Supremacy Clause (‘the Judges in every State shall be bound [by federal law]’).”²²⁵ The Court explained, additionally, that “the Constitution was originally understood to permit imposition of an obligation on state *judges* to *enforce* federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”²²⁶ To say that Congress may require state courts to “apply” or “enforce” federal law in cases over which the state court has jurisdiction, however, is not to say that Congress may require state courts to “make” federal law, at least in the way that Congress makes it.

Indeed, there is language in *Testa* itself suggesting that there are limits on Congress’s authority to use state courts to enforce federal claims. The Court confined its holding in *Testa*—that state courts must enforce federal claims—to circumstances in which state courts “have jurisdiction adequate and appropriate under established local law to adjudicate” a federal claim.²²⁷ It may be the case that a state court lacks the jurisdiction or authority under state law to exercise a delegated federal legislative power. Consider, for example, the legal system of Louisiana, which has strong roots in the civil law tradition. Under Article I of the Louisiana Civil Code, “[t]he sources of law are legislation and custom.”²²⁸ “Judicial decisions,” the Supreme Court of Louisiana has explained, “are not intended to be an authoritative source of law in Louisiana.”²²⁹ “Consequently, Louisiana courts have frequently noted that our civilian tradition does not recognize the doctrine of *stare decisis* in our state.”²³⁰ While a consistent judicial practice can give rise to a custom in Louisiana, a “single decision” cannot constitute binding law.²³¹ The Louisiana Supreme Court has thus described it as “undeniably true that ‘[t]he decisions of our state courts do not create or eliminate substantive rights as this is the proper function of the legislature.’”²³² As the Fifth Circuit has explained it,

²²⁵ *Id.* at 928-29 (emphasis added) (alteration in original) (quoting U.S. CONST. art. VI, cl. 2).

²²⁶ *Id.* at 907 (second emphasis added).

²²⁷ *Testa*, 330 U.S. at 394.

²²⁸ LA. CIV. CODE ANN. art. I (West 2000).

²²⁹ *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Bourgeois v. A.P. Green Indus.*, 783 So. 2d 1251, 1260 (La. 2001) (quoting *Tullier v. Tullier*, 464 So. 2d 278, 282 (La. 1985)).

"[u]nder Louisiana's Constitution, the power to make substantive laws is vested exclusively in the legislature. Under the state's constitution and Civil Code, Louisiana courts cannot make law but are bound to decide cases according to their best understanding of the law established by legislation and custom."²³³

If a state's courts have no power to make law under the state's constitution and laws, there is a serious constitutional question whether Congress may order them to exercise a federal legislative power when they adjudicate federal claims. *Testa*, *New York*, and *Printz* stand at most for the proposition that state courts must enforce federal law regulating individuals; they say nothing that would exempt a congressional command that state courts make laws regulating individuals from the anticommandeering principles that *New York* and *Printz* set forth.²³⁴

For present purposes, there is no need to get to the bottom of whether congressional delegations of legislative power to state courts would be unconstitutional acts of commandeering state institutions or unconstitutional delegations of federal legislative power to state institutions. There is a preliminary matter that obviates the need to exhaustively consider these difficult constitutional questions here: there is no evidence that Congress ever has enacted such a scheme of delegation. Neither Merrill nor Field identifies any federal statute expressly delegating power to state courts to make federal common law.²³⁵ Rather, each recognizes that congressional authorizations that

²³³ *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 319 (5th Cir. 1999). The reality of whether courts in Louisiana "make" no law may be quite different. See Albert Tate, Jr., *The 'New' Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877, 913 (1980) (arguing that judicially crafted solutions should be based on Louisiana statutes and constitutional concerns rather than on stare decisis); Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 23, 23 (Joseph Dainow ed., 1974) (explaining that Louisiana judges do not function as "traditional civilian judge[s]" do).

²³⁴ Indeed, the Court recently left open the possibility that there may be other limitations as well on the authority of Congress to regulate state courts in the service of federal policy. See *Jinks v. Richland County*, 123 S. Ct. 1667, 1672 (2003) (reserving judgment on the question of whether Congress has authority to regulate state court procedures in state law cases); Bellia, *supra* note 175, at 950 (questioning Congress's authority to regulate state court procedures in state law cases).

²³⁵ Merrill points out that express congressional delegations of lawmaking authority to state courts are rare, Merrill, *supra* note 7, at 42, citing as one example Federal Rule of Evidence 501, which provides that in federal question cases, "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." Field notes that "no Justice

legitimate a court's making federal common law will almost always be implied.²³⁶

It is not a fair inference that a federal statute that has gaps, open-textured provisions, or language that captures a common law standard delegates to the courts of fifty different states legislative power to make federal law. First, as a matter of plain textual meaning, it would seem strange to infer from a federal statute with open-ended provisions a congressional intent that fifty different court systems legislate federal law that none has power to enforce nationally. Second, as a matter of specific interpretive principles, it is significant that a determination that Congress has authorized state courts to make federal law is a determination that federal law so made preempts state law.²³⁷ The Supreme Court has held that express preemption occurs only when it is the "clear and manifest purpose of Congress."²³⁸ The "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."²³⁹ The Court also has "recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law."²⁴⁰ Whether preemption is express or implicit, it is *federal* law—a law that at some level of generality operates uniformly throughout the United States—that preempts state law. The very nature of federal law would seem to preclude any inference from a statute with gaps or open-textured provisions that, in enacting them,

has . . . advocat[ed] a specific intent standard." Field, *supra* note 6, at 945. Furthermore, she argues that, even if such a standard were adopted, the impractical nature of a specific congressional intent requirement would lead to a list of exceptions consuming the rule. *Id.*

²³⁶ See Field, *supra* note 6, at 942 (stating that the judiciary "decid[es] whether a directive is implicit in any particular enactment"); Merrill, *supra* note 7, at 42 (noting that "[i]mplied delegated lawmaking is much more common" than express delegation).

²³⁷ See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) ("[W]e have held that 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 . . . by federal law of a content prescribed . . . by the courts—so-called 'federal common law.'" (citation omitted)).

²³⁸ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²³⁹ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

²⁴⁰ *Id.* at 64 (citation omitted) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Congress intended state law to be preempted by a "federal" law that state courts are to make according to their views of what the national interest requires. If Congress intends state law to be preempted by a federal law that each state court will make as an adjunct federal legislature, it is fair to expect a clear manifestation of Congress's intent that that is to be the case.

In sum, an inference that when Congress enacts an open-ended provision it intends fifty state court systems to purport to make uniform national law on the basis of what national policy should be, law that no state is capable of enforcing as federal law and the Supreme Court may never see fit to unify, is unwarranted. Even were such an inference warranted or such a delegation made express by Congress, there is a strong case to be made, in light of recent Supreme Court precedent, that Congress may not require state courts to exercise federal legislative power. For these reasons, delegation theories of federal common law appear inadequate under their own positivistic methodology to fully explain whether and when the making of federal common law by state courts is justified.

* * *

From this analysis of inherent and delegated power theories, we see that a general problem with recognizing in state courts a power to make "federal" law is that the law that a state court makes, no matter what the state court calls it, operates only so far as the state's jurisdiction to regulate and enforce its regulations. What, then, if anything, justifies a state court in making federal common law? Is the answer that state courts in reality can make only state law, not federal law, no matter what they call it? The answer is not that simple. Just as real as the fact that the "federal" law that state courts make operates only within the jurisdiction of the state is the fact that a "federal" determination of law by a state court is reviewable by the Supreme Court. The question of when, if ever, state courts are justified in making federal common law accordingly has serious implications for the respective roles of the Supreme Court and Congress in the federal lawmaking enterprise.

III. THE JUDICIAL RESPONSIBILITY OF STATE COURTS IN MAKING FEDERAL COMMON LAW

This Part offers an analysis of when, if ever, the making of federal common law by state courts is justified. Most theories of federal common law proceed by explaining as a matter of constitutional prin-

ciple when courts may or may not exercise a legislative-type authority to make federal common law. This has not proven to be an easy task: the issues are complex, there is no specific constitutional text on the matter, and inferences from the constitutional structure are not easily reconcilable with other inferences that courts have drawn from the constitutional structure in resolving other issues. Accordingly, it may be necessary for courts to make federal law in a real sense, even at the level of identifying a constitutional principle governing when they may make law. An analysis of the authority of courts to make federal common law should attempt to reconcile the quest for constitutional principles governing the authority of courts to make federal common law with the reality that it may be necessary for courts to make federal law even at the level of identifying such constitutional principles. An argument that it would be appropriate for courts to make a legislative-type judgment establishing a constitutional principle that courts may or may not make legislative-type federal common law is not likely to succeed. In most instances, it would be difficult, if not impossible, to prove that the constitutional principle established by a legislative-type judgment is the *right* principle as opposed to other constitutional principles that might result from legislative-type decision making. Of course, the theories of federal common law that the last Part discusses all purport to be right.

To avoid these difficulties, it is necessary to recognize that it does not follow from the fact that in certain cases judges in a real sense make law that they must make it on the basis of legislative-type policy judgments. There is another manner in which judicial decisions may make law—indeed, the manner in which judicial decisions generally appear to make law—that far more easily comports with the Constitution than the legislative manner. This Part explains what that manner is and how it accords with the Constitution. First, this Part explains that it is necessary for state courts to make federal common law in order to render any decision in certain cases that they have a constitutional duty to resolve, including certain cases in which they turn to state law to fill gaps in federal regulatory schemes. Second, it explains the manner in which state courts historically have appeared to make “the law of the land” in cases that today courts describe as governed by federal common law. This manner is qualitatively different from the legislative-type manner upon which scholars have premised their analyses of federal common law. Third, it explains why this manner of judicial lawmaking better comports with the Supremacy Clause than the legislative-type manner. Finally, it explains that this manner of ju-

dicial lawmaking comports with certain normative considerations about how courts can and generally ought to make law. To bring these matters into focus, this Part begins with a case study.

A. A Case Study

Suppose that a plaintiff has a right of action arising under a federal statute against a defendant. Before the plaintiff files suit, the defendant dies. The federal statute is silent regarding whether claims arising under it may be brought against a defendant's estate. May the plaintiff pursue a federal claim against the defendant's estate? This question has arisen in state and federal courts since the time of the Founding. Consider how one state court and one federal court resolved this issue early in the Union and how one state court and one federal court resolved this issue more recently.

Consider first *Franklin v. Low*,²⁴¹ an 1806 case decided by the Supreme Court of New York. Franklin mailed a letter containing several hundred dollars' worth of bank notes at the federal post office in New York. A postal clerk opened the letter and stole the money. Franklin brought an action in assumpsit against the estate of the deceased postmaster of New York City for recovery. Franklin's counsel characterized the case as one of "first impression, arising under the act of congress for the establishment of the post-office."²⁴² An act of Congress set forth general duties of postmasters and further required the Postmaster General to give postmasters "instructions relative to their duty."²⁴³ The Postmaster General of the United States gave all postmasters instructions that each "was to be answerable for the fidelity and care of every person employed by him."²⁴⁴ The Supreme Court of New York framed the issue for decision as follows: "[W]hether any suit can be maintained against the representatives of a deceased postmaster, for the embezzlement of money by a clerk in the office, by taking the same out of a letter deposited in the office for transportation by the mail."²⁴⁵

The court held that the suit could not be maintained, drawing a distinction that Lord Mansfield drew in the English case of *Hambly v.*

²⁴¹ 1 Johns. 396 (N.Y. Sup. Ct. 1806).

²⁴² *Id.* at 397.

²⁴³ An Act to Establish the Post-Office of the United States, ch. 43, § 1, 1 Stat. 733 (1799).

²⁴⁴ *Franklin*, 1 Johns. at 397.

²⁴⁵ *Id.* at 402.

Trott.²⁴⁶ the plaintiff could recover against an estate only if the deceased defendant personally benefited from the injury that the plaintiff suffered, but not if the defendant's liability arose merely *ex delicto* (from a wrong or tort).²⁴⁷ In this regard, the court found the determinative issue to be whether the proper form of action for bringing this case would require a plea of "not guilty" by the defendant, for, if it would, that would signify "that the guilt of a deceased person is tried; and that the assets are not benefited."²⁴⁸ The court determined that the plaintiff could maintain an action in assumpsit, an action which would not have required a plea of not guilty, only if there was an actual gain to the deceased defendant from the clerk's misfeasance. As there was no such actual gain, assumpsit was unavailable. Accordingly, the defendant's liability could only arise *ex delicto*, and the action did not survive. The opinion of the court concluded with a broader jurisprudential statement: "Whether originally the law was wisely established, is not for me to inquire; it is sufficient for me that it is established, and that we are bound to pronounce it."²⁴⁹

A federal court addressed a similar issue in 1829 in *United States v. Korn*.²⁵⁰ In *Korn*, the United States brought an action to recover a penalty from the estate of a deceased defendant pursuant to a federal revenue law. The only question before the court was "whether an action for the recovery of it may be maintained against his administrator."²⁵¹ The court held that the action could not be maintained, as "[t]he English cases are uniform, confirmed by several in our own country, particularly in New York, that actions founded in tort or misfeasance, and arising *ex delicto*, die with the person."²⁵²

Now consider two relatively recent cases, one decided in federal court and one in state court, in which similar questions arose, namely,

²⁴⁶ 98 Eng. Rep. 1136 (1776).

²⁴⁷ *Franklin*, 1 Johns. at 403.

²⁴⁸ *Id.* When the general issue to be tried upon a form of action, such as trespass, was "guilty or not guilty," the only issue tried was whether the defendant committed the wrong that the specific form of action was fit to remedy. Whether the defendant benefited therefrom was not relevant. See HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 178 (London, Joseph Butterworth & Son 1824) (explaining that "in *Trespass*, the general issue, *not guilty*, evidently amounts to the denial of the trespasses alleged, and no more"); JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS 599 (Boston, Carter & Hendee, 2d ed. 1829) (providing an example of the plea of not guilty upon the general issue in a trespass action).

²⁴⁹ *Franklin*, 1 Johns. at 403.

²⁵⁰ 26 F. Cas. 815 (E.D. Pa. 1829) (No. 15,543).

²⁵¹ *Id.* at 815.

²⁵² *Id.*

whether particular federal claims survived the death of the defendant. In the 1997 case of *Epstein v. Epstein*,²⁵³ the United States District Court for the Southern District of New York addressed whether a plaintiff may bring a right of action arising under the federal Racketeer Influenced and Corrupt Organizations Act (RICO)²⁵⁴ against the estate of a deceased defendant. One member of the Epstein family brought suit against the estate of his brother (and others) alleging that the brother siphoned funds from the family business into personal ventures in violation of RICO. The issue before the court was whether a RICO claim survives the defendant's death, "an arguably unsettled issue of law" in the court's view.²⁵⁵ In framing the issue, the court explained that neither RICO nor any other federal statute "specifically addresses whether a private civil claim survives a party's death."²⁵⁶ "Accordingly," the court explained, "the issue is governed in the first instance by principles of federal common law."²⁵⁷ The court recited federal common law precedent "that a claim survives a party's death if it is 'remedial' rather than 'punitive.'"²⁵⁸ The estate argued that this issue—whether a RICO claim is remedial or punitive—should be determined case by case pursuant to a multifactor balancing test.²⁵⁹

The court rejected this approach on the grounds that "the prescribed factors in such tests are both numerous and unweighted," and thus "they provide a facade behind which a court can reach almost any result without appearing to depart from the application of the test."²⁶⁰ The court preferred, rather, a bright-line rule that civil RICO actions survive the death of the defendant because in all cases such claims are remedial. The court reasoned that Congress's "purpose in creating RICO's private right of action was to provide victims with a remedy."²⁶¹ RICO, the court explained, was modeled on damage provisions in the antitrust law that courts have deemed "remedial." Moreover, in other contexts, federal courts had "described RICO's private right of action as remedial in nature."²⁶² The court concluded:

²⁵³ 966 F. Supp. 260 (S.D.N.Y. 1997).

²⁵⁴ Pub. L. No. 91-452, 84 Stat. 922-23 (codified as amended at 18 U.S.C. §§ 1961-1968).

²⁵⁵ *Epstein*, 966 F. Supp. at 260.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 260-61 (citing *Carlson v. Green*, 446 U.S. 14, 23 (1980)).

²⁵⁹ *Id.* at 261.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 262.

²⁶² *Id.*

"By operation of *settled* principles of federal common law, it follows *a fortiori* that such claims survive a [defendant's] demise" ²⁶³

In the 1991 case of *Bank of Northern Illinois v. Nugent*, ²⁶⁴ the issue of whether a civil RICO claim survives the death of the defendant came before an Illinois appellate court. The plaintiff bank in *Nugent* had extended credit to an automobile leasing company, and Nugent and others had provided personal guarantees. ²⁶⁵ The bank brought an action against Nugent's estate and others alleging that certain of the defendants had caused the company to use funds in a manner contrary to the terms of the loan agreement, violating RICO. An issue in the case was whether a civil RICO action "survive[s] the death of the alleged wrongdoer." ²⁶⁶ In framing the issue, the court explained: "The RICO statute contains no provision regarding survival or abatement of a cause of action brought under it. Since there is no applicable general Federal statute, Federal common law governs the survival of a RICO claim." ²⁶⁷ Under federal common law, the court explained, "a determination of whether a civil RICO action is penal or remedial is necessary to resolve this issue." ²⁶⁸ The court proceeded to cite several federal district court cases that had "decided this issue" and to explain that "these decisions are not uniform, and there is clearly a split among districts." ²⁶⁹

The court went on, however, to distinguish all of these cases as "factually inapposite" to the one before it: "[T]he cases cited above address the issue of whether a claim for treble damages under RICO may be assessed against an estate for conduct only of the decedent during his lifetime. In this case, the complaint alleged fraudulent conduct both before and after decedent Nugent's death." ²⁷⁰ Without further discussion, the court found that the estate's defenses to the RICO claim against it should be dismissed because they "lack[ed] merit" and were "unavailing." ²⁷¹

²⁶³ *Id.* at 263 (first emphasis added).

²⁶⁴ 584 N.E.2d 948 (Ill. App. Ct. 1991).

²⁶⁵ *Id.* at 951.

²⁶⁶ *Id.* at 958.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 959.

Each of these cases was decided on the basis of a rule of decision that would qualify today as “federal common law.”²⁷² Some of them, too, in a real sense made federal common law. In *Franklin*, the New York court made a judgment about the legal materials upon which it relied that was one among other valid judgments that it could have made based on the precedents it considered. In determining whether “the form of action requires a plea of not guilty”—the question determinative of whether the action arose *ex delicto*—the court relied on its “recollection” that there was no instance of assumpsit being brought in similar circumstances and in fact concluded that assumpsit could not be brought because there was no gain.²⁷³ A dissenting judge concluded that assumpsit could lie against a testator even where he had realized no gain if there was a contract from which he might have gained, which the dissenting judge concluded there was.²⁷⁴ Neither the court nor the dissent cited any case with which the other’s reasoning was inconsistent, presumably because none was available.²⁷⁵ Rather, each endeavored to explain only that its reasoning was in line with prior precedent. The court explained, “[t]here is not, in my recollection, an instance of *assumpsit* having been brought in a case like the present.”²⁷⁶ The dissent explained that assumpsit properly could lie “[w]ithout . . . interfering with any adjudged case” and “consistently, too” with *Hambly*.²⁷⁷ If it were true before *Franklin* that the dissent’s judgment would have been consistent with prior precedent, it was no longer true after *Franklin*. In this sense, the *Franklin* Court made law. The judgment that the court made (that “no action would lie on an *assumpsit*”) resulted in the application of a rule of decision (that no “suit can be maintained against the representatives of a de-

²⁷² At the time that *Franklin* was decided, “federal common law” was a meaningless term; rather, general principles of law occupied some of the field that federal common law occupies today, including the question presented in *Franklin* of whether personal actions survived the death of the defendant. See *infra* notes 295-305 and accompanying text (discussing the role of such principles).

²⁷³ *Franklin v. Low*, 1 Johns. 396, 402 (N.Y. Sup. Ct. 1806).

²⁷⁴ *Id.* at 405 (Livingston, J., dissenting).

²⁷⁵ The analysis of each case here will assume that the precedent the court considered was the most relevant precedent to the issue before it. It is conceivable that there was precedent that the court did not consider that, fairly read in light of the precedent it did consider, compelled either the determination the court made or one it did not make. But it also is conceivable that no such precedent existed. For purposes of showing that more than one determination can be justifiable in light of existing precedent, it will suffice to proceed on the assumption that no such precedent existed.

²⁷⁶ *Franklin*, 1 Johns. at 402.

²⁷⁷ *Id.* at 405 (Livingston, J., dissenting).

ceased postmaster, for the embezzlement of money by a clerk in the office, by taking the same out of a letter deposited in the office for transportation by the mail")²⁷⁸ with which the dissent's judgment would from thenceforth be inconsistent and accordingly foreclosed in courts bound to rule in accordance with *Franklin's* holding.

In *Korn*, on the other hand, the court made no apparent judgment that resulted in any real sense in the making of law. Neither the court nor the parties in *Korn* perceived that any different sources of law or legal principles applied to the question presented than those that the New York court applied in *Franklin*, or that the action for a penalty arose in any way other than *ex delicto*. The court's application of the principle that "actions founded in tort or misfeasance, and arising *ex delicto*, die with the person"²⁷⁹ did not involve any apparent judgment that would alter the way in which future courts bound to follow *Korn* could read the precedents upon which *Korn* relied.

The same cannot be said, however, of the two more recent precedents, *Epstein* and *Nugent*. The *Epstein* court applied Supreme Court precedent that a claim survives "if it is 'remedial' rather than 'punitive.'"²⁸⁰ In doing so, however, it observed that "terms like 'remedial' and 'punitive' are neither self-defining nor mutually exclusive."²⁸¹ The court proceeded to make certain judgments in its analysis that, though apparently in line with Supreme Court precedent, were not the only judgments that the court could validly have made. For example, the court had to decide whether courts should resolve the remedial-punitive issue according to a case-by-case balancing test or a bright-line rule for all civil RICO cases. Its decision to employ a bright-line test seems generally consistent with Supreme Court precedent (the Supreme Court articulates rules of decision that apply to general categories of claims too regularly to warrant citation), and was based on a reason seemingly sound in light of existing federal law (a bright-line rule, according to the *Epstein* court, would generate the certainty that this context warranted and accord with discernable congressional purpose).²⁸²

²⁷⁸ *Id.* at 402.

²⁷⁹ *United States v. Korn*, 26 F. Cas. 815, 815 (E.D. Pa. 1829) (No. 15,543).

²⁸⁰ *Epstein v. Epstein*, 966 F. Supp. 260, 260-61 (S.D.N.Y. 1997).

²⁸¹ *Id.* at 261.

²⁸² *See id.* at 261-62 ("Congress' silence . . . cannot reasonably be read as a warrant to the courts to fashion unprecedented multi-factor case-specific tests of [this] kind . . .").

A judgment to balance case by case, however, also could have been consistent with Supreme Court precedent (the Supreme Court has required balancing with respect to other federal common law standards)²⁸³ and based on a sound reason in light of existing federal law (it is conceivable that some RICO claims could be more punitive or remedial than others, and that only a fact-intensive inquiry would determine whether survival in the given case would best serve discernable congressional purposes). The bright-line rule of decision that the court applied—RICO claims survive the death of the defendant in all cases—precludes future courts that must decide in accordance with its holding from balancing the remedial and punitive considerations in the factual context of a particular case. In this sense, the court made federal common law.²⁸⁴

The *Nugent* court also made federal common law in this sense. It distinguished the case before the court from several federal cases addressing the RICO survivability issue on the ground that the complaint alleged predicate conduct occurring both before and after the decedent's death. It cited no precedent for this distinction, nor did it provide any reason why the distinction should make a difference. Rather, it summarily concluded that the distinction rendered the estate's defense that the RICO claim did not survive meritless. Assuming that no Supreme Court holding compelled this decision (or the court would have cited it), it may not have been the only justifiable decision that the court could have made in light of Supreme Court precedent. It is not self-evident why the fact that other defendants engaged in predicate conduct after the defendant's death should justify recovery against the defendant's estate, especially if RICO is understood to be "punitive" in nature, an open question in the case. To the extent that *Nugent* forecloses courts bound to account for its holding from making the determination (seemingly valid at the time *Nugent* was decided) that some or all RICO claims do not survive even if predicate conduct occurred after the defendant's death, *Nugent* made new law.

What, if anything, justified the state courts in *Franklin* and *Nugent* in making purportedly nationally uniform law? Is it something differ-

²⁸³ See *supra* notes 72-76 and accompanying text (discussing *Axess* case).

²⁸⁴ Even though this was a trial court decision, the rule of decision it enforced is authoritative with respect to individuals subject to the jurisdiction of the court; it also is binding on courts that must rule in accordance with its decision, such as the bankruptcy courts of the district.

ent from what, if anything, justified the federal court in *Epstein* in making federal common law?

B. *The Necessity that State Courts Make Federal
Common Law in Certain Cases*

The Supreme Court has held that a state court generally has a constitutional duty to enforce claims that federal law creates, and to enforce federal defenses in adjudicating claims that a nonfederal source of law creates.²⁸⁵ This section argues that if a state court is to fulfill this duty, it cannot avoid making federal law in certain cases. It is often argued that courts can avoid making federal common law by applying state law to an issue to which they otherwise would apply federal common law. Indeed, certain scholars have argued that the Rules of Decision Act requires federal courts generally to apply state law rather than federal common law to issues that the Constitution and federal statutes do not resolve.²⁸⁶ The Rules of Decision Act, interestingly, does not purport to regulate state courts.²⁸⁷ In any event, we should not assume that turning to state law to fill the gaps in a federal regulatory scheme necessarily obviates the need to make federal common law in all cases.

Consider *Nugent*, the Illinois case that in effect made federal common law on the question of whether a particular federal claim survived the death of the defendant.²⁸⁸ Suppose that the *Nugent* court had turned to Illinois law to determine whether a federal civil RICO claim survives the death of the defendant. It would have found the Illinois Survival Act, which provides that certain actions survive the death of a party,²⁸⁹ and Illinois Supreme Court cases interpreting the

²⁸⁵ See *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (“[S]tate courts have concurrent jurisdiction to consider civil claims arising under RICO.”); *Felder v. Casey*, 487 U.S. 131, 151 (1988) (“[T]he Supremacy Clause imposes on state courts a constitutional duty ‘to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.’” (alteratino in original) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942))); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that so long as state courts “have jurisdiction adequate and appropriate under established local law to adjudicate” a federal claim, they “are not free to refuse enforcement”).

²⁸⁶ See *Merrill*, *supra* note 7, at 30-31 (stressing that the Act disavows making federal common law where there is state law that can be applied); *Redish*, *supra* note 7, at 766-67 (describing how courts should implement the Act).

²⁸⁷ See *Weinberg*, *supra* note 7, at 862 (observing that the Act is “limited in application by its own language to *federal courts* only”).

²⁸⁸ *Bank of N. Ill. v. Nugent*, 584 N.E.2d 948 (Ill. App. Ct. 1991).

²⁸⁹ 755 ILL. COMP. STAT. ANN. 5/27-6 (West 1993).

Act. The Illinois Supreme Court has held that “the Survival Act has historically been limited to compensatory damages” and that, conversely, “punitive damages do not generally survive under the Survival Act.”²⁹⁰ Assuming for the sake of simplicity that it made no difference under Illinois law whether predicate conduct by other defendants occurred before or after the defendant’s death, applying Illinois law would have required the *Nugent* court to decide whether an award of treble damages under RICO is remedial or punitive. This is not a judgment, however, that the *Nugent* court could have made without in effect making federal law.

It is state law that allows or does not allow survival *if* a provision is remedial or punitive, but it is federal law that *is* remedial or punitive, and thus *does* or *does not* impose liability against an estate. In other words, though Illinois law would supply the standard—remedial but not punitive actions survive—the standard requires a court to identify features of the federal statute that render it remedial or punitive. Identifying such features will not in all cases qualify as a mere act of “interpretation” under any recognized rule of interpretation. Congress may have enacted a statute that in letter and purpose defies categorization under a state law scheme for which Congress had no regard. If a federal statute is both remedial and punitive as Congress has enacted it, but a court must choose one characterization or the other, the process by which the court classifies the statute as remedial or punitive under state law may result in the making of federal law just as it may when a court must classify a statute as remedial or punitive for purposes of federal common law.

To characterize RICO as, say, “remedial” rather than “punitive” under Illinois law is to identify features of RICO that purportedly any other state court should consider if relevant under its survival law. Indeed, if the law of another state provided the same standard as Illinois law provides for determining whether actions survive the death of the defendant, but the courts of that other state determined that RICO was “punitive” rather than “remedial,” there would be a conflict between courts of different states on a federal question that the Su-

²⁹⁰ Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc., 692 N.E.2d 269, 272 (Ill. 1998). The same general law would have applied if the *Epstein* court had turned to New York law. A New York statute governing survival provides that “[f]or any injury, an action may be brought or continued against the personal representative of the decedent, but punitive damages shall not be awarded.” N.Y. EST. POWERS & TRUSTS § 11-3.2 (McKinney 2001).

preme Court could review on certiorari.²⁹¹ In sum, resorting to state law to "fill the gaps" does not necessarily obviate the need in a given case for a court to make federal common law.

The point is simply this: state courts cannot decide certain cases that they have a constitutional duty to decide without making determinations that in effect make federal common law.²⁹² The Constitution cannot require both that state courts enforce federal law and that state courts make no federal law in doing so. If state courts have a constitutional duty to enforce federal law, they must be justified in making federal common law where necessary to fulfill that duty. If there is an objection to state courts making determinations of federal law that are not traceable by any recognized rule of interpretation to the Constitution or a federal statute, the objection must be to state courts making those determinations *in a certain way*.

C. *How State Courts Historically Have Made the "Law of the Land"*

There are different ways in which courts can be said to make law. A common premise of many theories of federal common law is that if a court is justified in making federal common law, it is justified in willing into existence whatever law it believes would best serve its sense of

²⁹¹ See *Wilson v. Garcia*, 471 U.S. 261, 268 (1985) (holding that "[t]he characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it," and that "[t]hese, of course, are matters of federal law"); *Int'l Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966) ("[T]he characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law.").

²⁹² This is not to say that it is necessary for state courts to make federal law in any case in which federal law provides the rule of decision. But it is necessary more often than some scholars have acknowledged. Redish has argued, for example, that it is necessary for courts to fill gaps only when "the issue being judicially resolved is one that *must* be resolved before the statute may be applied—in other words, where not to decide the issue is effectively to decide it." Redish, *supra* note 7, at 795. Such issues include those that "must be resolved before the statute can be applied to matters concededly within its realm," and excludes "matters simply not reached by the statute's text." *Id.* at 796. This overlooks that it may be necessary for a state court to make federal law even if it turns to state law to fill gaps. Moreover, this distinction is not readily apparent in the case of the civil RICO claim against the deceased defendant's estate. Is the survivability of a RICO claim against the deceased defendant's estate an issue that must be resolved before the statute can be applied to matters concededly within its realm, or a matter simply not reached by the statute's text? If it is the latter, the court's determination that it must dismiss the case because the statute does not address the survival question would be a judge-made determination that no current federal statute compels.

the national interest.²⁹³ It does not follow, however, from the fact that a court is justified in rendering a decision that makes law that it is justified in making law on the basis of purely forward-looking policy determinations. As this section explains, the historical practice of state courts has not been to decide matters that courts today consider to be governed by federal common law as if those courts were making the kind of policy judgment that might move a legislature to make law. Rather, state courts have justified their decisions on the grounds that they are most in line with the requirements of existing legal principles. On the one hand, this point might seem too obvious to be worth making—of course, it might be said, courts generally act as if they are applying rather than making law. On the other hand, in certain instances the Supreme Court has made federal common law for forward-looking policy reasons without any pretense that it was applying existing legal principles.²⁹⁴ Scholars addressing federal common law have typically assumed that courts make federal common law (self-consciously or otherwise) in a way that qualifies as legislative-type policymaking. The fact that state courts have not professed to engage in federal policymaking is significant. Even if state courts in reality have decided federal common law matters on the basis of forward-looking policy considerations, in exceptional cases or as a general practice, the fact that they have consistently professed to decide them on the basis of existing legal principles suggests an understanding that the legitimacy of their decisions depends on their acting in accordance with existing law.

To understand how state courts historically have approached matters of federal common law, it is necessary first to recognize that “federal common law” was not a meaningful term in the late eighteenth, the nineteenth, and the early twentieth centuries. During that time period, “general principles” or “general law” governed several matters that courts today describe as governed by federal common law.²⁹⁵ General law, or the law of nations, governed matters that courts today categorize as commercial law, admiralty and maritime law, conflict of

²⁹³ See *supra* text accompanying notes 14-17 (describing different ways scholars have stated this assumption).

²⁹⁴ See *infra* notes 405-08 and accompanying text (describing example of the Supreme Court acting in this way).

²⁹⁵ See Stewart Jay, *The Origins of Federal Common Law: Part II*, 133 U. PA. L. REV. 1231, 1267-71 (1985) (describing “general law” as “an understood body of existing principles, or at least a jurisprudence capable of being understood through the exercise of reason,” and explaining why, during the era in which general law was thought to operate, “‘federal common law’ was not a meaningful term”).

laws, and private international law. General law existed by virtue of international custom and practice and was distinguishable from "local" law, which governed such matters as realty, probate, and procedure.²⁹⁶ In some cases, courts applied the common law of England to matters that today courts describe federal common law as governing.²⁹⁷ There is no need here to repeat the extensive treatment that others have given to the operation of general law versus local law in the eighteenth and nineteenth centuries.²⁹⁸ Suffice it to say that general principles were not uniquely federal law: general principles operated as the rule of decision in state and foreign courts before there even was a United States federal government. Though general law was not federal law, it was regarded as "the law of the land" in cases in which it applied. St. George Tucker explained in his edition of *Blackstone's Commentaries* that various sources of law would apply in courts of the United States when "the written law is silent," including not just local law, but general law and the common law of England as well.²⁹⁹ In cases in which principles of general law or the common law of England applied, courts should regard them, he wrote, "as the law of the land."³⁰⁰ As Stewart Jay has explained in recent times, "[u]nder the

²⁹⁶ See RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* 51-53 (1977) (describing how these areas of law were considered to be outgrowths of the law of nations).

²⁹⁷ See *id.* at 53-60 (discussing cases in which federal courts applied "general law" or common law to issues now said to be governed by federal common law).

²⁹⁸ See *id.* at 51-60 (discussing categories of law commonly in use in this period); 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, 111-15 (1993) (identifying the previously accepted distinction between "general" and "local" law); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1527-28 (1984) (arguing that late eighteenth century federal courts followed local law in matters of local concern, but rarely found local law dispositive on matters of national concern); Jay, *supra* note 295, at 1263-67 (examining that distinction in the context of Section 34 of the Judiciary Act of 1789).

²⁹⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *429-30.

³⁰⁰ *Id.* State cases in the first decades after ratification routinely referred to general principles as the "law of the land." See *French v. Gray*, 2 Conn. 92, 111 (1816) (describing rules of statutory construction as the "law of the land"); *Evans v. Hesler*, 4 Ky. 561, 561 (1809) (distinguishing local custom from "the general laws of the land"); *Griswold v. Waddington*, 16 Johns. 438, 415 (N.Y. 1819) (referring to "general law of the land"); *Yates v. People*, 6 Johns. 337, 466 (N.Y. 1810) (explaining that decisions of the court on "general principles" were the "law of the land") (opinion of Clinton, J.), *overruled by Mitchell's Case*, 12 Abb. Pr. 249 (N.Y. Sup. Ct. 1861); *Sleght v. Hartshorne*, 2 Johns. 531 (N.Y. 1807) (explaining that the term "usages of trade" can refer either to "general usages of trade, which compose the law of merchants, of universal authority

formulations of the Framers, the interests of the federal government were not thought to require the creation of a distinctive *federal law*" by the courts; "[m]atters of general law possessed by definition a transnational character, while local law was identifiable with the range of concerns that the Framers indicated would remain 'internal' to the states."³⁰¹

In time, general principles dissipated as a source of law in state and federal courts. In the late nineteenth and the early twentieth centuries, the distinction between general law and local law became increasingly blurred,³⁰² the operation of general principles varied more and more from court to court,³⁰³ and the rise of positivistic legal thought led courts to conclude that all law, including general law, must be attributable to a sovereign source.³⁰⁴

Today, federal common law does not occupy the entire field of matters that general law was thought to occupy in its day. For example, in the late eighteenth and the nineteenth centuries, courts described general principles as governing extensive aspects of commercial transactions. Courts today do not describe federal common law as generally governing such matters. Conversely, courts today describe federal common law as governing areas that general law was not understood to govern. For example, courts today describe federal common law as governing when there is a significant conflict between the operation of state law and a uniquely federal interest. Courts in the

among commercial men in civilized societies, and forming one of the constituent parts of the laws of this State, as the general law of the land" or to local usages (emphasis omitted)); *Thomas v. O'Hara*, 8 S.C.L. 303, 303 (S.C. 1817) (distinguishing "general law of the land" from "usages of local origin").

³⁰¹ Jay, *supra* note 295, at 1274-75.

³⁰² See *id.* at 1267 (explaining that the muddling of "the demarcation between general and local law" contributed to the collapse of general law as a source of law); see also BRIDWELL & WHITTEN, *supra* note 296, at 119-22 (explaining how in the late eighteenth and early nineteenth centuries, federal courts began to expand the field in which general law previously was understood to operate—for example, the area of torts).

³⁰³ See Jay, *supra* note 295, at 1267 (explaining that the lack of uniformity in general law that resulted from courts making different determinations of it contributed to the collapse of general law as a source of law).

³⁰⁴ See BRIDWELL & WHITTEN, *supra* note 296, at 123-27 (arguing that the rise of a "positivistic judicial philosophy" contributed to the unsettling of general principles as a source of law). The penultimate statement of this shift is, of course, the following from Oliver Wendell Holmes, which the Court quoted in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79 (1938): "[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it." (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

late eighteenth and the nineteenth centuries did not describe general principles as generally governing such matters. That said, there are significant areas of overlap between the fields that courts historically described general law as occupying and those that courts today describe federal common law as occupying. These include disputes involving the rights and obligations of the United States in commercial transactions, admiralty and maritime disputes, certain interstate disputes, and certain disputes implicating principles of international law.³⁰⁵

Regardless of the source of law operative in state courts—be it general principles or federal common law—the standard practice of state courts in the making of that law has been consistent in one crucial respect: they have not claimed to make that law on the basis of what would be the best policy nationally (federal common law) or transnationally (general principles); rather, they have claimed to decide cases in accordance with the requirements of the *existing* law of the land. The case study presented earlier of how state and federal courts have answered the question whether particular federal claims survive the death of the defendant is illustrative.

As explained, the 1804 New York decision in *Franklin* and the 1991 Illinois decision in *Nugent* made law on this question in a real sense.³⁰⁶ Neither of these courts, however, claimed to make it on the basis of what it thought would implement good policy as a purely forward-looking matter. The *Franklin* court claimed to decide the issue on the basis of a “general and universal proposition” that the court was “bound to pronounce.”³⁰⁷ The court made a judgment in the course of deciding the case: where the testator’s misfeasance causes an injury to the plaintiff but no gain to the testator, assumpsit will not lie unless the defendant’s assets benefit from the misfeasance.³⁰⁸ It characterized the decision as being in line with the precedent that the court considered.³⁰⁹ The dissent’s judgment that assumpsit could lie against the testator if there was a contract from which he might have gained also claimed to be consistent with prior cases.³¹⁰

³⁰⁵ See *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (identifying these as traditional enclaves of federal common law).

³⁰⁶ See *supra* text accompanying notes 241-84 (explaining how these and other courts made law).

³⁰⁷ *Franklin v. Low*, 1 Johns. 396, 402-03 (N.Y. Sup. Ct. 1806).

³⁰⁸ *Id.* at 402.

³⁰⁹ *Id.* at 402-03.

³¹⁰ *Id.* at 404-05 (Livingston, J., dissenting).

The *Nugent* Court too did not claim to decide the survival issue based on what would constitute the best national policy going forward. Rather, recognizing a split of federal authority on the question, the court reasoned from what it characterized as an existing principle: where predicate conduct occurs after the death of the defendant, the RICO claim survives that death.³¹¹ The opinion professed to accord with all prior cases addressing this issue, regardless of whether they found RICO to be remedial or punitive.

The characterization of courts historically purporting to “find” law as a “brooding omnipresence in the sky”³¹² versus “making” law “with the self-conscious goal of bringing about social change”³¹³ is familiar. It is unhelpful, however, in categorizing state court cases in which the “law of the land” has been a rule of decision.³¹⁴ Neither category captures the lawfinding or lawmaking process at work in *Franklin* and *Nugent*. Courts can discern requirements of existing law without those requirements being a “brooding omnipresence in the sky” and can make law without doing so “with the self-conscious goal of bringing about social change.” *Franklin* and *Nugent* appear to have made law as a necessary consequence of an effort to best discern and apply existing legal principles. In this respect, they are typical of a method of state court decision making regarding matters of general principles and federal common law that generally has obtained since the time of the Founding.

First, consider cases that state courts described general law as governing in the first half of the nineteenth century that, if brought to-

³¹¹ See *Bank of N. Ill. v. Nugent*, 584 N.E.2d 948, 958 (Ill. App. Ct. 1991) (dismissing arguments that a civil RICO action does not survive the death of the alleged wrongdoer).

³¹² See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .”).

³¹³ Morton Horwitz has argued that judges in the early nineteenth century “came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 30 (1977).

³¹⁴ Randall Bridwell and Ralph Whitten have explained in a helpful way the limitations of this dichotomy. See BRIDWELL & WHITTEN, *supra* note 296, at 51–53 (arguing that federal courts in the early eighteenth century did not try to decide general law cases according to transcendental legal principles or strategic policy design, but rather according to established custom).

day, courts would describe federal common law as governing.³¹⁵ One category of such cases is those implicating certain proprietary rights and obligations of the United States.³¹⁶ In *Commonwealth v. Gamble*,³¹⁷ for instance, the Pennsylvania Supreme Court had to resolve whether the enlistment of a minor in the Marines was a valid contract. The court held that it was, on the following grounds:

[The common law of England holds that a minor is] at liberty to enter into a contract to serve the state, wherever such contract is not positively forbidden by the state itself; [moreover] there is nothing in the constitution of the government, or of the circumstances of the people of this country, to afford a reason why it should not be the common law here. In a state of war, the necessity of such a principle is obvious; and the same necessity exists, although in a less degree, in a state of peace.³¹⁸

The court's decision purported to be consistent with existing legal principles ("the common law of England") and their rationale ("the necessity of such a principle is obvious").³¹⁹

³¹⁵ These cases emerged from a review of all state court cases contained in Westlaw databases that were decided between 1791 and 1840 and that include the words "United States," the words "Cong." or "Congress" within two words of "Act," or the word "federal" within two words of "act" or "statute." The intent was to capture as many cases as possible in which the interests of the United States would be involved or issues would arise in the enforcement of a federal statute that the statute did not itself resolve. The process of gathering cases did not employ, strictly speaking, scientific procedures to ensure a random sample. That said, if a significant number of cases exist that defy the description set forth in this section, it seems that at least a few would have emerged in the hundreds of cases reviewed.

³¹⁶ The Supreme Court has held in recent times that federal common law governs certain proprietary interests of the United States. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (explaining that "obligations to and rights of the United States under its contracts are governed exclusively by federal law"); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (holding that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law"). State courts resolved such matters in the first half of the nineteenth century on the basis of general law, where it applied, and in a way that professed to accord with existing general law principles.

³¹⁷ 11 Serg. & Rawle 93 (Pa. 1824).

³¹⁸ *Id.* at 94.

³¹⁹ *Id.*; see also *Martin's Adm'r v. United States*, 18 Ky. (2 T.B. Mon.) 89, 90 (Ky. 1825) (holding that in an action by the United States to collect on a distiller's bond, the distiller's act of giving 400 gallons of whiskey to the revenue collector was not an accord and satisfaction of the distiller's obligation to the United States on grounds that an accord and satisfaction depends "entirely upon the authority of the collector to receive whisky in payment of the obligation," which under general agency principles the agent did not have), *readjudicated with same result by* 20 Ky. (4 T.B. Mon.) 487 (Ky. 1827); *State v. Dimick*, 12 N.H. 194, 199 (1841) (holding that a minor who entered into a contract of enlistment with the United States Army without the consent of his parent, which a federal statute required for a minor to enlist, could ratify the contract

This method of decision making is also evident in cases involving the civil liability of federal officials.³²⁰ For example, in *Maxwell v. M'Ivory*,³²¹ the Court of Appeals of Kentucky (the highest Kentucky state court at the time) had to resolve whether a deputy federal postmaster was liable to a party wronged by his negligence in office. The court resolved that

[u]pon general principles . . . he ought to be liable, if the charge against him be true in fact; for there is no maxim of law less unexceptionable, upon the solid basis of right and sound policy, than that he who, for gain or a premium, undertakes to perform an act or discharge a duty, and from negligence or culpable omission suffers the interest and property of his employer to be destroyed or lost, is liable for the injury.³²²

Again, the court claimed that its decision was consistent with existing law ("general principles") and its rationale ("upon the solid basis of right and sound policy").³²³

upon reaching the age of majority so as to render it binding on the ground "that the contract of enlistment was one which the infant might ratify, on his coming of age, so as to bind himself; and that this might be done by his acts, in the same manner that he might ratify other contracts"); *Blake v. Johnson*, 1 N.H. 91, 92 (1817) (holding that a collector of duties upon carriages who conducts a distress and sale under a federal statute must keep the goods for a reasonable time before selling them on grounds that "[t]he common law in no case authorized the immediate sale of a distress[, nor is such sale] warranted by statute, either in *England* or in this country"); *United States v. Vaughn*, 3 Binn. 394, 399-400 (Pa. 1811) (holding that the United States may not attach bank stock as the property of individuals, in whose name the stock was held in the books of the bank but who in fact had sold the stock to others, on grounds that "a mere chose in action equitably assigned, is not subject to the operation of a foreign attachment instituted against the party, whose name must necessarily be used at law for the recovery of the demand; and that an attaching creditor can stand on no better footing than his debtor," a principle which "appears from the *English* authorities, and the adjudications in our sister states' courts").

³²⁰ The Supreme Court has held in several contexts in recent times that federal common law governs "the civil liability of federal officials for actions taken in the course of their duty." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988).

³²¹ 5 Ky. (2 Bibb) 211 (1810).

³²² *Id.* at 213-14.

³²³ *Id.* at 213. Another example is *Schroyer v. Lynch*, 8 Watts 453 (Pa. 1839), in which the court decided the issue of whether a deputy postmaster was liable for delinquencies of an assistant that the assistant had concealed from the deputy with reference to the principle that

every deputy postmaster ought to devote a proper portion of his time, either to the performance of the duties of his office himself in person, or to the superintendence of his assistants while employed in performing the same . . . that he may be made liable for losses occasioned through the want of such personal attention on his part, seems to be equally reasonable and just. . . . The answer of the court below, in every other respect . . . appears to be in accordance with the authority of *Dunlap v. Monroe* [a United States Supreme

This method of decision making is also evident in cases resolving certain issues of international law.³²⁴ In *Amory v. M'Gregor*,³²⁵ for example, the New York Supreme Court had to decide whether an American citizen, upon the outbreak of war, had the right to withdraw his goods from the enemy country. In resolving this issue, the court explained:

That all trading with an enemy is illegal, is a general and well settled rule. The principle is recognised and sanctioned, as well by the common law, as by the maritime codes of all the European nations. It is a wise and salutary rule; but it would require the most direct and controlling authority, to satisfy my mind, that the mere act of withdrawing goods from the enemy's country, at the breaking out of a war, comes within the reason or policy of the rule; and no case has fallen under my observation, that has pressed the principle thus far.³²⁶

In other words, the court explained, "[i]ntercourse, inconsistent with actual hostility, is the offence against which the operation of the rule is directed,"³²⁷ not removing one's own property from an enemy country. To the extent that this case developed, rather than merely applied, general law principles, it did so through a process of ascertaining the requirements of existing law ("no case . . . has pressed the principle thus far") and its rationale ("intercourse, inconsistent with actual hostility" is the existing rule's concern).³²⁸

Court case] and therefore free from error.

Id. at 457-58.

³²⁴ Recently scholars have debated vigorously the idea that certain principles of international law operate in the jurisdiction of the United States as federal common law. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 873-76 (1997) (questioning the validity of customary international law operating as federal common law), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1841 (1998) (supporting the rule that international law is federal law). There is no need here to take a position in this debate. Suffice it to say that when matters implicating international law arose in cases within the proper jurisdiction of state courts in the first half of the nineteenth century, state courts resolved such matters based on general principles of the law of nations and in a way that purported to respect those principles.

³²⁵ 15 Johns. 24 (N.Y. Sup. Ct. 1818).

³²⁶ *Id.* at 34-35 (emphases and citation omitted).

³²⁷ *Id.* at 35 (emphasis omitted).

³²⁸ *People v. McLeod*, 25 Wend. 483 (N.Y. Sup. Ct. 1841), provides another example. The court had to decide whether New York courts could prosecute a British subject who committed a homicide in New York. The defendant asserted that he committed the homicide at the direction of Great Britain, a defense of possible merit if the United States and Britain were at war. An issue in the case, then, was whether the two countries in fact were at war. In addressing this issue, the court cited writers on the law of nations, Blackstone, and English cases to discern the governing law. The court be-

Even during the late nineteenth and early twentieth centuries—when, it has been argued, the “legitimation of a positivistic judicial philosophy . . . produced a decline in the studious examination and use of precedent in accordance with its historically founded limitations”³²⁹—it is not the case that state courts claimed to decide cases according to what they thought general principles should be. As the positivistic thinking that culminated in *Erie* came to prevail, courts began a process of attributing matters of general law to either state or federal law.³³⁰ For example, in *Southern Railway Co. v. Prescott*,³³¹ the Supreme Court determined that the Interstate Commerce Act “manifest[ed] the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions.”³³² As Congress had set forth no such uniform rule, general principles had to govern. To generate uniform-

lied that “on the question of war or peace there is a *quo animo* of nations, by which we are bound.” *Id.* at 579.

In *Wall v. Robson*, 11 S.C.L. (2 Nott & McC.) 497 (S.C. Ct. Const. App. 1820), the court held that a war suspends the operation of the statute of limitations between the citizens of the two countries during the time the war continues on this reasoning:

From the foregoing principles, laid down by Lord Coke, it appears, that the common law recognizes the civil law, and they both coincide and harmonize upon this important subject, namely, that in time of war no action can be maintained by an alien enemy; but upon the return of peace, all the friendly relations between the subjects and citizens of the two countries are restored, and their rights may be mutually prosecuted in the courts of justice in either country, respectively, without hindrance or interruption.

Id. at 502; see also *Griswold v. Waddington*, 16 Johns. 438, 444-45, 448 (N.Y. Sup. Ct. 1819) (holding that the court should “sustain a suit in favour of a citizen on his contract made with an enemy, and arising out of his commerce with the enemy in time of war” only after analyzing “the authorities, in order to discover what are the correct opinions and decisions of the enlightened part of mankind”); *Clarke v. Morey*, 10 Johns. 69, 73 (N.Y. Sup. Ct. 1813) (holding that an alien living in the United States during time of war between the United States and her country is entitled to sue and be sued as in time of peace, for, among other reasons, “it has now become the sense and practice of nations, and may be regarded as the public law of Europe” (emphasis omitted)); *Commonwealth v. Holloway*, 1 Serg. & Rawle 392, 396 (Pa. 1815) (holding that an alderman may not imprison the seaman of a foreign vessel, shipping in England, who has deserted in an American port, until he finds security to go on his voyage on the following grounds: from the “the usage and practice of nations,” the court could not “say that, from any evidence which has been adduced to us, there prevails such an uniform and general practice, as is entitled to the name of the law of nations”).

³²⁹ BRIDWELL & WHITTEN, *supra* note 296, at 123.

³³⁰ That process continues today, as shown by recent debates over whether customary international law is state law or federal common law. *Supra* note 324.

³³¹ 240 U.S. 632 (1916).

³³² *Id.* at 639-40.

ity, the Court characterized the operation of general principles in this area as a federal matter: "[T]he measure of liability under [the Act] must . . . be regarded as a federal question. . . . And the question . . . is none the less a Federal one because it must be resolved by the application of general principles of the common law."³³³

Where the Supreme Court "federalized" general principles of law, state courts as a standard practice claimed to follow Supreme Court determinations of those principles.³³⁴ In other matters, general law remained distinct from federal law. It is interesting to observe how state courts treated Supreme Court precedent on general law regarding such matters. In countless cases, state courts simply explained how their determinations of federal law were "affirmed by" or "supported under" Supreme Court decisions.³³⁵ In other cases (fewer and

³³³ *Id.*

³³⁴ See, e.g., *Mut. Orange Distribs. v. Atchison, Topeka & Santa Fe Ry. Co.* 217 Ill. App. 23, 29-31 (1920) (citing *Prescott* and applying its principle); *Conover v. Wabash Ry. Co.*, 208 Ill. App. 105, 111-12 (1917) (same); see also *Klinge v. S. Pac. Co.*, 57 P.2d 367, 370 (Utah 1936) ("The question of the proper measure of damages is inseparably connected with the right of action, and, in cases arising under the Federal [Employers' Liability] Act . . . it must be settled according to general principles of law as administered in the Federal Court.") (internal quotation marks and citation omitted); *Miller v. Miller*, 257 Ill. App. 287, 298 (1930) (applying same principle); *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. McWhorter*, 275 S.W. 363, 364 (Ky. 1925) (same); *Louisville & Nashville R. Co. v. Briggs*, 215 S.W. 529, 531 (Ky. 1919) (same); *Crecelius v. Chicago, Milwaukee & St. Paul Ry. Co.*, 223 S.W. 413, 416 (Mo. 1920) (same); *Sheean v. Hines*, 184 N.W. 934, 938 (Neb. 1921) (same). State courts applied this reasoning in actions under other federal statutes as well. For example, in *St. Louis-San Francisco Railway Co. v. Barron*, 267 S.W. 582 (Ark. 1924), the court held that in an action under the Federal Safety Appliance Act, certain questions relating to liability must be resolved according to United States Supreme Court precedent, for "the test of all substantive questions relating to liability must depend upon the Federal statute and the interpretation thereof by the Supreme Court"; only upon finding no precedent did the court decide it was "at liberty to look to the general principles of the law as announced by our own court." *Id.* at 584-85.

These state court cases, as well as the remainder of state court cases cited in this section, emerged from a review of all state cases contained in Westlaw databases that were decided between 1842 (the year that the Court decided *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)) and 1938 (the year that the Court decided *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)), and that include the phrases "Supreme Court," "United States," and "general principles."

³³⁵ See, e.g., *U.S. Fid. & Guar. Co. v. First Nat'l Bank*, 140 So. 755, 759 (Ala. 1932) ("The conclusion [of an Alabama case decided according to general principles of law] is supported under the rule of subrogation by the decision cited from the Supreme Court of the United States . . ."); *Am. Radio Stores, Inc. v. Am. Radio & Television Stores Corp.*, 150 A. 180, 183 (Del. Ch. 1930) ("[U]nder the general principles of law governing in unfair competition cases . . . trade-mark rights rest in user. As was said by the Supreme Court of the United States . . ."); *Paducah Distilleries Co. v. Crescent Mfg. Co.*, 6 Teiss. 151, 155 (La. Ct. App. 1909) ("The general principles applicable to

more far between), state courts voluntarily overturned their own precedents on matters of general law in light of Supreme Court precedent on such matters,³³⁶ or deemed themselves compelled to follow such Supreme Court precedents.³³⁷ Under either approach, the

trade-marks and the conditions under which a party may establish an exclusive right to the use of a name or symbol, are well settled by . . . decisions of the Supreme Court of the United States . . ."); *Cumberland Glass Mfg. Co. v. De Witt*, 87 A. 927, 931 (Md. 1913) ("[T]here ought not be any difficulty about the general principles of law in this State applicable to this class of actions. . . . The doctrine . . . has been affirmed by the Supreme Court of the United States . . . and is followed by many of the state courts."); *Hastings v. Mont. Union Ry. Co.*, 46 P. 264, 265 (Mont. 1896) ("The general principles of the law of master and servant . . . are controlling in this instance. We note . . . that the [S]upreme [C]ourt of the United States . . . has reiterated the doctrine . . ."); *Robinson v. Centenary Fund & Preachers' Aid*, 54 A. 416, 417 (N.J. 1903) ("These are the general principles laid down in the text-books and recognized in the Judicial Reports of this state. . . . To the same effect is the recent decision of the Supreme Court of the United States . . ."); *Mitchell v. Carolina Cent. R.R. Co.*, 32 S.E. 671, 673 (N.C. 1899) ("The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases. . . . [A] few citations from the Supreme Court of the United States, which sustain the rule most favorable to the carrier, will sufficiently illustrate this view. . . ." (internal quotation marks omitted)); *Carlisle v. Wishart*, 11 Ohio 172, 191-92 (1842) (en banc) ("It is believed that the law, as thus settled by the highest tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states."); *Whale v. Rice*, 49 P.2d 737, 741 (Okla. 1935) ("The principle invoked is well recognized in law. As stated by the Supreme Court of the United States . . ."); *Mason v. Apalache Mills*, 62 S.E. 399, 401 (S.C. 1908) ("These general principles are also stated and form the basis of . . . [an] opinion of the Supreme Court of the United States . . ."); *Tait's Ex'r v. Cent. Lunatic Asylum*, 4 S.E. 697, 701 (Va. 1888) ("These general principles are of the utmost importance in the administration of justice. . . . And in a recent case in the [S]upreme [C]ourt of the United States the rule, and the reason upon which it is founded, is stated . . .") (internal quotation marks omitted); *Walker v. Beauchler*, 68 Va. (27 Gratt) 511, 519 (1876) ("[T]he [S]upreme [C]ourt of the United States has . . . decided that the late conflict was a war . . . and that . . . to determine how the contracts, rights and obligations of citizens were affected by that war, recourse must be had to the general principles applicable to a state of war between nations.").

In *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 527 (1928), the Supreme Court observed that "state courts quite generally construe the common law as this Court has applied it."

³³⁶ See, e.g., *Metro. Nat'l Bank of N.Y. City v. Gordon*, 28 Ark. 115, 118 (1872) ("And when the highest court of the nation has repeatedly considered and fully settled the law upon questions alike cognizable before them and us, we are disposed to conform to their ruling, even to the overruling of the decisions of our own court.").

³³⁷ See, e.g., *Straughan v. Fairchild*, 80 Ind. 598, 600-01 (1881) ("On a subject of such general importance, and concerning which there can not properly be a local rule . . . and since the highest tribunals in this country and in England are ruling in harmony upon the point, a State court can hardly be justified in adopting . . . a different rule."); *Martin v. Hibernia Bank & Trust Co.*, 53 So. 572, 574-75 (La. 1910) ("The principle . . . is supported by the great weight of authority, and on questions of commercial law the decisions of the Supreme Court of the United States should be fol-

decision-making process in state courts professed to be one of deciding in accordance with the requirements of existing precedent.

In other cases, state courts rejected Supreme Court determinations of general principles for one of two (or both) reasons. One reason was that the Supreme Court determination, in the state court's view, did not accord with general principles, *with which the state court believed its decision must accord*.³³⁸ The other was that the Supreme Court's decision conflicted with the decision of a higher state court *that the state court deemed itself bound to follow*.³³⁹ In neither case were state courts purporting to decide issues on the basis of what they thought national or international policy should be.

In sum, state courts as a general practice historically have decided matters of general law and federal common law in ways that claim to hew to existing precedent.³⁴⁰ While this observation may seem obvi-

lowed both for their authoritative weight, and for the sake of uniformity so desirable in the matter of negotiable instruments.").

³³⁸ An example is *Midland National Bank v. Security Elevator Co.*, 200 N.W. 851 (Minn. 1924). There the court stated:

It is with painful reluctance that, on this question of general import, we cannot adopt the rule of the Supreme Court of the United States. . . . [W]hile the uniformity of decision so desirable upon questions of general law can best be achieved in this country by following the lead of the Supreme Court, yet each state court is at liberty to disregard its leadership, for the time being, when satisfied that a rule has been adopted, as a rule of the common law, as to which there is, not a conflict among those authorities recognized as evidence of that law, but an absence of authority.

200 N.W. at 855 (internal quotation marks omitted); *see also* *Wilcox v. Draper*, 10 N.W. 579, 585 (Neb. 1881) ("A desire to conform our rulings . . . to those of the supreme court of the United States, and thus secure uniformity of decisions, inclines us to follow . . . [the decisions of] that court. But it is of much greater importance that decisions shall be based upon sound principles and correct law."); *Bindley v. Martin Bros.*, 28 W. Va. 773, 792 (1886) ("The progress of the legal opinion of this country is towards the position of the modern English courts, and the disposition, to depart from the law as laid down by the Supreme Court on account of the difficulty of applying it because of the many exceptions . . .").

³³⁹ *See, e.g.*, *Ga. R.R. & Banking Co. v. Stanley*, 145 S.E. 530, 532 (Ga. Ct. App. 1928) ("In respect to questions of general law, the State courts are required to follow the decisions of the highest court of the State, and are not bound by the authority of the Supreme Court of the United States" (quoting *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*, 99 N.E. 920, 924 (1912))).

³⁴⁰ This is not in any way to deny that at various times states have resisted the operation of certain federal laws. The famous Kentucky and Virginia resolutions of 1798 and 1799 claimed certain powers in states to declare acts of Congress unconstitutional. Thomas Jefferson, *Kentucky Resolutions* (Nov. 10, 1798 & Nov. 14, 1799), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 131-35 (Philip B. Kurland & Ralph Lerner eds., 1987); James Madison, *Virginia Resolutions* (Dec. 21, 1798), *reprinted in* 5 *FOUNDERS' CONSTITUTION*, *supra*, at 135-36. (Even these resolutions were not, however, attempts

ous, it is nonetheless significant. Historically, state courts have claimed to decide matters of federal common law in a different manner, first, than the Supreme Court has decided certain matters of federal common law (as Part IV of this Article explains) and, second, than scholars usually presume that federal courts decide matters of federal common law.

Of course, it may be argued, as it often is, that the fact that courts purport to act for one reason (in accordance with the requirements of existing law) does not mean that they are not in reality acting for another (in accordance with policy preferences of the particular judge). Assuming this to be true—either in exceptional cases or as a general practice—the fact that state courts have overwhelmingly claimed to abide by the existing law of the land demonstrates a judicial understanding that abiding by such existing law is necessary for their decisions to be justified.

D. Reconciling Federal Lawmaking by State Courts with the Supremacy Clause

The manner in which state courts historically have claimed to enforce the law of the land, including federal common law, comports more easily with the Supremacy Clause than a manner in which they would act as an adjunct federal legislature. The language of the Supremacy Clause is familiar:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³⁴¹

As argued in Part II.A, the Supremacy Clause itself does not justify state courts in “legislating” the federal law to which they are bound. This section will take the argument a step further: the Supremacy

to make federal law. Rather, as Wayne Moore has observed, the authors of the resolutions “presumed that the Constitution’s meaning was independent not only of their positions but also of interpretations by one or more federal officials.” Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 342-43 (1994).) It is only to say that when state courts have applied general law or federal common law as a rule of decision, they have not claimed to make it.

³⁴¹ U.S. CONST. art. VI, cl. 2.

Clause affirmatively forbids state courts from engaging in conscious federal policy change.

The Supremacy Clause has an uneasy relationship with the concept of federal common law. On the one hand, there is strong evidence that, as an original matter, the Supremacy Clause contemplated only the Constitution, laws enacted by Congress, and federal treaties as the federal supreme law of the land.³⁴² Accordingly, it has been argued, the Supremacy Clause excludes federal common law as an additional kind of federal supreme law of the land.³⁴³ On the other hand, courts historically described general principles as operating as the "law of the land" absent a proper exercise of legislative displacement.³⁴⁴ As the Supreme Court recast certain general principles as federal common law, it described such law as principles of federal law binding on state courts.³⁴⁵ Several scholars, as already explained, have described federal common law as binding on state courts under the Supremacy Clause.³⁴⁶

No matter which view is correct, a constitutional principle that a state court may make federal law on the basis of its views of what national policy should be is unsustainable under the Supremacy Clause. The core purpose of the Supremacy Clause was to prevent the states from interfering with the unified operation of federal law. John Jay argued in 1787, shortly before the Constitutional Convention, that the Continental Congress should forbid state legislatures from enacting their own interpretations of national treaties. He made two points that foreshadowed debates in the Federal Convention and ratification conventions regarding the supremacy of federal law. First, he argued that it is nonsensical for federal law to mean one thing in one state and another thing in another state. In his words, it is "irrational" that "the same Article of the same treaty might by law be made to mean one thing in New Hampshire, another thing in New York, and neither the one nor the other of them in Georgia."³⁴⁷ Second, he argued that courts would determine the content of treaties according to the same legal principles. In his words, all courts had the same "duty" to de-

³⁴² See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334-36 (2001) (explaining textual evidence that "Laws" in Supremacy Clause means congressionally enacted statutes).

³⁴³ *Id.* at 1452-59.

³⁴⁴ See *supra* note 300 and accompanying text.

³⁴⁵ See *supra* note 300-333 and accompanying text.

³⁴⁶ *Supra* note 12 and accompanying text.

³⁴⁷ John Jay, Continental Congress (Apr. 13, 1787), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 340, at 589, 590.

termine the meaning of treaties “according to the rules and maxims established by the laws of Nations for the interpretation of treaties.”³⁴⁸

The need to prevent states from controlling the operation of federal law, and the duty of judges to observe one and the same federal law, were central themes in Federal Convention and ratification debates over the supremacy of federal law. First, there is little dispute that the core purpose of the Supremacy Clause was to ensure that the states did not control the operation of federal law. The history is familiar. At the Federal Convention, James Madison and others initially favored a federal congressional power to negative legislative acts of the states. They argued that the power to negative would control the “constant tendency in the States to encroach on the federal authority.”³⁴⁹ Indeed, Madison described “[t]he mutability of the laws of the States” as “a serious evil.”³⁵⁰ He believed that “the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.”³⁵¹ Ultimately, the Convention agreed not upon a negative, but upon a declaration that state judges shall be bound by federal law. Though some argued that such a provision would not be as effective as a negative,³⁵²

³⁴⁸ *Id.*

³⁴⁹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]. The records of the Convention reflect Madison's view as follows: “Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions.” *Id.* He thought that “[t]his prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system.” *Id.* at 165. James McClurg wrote to Madison in August 1787 that “I have still some hope that I shall hear from you of ye reinstatement of ye Negative—as it is certainly ye only mean by which the several Legislatures can be restrain'd from disturbing ye order & harmony of ye whole, & ye Governmt. render'd properly national, & one.” Letter from James McClurg to James Madison (Aug. 22, 1787), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 340, at 597, 597 (emphasis omitted).

³⁵⁰ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 1 FOUNDERS' CONSTITUTION, *supra* note 340, at 644, 646.

³⁵¹ *Id.*

³⁵² In arguing in favor of a negative, Madison expressed that “[c]onfidence can [not] be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures.” 2 RECORDS, *supra* note 349, at 27-28 (brackets in original). Similarly, James Wilson expressed the view that “[t]he firmness of Judges is not of itself sufficient[.] Something further is requi-

its intended purpose was the same: to prevent a "part" from controlling the "whole."³⁵³ William McClaine argued in the North Carolina ratifying convention that "[t]o permit the local laws of any state to control the laws of the Union, would be to give the general government no powers at all. If the judges are not to be bound by it, the powers of Congress will be nugatory."³⁵⁴

Second, though some believed that judges would not be as effective in ensuring the enforcement of federal law as a congressional negative, it appears to have been generally understood that the role of judges would not be to act as adjunct federal legislators in adjudicating federal cases. Gordon Wood has described how colonists in the late eighteenth century both feared judicial discretion and were concerned for equity in their laws.³⁵⁵ There was a tension between the "profound fear of judicial independence and discretion"³⁵⁶ and the inability of legislatures to always be "able to guarantee equity by their enactments."³⁵⁷ Ultimately, he suggests, "most Americans" were "too apprehensive of the possible arbitrariness and uncertainties of judicial discretion" to have judges exercising a legislative-type will.³⁵⁸ Statements by prominent members of the Founding generation accord with this understanding.

Under the Articles of Confederation, John Jay assumed that it would be improper for state judges to act as state legislators had in making law that thwarted the objects of federal treaties:

site—It will be better to prevent the passage of an improper law, than to declare it void when passed." *Id.* at 391.

³⁵³ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 181 (Jonathan Elliot ed., New York, Burt Franklin, 2d ed. 1888).

³⁵⁴ *Id.* Governor Samuel Johnston similarly argued in the North Carolina ratifying convention that "[t]he laws made in pursuance thereof by Congress ought to be the supreme law of the land; otherwise, any one state might repeal the laws of the Union at large. Without this clause, the whole Constitution would be a piece of blank paper." *Id.* at 187-88. Late in his life, James Madison wrote that it was to protect the "authority of the whole" from "the parts separately and independently" that "dictated the clause declaring that the Constitution & laws of the U.S. should be the supreme law of the Land, anything in the constn or laws of any of the States to the contrary notwithstanding." James Madison, Notes on Nullification (1835-36), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 340, at 632, 632.

³⁵⁵ GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 296-305 (1969).

³⁵⁶ *Id.* at 298.

³⁵⁷ *Id.* at 304.

³⁵⁸ *Id.*

[W]hen it is considered that the Judges in general are Men of Character and Learning, and feel as well as know the obligations of Office and the value of reputation, there is no reason to doubt that their conduct and Judgments relative to these as well as other Judicial matters will be wise and upright.³⁵⁹

Alexander Hamilton famously wrote in *Federalist No. 78* that the role of judges is different than the role of legislatures: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."³⁶⁰ Chief Justice John Marshall sounded a similar theme while riding circuit in 1807 when he expressed that even a motion to the "discretion" of a court "is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."³⁶¹ William Cranch, in the preface to his reports of Supreme Court opinions, justified his enterprise as assisting judges to properly fulfill their responsibility to abide by existing law:

In a government which is emphatically stiled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.³⁶²

Thomas Jefferson wrote, "[r]elieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it's equity, and the whole legal system becomes incertain."³⁶³ Jefferson continued to criticize judicial discretion—"the honied Mansfieldism

³⁵⁹ John Jay, Continental Congress (Apr. 13, 1787), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 340, at 589, 591.

³⁶⁰ THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Elsewhere in *Federalist No. 78*, Hamilton wrote that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Id.* at 470.

³⁶¹ *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807).

³⁶² William Cranch, *Preface* to 5 U.S. (1 Cranch) iii, iii-iv (William Cranch ed., 1804).

³⁶³ Letter from Thomas Jefferson to Phillip Mazzei (Nov. 28, 1785), *reprinted in* 9 THE PAPERS OF THOMAS JEFFERSON 67, 71 (Julian P. Boyd ed., 1954).

of Blackstone”—decades after the Founding.³⁶⁴ All of this merely confirms what is implicit in the text of the Supremacy Clause: the states do not control the operation of federal law, and federal law is binding on state judges in the performance of their uniquely judicial role. Recognizing a power in state judges to make federal common law based on what they believe national policy should be would turn the Supremacy Clause on its head.

It might be asked in light of this analysis whether Congress, consistent with the Supremacy Clause, may delegate power to state courts to make legislative-type federal common law. If Congress were to make such a delegation, would not state courts, making federal law pursuant to the delegation, merely be enforcing an existing principle of federal law, namely that state courts should set federal policy? As argued in Part II.B.2, we should not rush to infer such a delegation from a federal statute that does not expressly make it. There would be serious questions regarding the constitutionality of such a delegation in light of nondelegation and anticommandeering principles, and it does not appear that Congress has ever made such an express delegation. Suppose, however, that Congress did delegate power to state courts to make federal law. Leaving nondelegation and anticommandeering considerations to one side, there is a strong argument to be made that such a delegation would not comport with the Supremacy Clause.

The Supremacy Clause characterizes federal law as the “supreme Law of the Land.”³⁶⁵ Hamilton rhetorically asked in *Federalist No. 33*: “What inference can be drawn from this, or what would they amount to, if they were not to be supreme?”³⁶⁶ He responded that “[i]t is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy.”³⁶⁷ If federal law is the supreme law of the land, it is *the* governing law throughout the jurisdiction of the United States. This does not mean that federal law may not govern activities in only one state. A federal law provides, for example, that a portion of a canal “located in the City of Buffalo, State of New York, is declared to be a nonnavigable waterway of the United States.”³⁶⁸ A law may govern activities in only one state and still be the law of the land.

³⁶⁴ Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *reprinted in* THOMAS JEFFERSON: WRITINGS 1512, 1513-14 (Merrill Peterson ed., 1984).

³⁶⁵ U.S. CONST. art. VI, cl. 2.

³⁶⁶ THE FEDERALIST NO. 33, at 200 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁶⁷ *Id.*

³⁶⁸ 33 U.S.C. § 59q-1 (2000).

Indeed, it is the law not only in Buffalo but also in the United States as a whole that this canal in Buffalo is a nonnavigable waterway. Federal laws imposing obligations in a particular state are common, as is state participation in the development of such state-specific federal law. It would be, however, to use John Jay's term, "irrational" for federal law in New York to be that this particular canal in Buffalo is nonnavigable but in Pennsylvania to be that this particular canal in Buffalo is navigable. The supreme law of the land cannot be both. Were Congress to purport to delegate to state courts the power to "legislate" federal common law, it would be requiring state courts to make and enforce law that does not operate as the supreme law of the land. Until a federal institution were properly to make such law the law of the land, such law would operate only within the jurisdiction of the state. Regardless of whether we call this a congressional delegation of power to make federal law, it in fact would only be an authorization to a state court to make law of the state until a federal institution properly made it the law of the land.

This is not a distinction without a difference. If a state court properly may call law that it makes "federal" law, the Supreme Court has jurisdiction to review the lawmaking act. A Supreme Court determination affirming the lawmaking act or reversing it in favor of its own lawmaking act will result in a determination of federal law that, unlike the state court's determination, is enforceable as the law of the land. If a state court properly may call law that it makes only "state" law, the Supreme Court does not have jurisdiction to review the lawmaking act as such. In that case, only Congress, through a proper exercise of its enumerated powers, may create a law of the land governing the matter that the state court addressed. Accordingly, whether law that a state court makes is properly called "federal" or "state" law has significant ramifications for the ability of the Supreme Court to participate in federal lawmaking and, conversely, of Congress to leave federal lawmaking to the Supreme Court. The making of "federal" law by state courts bypasses both the enumerated federal lawmaking powers and the political accountability of Congress as a federal lawmaking institution.

When, then, is it proper for a state court to call law that it makes "federal" law? It seems clear that the answer is only when a state court makes law as a necessary consequence of its best efforts to apply existing principles of federal law. Only then can a state court be said, consistent with the requirements of the Supremacy Clause, to be enforcing the supreme law of the land. Is it the case that state courts may

make different federal common law rules as a result of such efforts? Of course, and they have. The jurisdictional conflicts in federal law that result from this kind of lawmaking by state courts are conceptually different, however, than the conflicts that would arise were state courts to attempt to set rather than enforce national policy. The specific intent of the Supremacy Clause was to preclude individual states from making their own judgments of what national policy should be. Jurisdictional conflicts that result from courts' best efforts to discern and apply existing law are simply an unavoidable byproduct of the judicial application of open-textured text and precedent. A state court that set "national" policy by making a federal common law rule would not be enforcing the supreme law of the land, binding on judges in other states, no matter what that court said it was doing. A state court deciding in accordance with existing federal law would be enforcing the supreme law of the land, as the court thought that law bound judges in other states.³⁶⁹

This is not to say that all courts in the Union must apply the same law as other courts would to all issues that arise in a case. It is well established that jurisdiction-specific law generally governs matters such as procedure and justiciability. This is only to say that when a state court purports to enforce the "supreme Law of the Land," it must seek to enforce its best understanding of existing principles of federal law.

It might also be asked what place the notion that states can serve as laboratories for developing new social, political, and economic ideas has in this analysis. Justice Brandeis famously wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."³⁷⁰ Courts and scholars have oft repeated this re-

³⁶⁹ There is a parallel here between how state courts should determine issues of federal law and how the Supreme Court has held that federal courts are to determine issues of state law. When state law provides the rule of decision in federal court, "state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: 'with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law.'" *Salve Regina Coll. v. Russell*, 499 U.S. 225, 227 (1991) (alteration in original) (quoting *Meredith v. City of Winter Haven*, 320 U.S. 228, 238 (1943)). It would defy the Supremacy Clause for state courts to resolve questions of federal law otherwise.

³⁷⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

frain.³⁷¹ Would not recognizing a power in state courts to make federal common law in a legislative-type way better enable state courts to fulfill this function? The problem with invoking this notion here is that, by definition, federal law, when properly made, is binding on state judges and preclusive of contradictory experimentation. This is the central purpose of the Supremacy Clause. If Congress believes that it should not legislate on a matter because further experimentation is warranted, it may leave the matter to state law. In that way, not just state courts, but also state legislatures, may play their proper role in such experimentation.

There is, of course, an important premise at work in this constitutional analysis of the propriety of federal lawmaking by state courts. It is that courts *can* make law in the way that state court decisions, taken at face value, have made federal common law. The account offered necessarily rejects a skeptical account of judicial lawmaking that views appeals by judges to “principle”—the kind of principle that accounts for and explains prior judicial decisions and relevant statutes—as necessarily “political theater” masking a reality in which judges make “policy” decisions that seek to advance interests of the community prospectively.³⁷² In other words, this account does not view “consistency and order” as inherently mere “toys of the trade.”³⁷³

E. *Normative Considerations About How Courts Ought to Make Law*

The way in which state court decisions, on their face, have historically made federal common law readily comports not only with the Supremacy Clause, but also with certain normative claims about how courts can and ought to make law. It does not follow from the fact that judicial decisions in a real sense make law that they must make it

³⁷¹ See e.g., *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 787-88 (1982) (O'Connor, J., concurring in part and dissenting in part) (citing judicial and scholarly references to this concept).

³⁷² LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 113 (1973).

³⁷³ *Id.* at 580. For an example of such skeptical thinking at the time of the rise of judicial realism, see Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *YALE L.J.* 468, 480 (1928), which asserts that the judicial process is “an emotive experience in which principles and logic play a secondary part.” For a more recent example, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 2 (1997), arguing that judges operate on the basis of an “externally motivated, ideological choice to work to develop a particular restatement and a particular solution rather than another.” See also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 200 (1987) (describing the position that “judges are just actors with some command over state force and socially acceptable chatter; they are not acting in some privileged domain of reason that can or ought to be protected from openly political conversation”).

as a matter of purely forward-looking policy determinations. Scholars of various jurisprudential stripes have described a common law process in which real constraints on judicial lawmaking are possible and observed. Karl Llewellyn described a "Grand Style" of common law adjudication (a style, which, he argued, adjudication ought to assume),³⁷⁴ the "upshot" of which involved both the making of law and controls on how judges make law.³⁷⁵ Llewellyn observed that "[b]eneath what looks on the page as 'mere' following, beneath what . . . feel and seem, in the main, to the very deciding court itself to be such 'mere' following, there swirls a constant current of creation."³⁷⁶ The "Grand Style," however, did not leave a judge "free to decide 'as he wants to'";³⁷⁷ rather, it involved certain "controlling factors"—"the doctrinal structure, the craftsmanship of the law and of the office, and the immanent rightnesses, largely to be felt and found"—that harnessed "the will or individual urges" of judges.³⁷⁸

More recently, Ronald Dworkin has argued that judges are not justified in acting as adjunct legislators in adjudicating cases. Dworkin recognizes that we commonly, upon observing the reality that judges make law, characterize judges as acting as "deputy legislators."³⁷⁹ He argues, however, that "judges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading."³⁸⁰ In Dworkin's view, that which justifies a legislature in making the kind of prospective laws that legislatures typically make does not justify courts in making law in the same way. "A legislature," Dworkin explains, "may justify its decision to create new rights for the future by showing how these will contribute, as a matter of sound policy, to the overall good of the community [J]udges[, however,] are in a very different position from legislators."³⁸¹ Dworkin adds that

[litigants] are entitled, in principle, to have their acts and affairs judged in accordance with the best view of what the legal standards of the community required or permitted at the time they acted, and integrity de-

³⁷⁴ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 37-38 (1960).

³⁷⁵ *Id.* at 116.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 401.

³⁷⁸ *Id.* at 402.

³⁷⁹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82 (1977).

³⁸⁰ *Id.*

³⁸¹ RONALD DWORKIN, *LAW'S EMPIRE* 244 (1986).

mands that these standards be seen as coherent, as the state speaking with a single voice.³⁸²

Dworkin argues, further, that “[i]t does not fit the character of a community of principle that a judge should have authority to hold people liable in damages for acting in a way he concedes they had no legal duty not to act.”³⁸³ Accordingly, “when judges construct rules of liability not recognized before,” they, unlike legislatures, “must make . . . decisions on grounds of principle, not policy: they must deploy arguments why the parties actually had the ‘novel’ legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past.”³⁸⁴ More specifically, judges should decide “hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.”³⁸⁵ In short, Dworkin argues, the judge must make a decision on the basis of a principle that “both fits and justifies what has gone before, so far as that is possible.”³⁸⁶ This does not mean that judges are never justified in overturning precedents. It means only that when they do so, they must act as far as is possible in accordance with legal principles regarding when it is appropriate to depart from settled understandings of legal principles.³⁸⁷

³⁸² *Id.* at 218. Similarly, Dworkin argues elsewhere that “[t]he gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.” DWORKIN, *supra* note 379, at 113.

³⁸³ DWORKIN, *supra* note 381, at 244; *see also* DWORKIN, *supra* note 379, at 102 (“We do not think that [the judge] is free to legislate interstitially within the ‘open texture’ of imprecise rules.”) (citing H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961)).

³⁸⁴ DWORKIN, *supra* note 381, at 244.

³⁸⁵ *Id.* at 255.

³⁸⁶ *Id.* at 239.

³⁸⁷ Dworkin and Llewellyn are not the only theorists of the adjudicative process to justify judicial lawmaking with reference to some standard of fitness and soundness. *See, e.g.*, NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 250 (1978) (summarizing his argument that, for a legal decision in a hard case to be justified, there must be a relevant principle of law or analogy that supports it, and the decision must pass tests of coherence, consistency, and consequences); John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1, 35 (Jules Coleman & Scott Shapiro eds., 2002) (explaining that the “reasonableness” of particular legal “standards and institutions is not of the form ‘inevitably required by reason (morality)’ but rather of the form ‘adopted by our law by choice from among the range of reasonable options,’” and that “once these options have been chosen, the rational requirements of coherence strongly limit the range of reasonable options for further specification and development” (emphasis omitted)).

Such normative claims do not view all cases as "easy" and none as "hard."³⁸⁸ They merely recognize the reality that there are wrong answers to legal questions even in cases in which there may not be one right answer. Had the court in *Franklin*,³⁸⁹ a seemingly hard case, determined that it should resolve the survival question not on the basis of whether the defendant benefited from the transaction as opposed to whether his liability arose *ex delicto*, but rather on the basis of whether the plaintiff generally was in need of money, whether the defendant was generally a good or a bad postmaster, whether other claimants on the assets of the estate really needed the money, whether the defendant had been a citizen of the United States for more than ten years, or whether the defendant had blue eyes or not, the court would have made a rule that perhaps served what it believed to be a good national policy (help those in need of money, reward the estates of good public servants, distribute assets on the basis of the present needs of creditors, prefer established citizens over new citizens, prefer people with one physical characteristic over those with another), but it

³⁸⁸ See DWORKIN, *supra* note 381, at 353-54 ("[Q]uestions of law are sometimes very easy for lawyers and even for nonlawyers. It 'goes without saying' that the speed limit in Connecticut is 55 miles an hour and that people in Britain have a legal duty to pay for food they order in a restaurant."); MACCORMICK, *supra* note 387, at 250 ("In the simplest situation, where a clear rule is agreed by all parties to be clearly applicable, the only problem is over proof of facts, and once a conclusion on that is reached, the decision is justified by a simple deductive argument."); John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 134, 142 (Robert P. George ed., 1992) ("[T]he law's distinctive devices [are] defining terms, and specifying rules, with sufficient and necessarily artificial clarity and definiteness to establish the 'bright lines' which make so many real-life legal questions *easy questions*."). The existence of easy cases is evident not only in reported decisions that bear the features of the easy case, but in the countless cases that are never brought because they lack merit or settle before having to be decided.

The existence of hard cases has been explained in several different ways. As Neil MacCormick summarizes: "[T]he alleged clarity of a rule is intrinsically disputable, and problems of interpretation or classification may be raised; and moreover claims may be put forward in circumstances in which no pre-established rule at all seems to govern the issue—the 'problem of relevancy'." MACCORMICK, *supra* note 387, at 250. Others have explained hard cases in terms of the discretionary decisions a court must make before it may employ the tools of logic. Julius Stone observes that "even so far as lawyers and judges do proceed by logical deduction, the premises which they use are often not *legal* propositions at all." JULIUS STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 52 (1964). Karl Llewellyn similarly observes that classifying facts is "a job of fresh creation which has to be done before a true deduction becomes possible." LLEWELLYN, *supra* note 374, at 12.

For a summary of the literature on the distinction between easy and hard cases, see William Lucy, *Adjudication*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 387, at 206, 208-21.

³⁸⁹ 1 Johns. 396 (N.Y. Sup. Ct. 1806).

would not have been making a determination on the basis of any principle that rendered it and existing law a coherent and sound whole. That there may not be one right answer to a legal problem does not mean that there are no wrong answers, or that the range of not-wrong answers cannot be narrowed down to (say) two, even in a hard case.

These nonskeptical theories of adjudication—be they categorized as “positivistic” or “natural law”³⁹⁰—are premised on the normative claim that judges ought to try to decide a case in the same way that other judges deciding the same case at the same time in the same realm would decide it. Under these theories, the familiar phrase that like cases should be treated alike is a shorthand formulation of a fundamental principle of fairness.³⁹¹

³⁹⁰ As John Finnis has explained:

[W]hat warrants warranted appeals to analogy is not a pattern of reasoning, but an *insight* into some standard—perhaps never noticed or articulated before—which justifies *both* the earlier decision in *A* and the corresponding decision in *B*, and is appropriately coherent with the rest of the law and with sound practical judgment at large.

Finnis, *supra* note 387, at 36-37 (footnote omitted). Llewellyn made the converse of the same point, namely that “a distinction without a difference”—one that is not based on an insight into a standard that justified different treatment—“is a stench.” LLEWELLYN, *supra* note 374, at 287.

³⁹¹ See DWORKIN, *supra* note 381, at 165 (arguing that political morality “requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some”); MACCORMICK, *supra* note 387, at 150 (describing it as a “principle of justice in adjudication . . . to treat like cases alike, and therefore to treat this case in a way in which it will be justifiable to treat future like cases”); Finnis, *supra* note 387, at 55 (“[J]udges confronted by an issue not settled by the plain meaning of a constitution or statute ought to try to settle it in the way that it would be settled by any other judges hearing the case on the same day in the same realm.”). Similarly, Finnis points out that:

In the working of the legal process, much turns on the principle—a principle of fairness—that litigants (and others involved in the process) should be treated by judges (and others with power to decide) *impartially*, in the sense that they are as nearly as possible to be treated by each judge as they would be treated by every other judge.

Finnis, *supra* note 388, at 150. Compare MacCormick’s argument that:

It is sometimes said that equity is a matter of deciding each case on its own special merits without regard to general rules or principles. It seems to me that that view is pure nonsense. I cannot for the life of me understand how there can be such a thing as a good reason for deciding any single case which is not a good generic reason for deciding cases of the particular type in view, that is to say, the ‘merits’ of any individual case are the merits of the type of case to which the individual case belongs.

MACCORMICK, *supra* note 387, at 97.

IV. IMPLICATIONS FOR THE MAKING OF FEDERAL COMMON LAW BY FEDERAL COURTS

Does this analysis of the making of federal common law by state courts offer any insights into what justifies the making of federal common law by federal courts? This Part offers some preliminary thoughts on this question. Consider this question with respect to, first, federal courts without national jurisdiction and, second, federal courts with national jurisdiction.

Most inferior federal courts, like state courts, do not exercise a national jurisdiction. Rather, Congress has defined the jurisdiction of federal courts of appeals and district courts with reference to geographic territory.³⁹² Thus, while the judgment of an inferior federal court against a party is generally enforceable against that party in any federal district in the United States,³⁹³ a federal common law rule that an inferior federal court decision may make is not authoritative against all nonlitigants within the jurisdiction of the United States.

In most matters, a district court does not have personal jurisdiction over all persons within the jurisdiction of the United States; rather, it has jurisdiction over those present in³⁹⁴ or having minimum contacts with³⁹⁵ the state in which the district court sits, assuming state long-arm jurisdiction extends that far. An appeal, in most matters, can be taken from a district court only to "the court of appeals . . . for the circuit embracing the district."³⁹⁶ Federal district and circuit courts thus operate in most matters under similar limitations as state courts on their ability to make law that is "the supreme Law of the Land."³⁹⁷ That said, federal courts without national jurisdiction cer-

³⁹² See 28 U.S.C. §§ 41, 81-132 (2000) (creating both circuit courts of appeal and district courts according to state boundaries).

³⁹³ See 28 U.S.C. § 1963 (2000) (providing that any judgment entered in a federal court of appeals or district court "may be registered . . . in any other district A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.").

³⁹⁴ See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) (holding that "jurisdiction based on physical presence alone" does not violate due process).

³⁹⁵ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam* . . . he [must] have certain minimum contacts with [the forum] . . .").

³⁹⁶ 28 U.S.C. § 1294 (2000).

³⁹⁷ This is what generates the problem of "agency nonacquiescence": the refusal of a federal agency to follow the case law of a particular federal district court or court of appeals. See Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 68 (2003) (examining a different type of nonacquiescence in which agencies "leverage a court's

tainly are no less justified in making federal common law than state courts are.

First, the same necessity to make federal common law to enforce existing federal law that arises in state courts arises in federal courts. As the case study presented earlier demonstrates, the federal court in *Epstein* had to make federal common law to enforce the federal claim that it had a statutory duty to enforce.³⁹⁸ Second, it seems probable that a study of historical federal court practice would reveal that federal courts, like state courts, traditionally have enforced federal common law—or, in early days, general law—on the basis of what they discerned the existing law of the land to require. This was the case in both *Korn* (1829),³⁹⁹ decided according to general principles, as well as in *Epstein* (1997),⁴⁰⁰ decided according to federal common law.⁴⁰¹ This manner of decision making comports with an understanding of federal law as law that operates as the supreme law of the land. Like state courts, federal courts that do not have national jurisdiction can only be said to be enforcing the supreme law of the land when they enforce existing principles of federal law as much as it is possible to do so. This manner of decision making also comports with the normative claim that judges ought to decide issues governed by federal common law rules of decision as far as possible in the same way as other judges in the same realm would decide them on the same day. There is no question that federal courts without national jurisdiction should be understood to have at least the same authority that state courts have to make federal common law. Claims that they have more authority, however, raise serious constitutional questions about the nature of federal law as the Supremacy Clause conceives of it, and broader normative questions about how a court properly determines the law that it will enforce.

Consider next federal courts with national jurisdiction. The Supreme Court exercises national jurisdiction with respect to federal law matters. It has authority to review federal law determinations made by

contempt power to avoid problems of nonacquiescence in other jurisdictions"); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 718-53 (1989) (defining agency nonacquiescence and evaluating both its constitutionality and the costs and benefits of the practice).

³⁹⁸ See *supra* notes 280-83 and accompanying text (describing the *Epstein* holding that RICO claims survive the death of the defendant in all cases).

³⁹⁹ United States v. Korn, 26 F. Cas. 815 (E.D. Pa. 1829) (No. 15,543).

⁴⁰⁰ Epstein v. Epstein, 966 F. Supp. 260 (S.D.N.Y. 1997).

⁴⁰¹ See *supra* text accompanying notes 250-63 (examining the federal common law made in *Epstein* and *Korn*).

federal courts of appeals⁴⁰² and the highest court of any state in which the federal law determination at issue could be had.⁴⁰³ Certain inferior federal courts also exercise a national jurisdiction. For example, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over patent appeals from federal district courts nationally.⁴⁰⁴ It will suffice for present purposes to focus on the Supreme Court.

First, the same necessity that justifies state courts and inferior federal courts in making federal common law in certain cases justifies the Supreme Court in making federal common law in certain cases. If, in certain cases, state and lower federal courts necessarily must make federal common law to enforce federal law, the Supreme Court, upon review of such determinations, must do the same. The manner in which Supreme Court decisions have made federal common law, however, does not appear to be as consistent as it has been in state courts, at least post-*Erie*. In *Clearfield Trust Co. v. United States*,⁴⁰⁵ the Supreme Court famously explained that when the rights and duties of the United States are at stake and in the "absence of an applicable Act of Congress[,] it is for the federal courts to fashion the governing rule of law according to their own standards."⁴⁰⁶ The Supreme Court has made similar statements in other cases.⁴⁰⁷ In *Clearfield* the Court treated background principles of commercial law not as principles with which the Court's decision should comport, but "as a convenient source of reference for fashioning federal rules."⁴⁰⁸

In other cases, the Court has invoked preexisting legal principles not as a mere source of reference, but as binding authority. In *Holmberg v. Armbrrecht*,⁴⁰⁹ the Court found that, in the face of congressional silence on the statute of limitations for the enforcement of a federal right, "[w]e have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress."⁴¹⁰ The Court did not

⁴⁰² 28 U.S.C. § 1254 (2000).

⁴⁰³ *Id.* § 1257.

⁴⁰⁴ *Id.* § 1295.

⁴⁰⁵ 318 U.S. 363 (1943).

⁴⁰⁶ *Id.* at 367.

⁴⁰⁷ See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) ("*Clearfield* directs federal courts to fill the interstices of federal legislation 'according to their own standards.'" (quoting *Clearfield*, 318 U.S. at 367)).

⁴⁰⁸ *Clearfield*, 318 U.S. at 367.

⁴⁰⁹ 327 U.S. 392 (1946).

⁴¹⁰ *Id.* at 395.

portray its role, however, as devising these principles based on national policy considerations. Rather, it explained that “[w]hen Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.”⁴¹¹ The Court proceeded to apply standards that “[t]raditionally and for good reasons” courts had applied to requests for equitable relief.⁴¹² At first glance, the general practice of the Supreme Court in this regard seems somewhat inconsistent.

How do the constitutional provisions and normative concerns addressed with respect to state courts relate to the making of federal common law by the Supreme Court? Regarding the Supremacy Clause’s conception of federal law as “the Law of the Land,” the jurisdiction of the Supreme Court is different in a material respect from that of state courts and most inferior federal courts: it is nationwide. Accordingly, federal common law that the Supreme Court makes, unlike federal common law that state courts make, operates as federal law with effect upon its very making—in other words, it governs within the jurisdiction of the United States. Does this mean that the Supreme Court has a freedom under the constitutional structure to make federal common law on the basis of purely forward-looking national policy concerns that state courts do not have?

Not necessarily. For the Supreme Court to have a power to “legislate” federal common law, something must explain what justifies the Court in applying a rule of decision—e.g., the one in *Clearfield* that the court devised “according to its own standards”—that the state court would not have had authority to apply in the first instance. It is true that the Supreme Court has held that it may apply on appeal a different law than a lower court applied when Congress has retroactively changed the law during the course of litigation.⁴¹³ It has justified this practice since the time of the Founding, however, in the judicial duty of all courts, no matter what the stage of litigation, to “decide according to existing laws.”⁴¹⁴ The general normative claim that a court

⁴¹¹ *Id.*

⁴¹² *Id.* at 396.

⁴¹³ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995).

⁴¹⁴ See *id.* at 227 (“It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress’s latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must ‘decide according to existing laws.’” (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) (Marshall, J.))).

ought to decide a case as every other court applying the same governing law would decide it on the same day would seem equally applicable to the Supreme Court as it is to state courts.

It is beyond the scope of this Article to work out all the ramifications for federal courts of the explanation presented here of the legitimate operation of federal common law in state courts. Let us assume, though, that, like state courts, federal courts are justified in making federal common law only as a necessary consequence of discerning as best as possible the requirements of existing law.

Theories that argue that federal courts are justified in applying federal common law rules of decision only as necessary to enforce constitutional principles are not inconsistent with this position. Most notably, Brad Clark has argued that federal common law rules may operate only "to further some basic aspect of the constitutional scheme—for example, by preventing the judiciary and the states from interfering with matters that the Constitution assigns exclusively to the political branches of the federal government, or by implementing the constitutional equality of the states."⁴¹⁵ If courts are justified in making federal common law rules only as necessary to enforce existing law and only based on reasons that comport with existing legal principles, courts must take account of constitutional principles that speak to the questions of when federal common law rather than state law may apply and what the particular content of a federal common law rule may be.

Moreover, the field that federal common law occupies under the theory that this Article offers is much the same as the field that federal common law occupies under Tom Merrill's delegation theory of federal common law. Almost all delegations under Merrill's theory are implied delegations where either "the enacting body adopts a broad legal standard that federal courts are directed to apply in resolving controversies,"⁴¹⁶ or "Congress adopts a legal standard that is borrowed from (or 'codifies') the common law."⁴¹⁷ In applying either of these kinds of standards as the rule of decision, a state court necessarily in certain cases would have to make federal law in order to render any decision at all. To justify judicial lawmaking in such cases, however, it is not necessary to say that Congress has delegated power to the court to make federal common law. The duty to enforce federal law will jus-

⁴¹⁵ Clark, *supra* note 6, at 1251.

⁴¹⁶ Merrill, *supra* note 7, at 43.

⁴¹⁷ *Id.* at 44.

tify courts in making federal law as necessary to fulfill the duty. As Chief Justice John Marshall observed in *Marbury v. Madison*,⁴¹⁸ “[t]hose who apply the rule to particular cases, must of necessity expound and interpret [the] rule.”⁴¹⁹ It appears that nearly all areas of permissible federal lawmaking under Merrill’s theory would be permissible under the theory articulated here. The argument here clarifies, however, that when judges must make federal common law to decide a case, they need not have received a delegation of legislative power to be justified in doing so and, indeed, if federal courts are subject to the same constraints as state courts in how they make such law, are not justified in making such law based on the kinds of policy reasons that might move Congress to make federal law.

Finally, this analysis has implications for the way in which Congress makes law as well. Scholars have been quick to criticize courts when it comes to the enterprise of federal common law lawmaking. In any discussion of the responsibility of state or federal courts to make federal common law, however, the responsibilities of Congress should not be overlooked. As Congress enacts laws with more open-ended standards and wider gaps, the exercise of a court’s responsibility to enforce them becomes more complex. This Article has argued that state courts have a duty to make federal law only as a consequence of their best efforts to resolve an issue according to the legal principles that they believe would bind every other judge in the nation if faced with the same issue. The responsible discharge of this duty should lead to greater uniformity in the federal law that courts apply nationwide than the neglect of this duty. It is not merely the responsibility of courts, however, to tend to the uniform application of federal law; the Constitution provides express roles for Congress in this regard as well. The Constitution gives Congress great latitude in creating and conferring jurisdiction upon inferior federal courts⁴²⁰ and in regulating the appellate jurisdiction of the Supreme Court.⁴²¹ It also gives it great latitude in conferring on federal courts exclusive jurisdiction over cer-

⁴¹⁸ 5 U.S. (1 Cranch) 137 (1803).

⁴¹⁹ *Id.* at 177.

⁴²⁰ See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁴²¹ See *id.* art. III, § 2, cl. 2 (establishing the Supreme Court’s appellate jurisdiction as being subject to “such Exceptions, and under such Regulations as the Congress shall make”).

tain matters.⁴²² The organizational and jurisdictional structure of the courts in which federal claims are to be heard directly bears on the extent to which courts are able to maintain uniformity in federal law. Most importantly, though, it is Congress that enacts "the Laws of the United States" that bind state and federal judges. We must never lose sight, in assessing whether state and federal judges are responsibly deciding cases in which they must make federal law, that it is the responsibility of Congress to assess, in the first instance, what degree of specificity in its enactments best serves the common good.

CONCLUSION

This Article has sought to demonstrate four things. First, state courts make federal common law in as real a sense as federal courts make it. Second, theories that have attempted to explain the making of federal common law by federal courts are inadequate to explain the making of federal common law by state courts. Their common premise that courts make federal common law on the basis of the kinds of considerations that might move Congress to enact a federal statute largely accounts for the inadequacy. Third, historical practice, the constitutional structure, and certain normative claims about the way in which courts ought to make law all point to the following constraint on the way in which state courts justifiably may make federal common law: state courts may make federal common law not on the basis of purely forward-looking policy considerations, but only as a consequence of their best efforts to enforce federal law as it existed at the time pertinent to the issue being resolved. Fourth, federal courts are justified in making federal common law in at least the same circumstances and under the same constraints as state courts. There is good reason, however, to rethink the common premise that where federal courts are justified in making federal common law, they are justified in making it as an adjunct federal legislature.

⁴²² Early Congresses understood they had the constitutional ability to confer exclusive jurisdiction over certain types of claims on the federal courts. For example, "[s]ince the Patent Act of 1800, Congress has lodged exclusive jurisdiction of actions 'arising under' the patent laws in the federal courts." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (quoting 28 U.S.C. § 1338).