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FEDERAL COMMON LAW: A STRUCTURAL REINTERPRETATION

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The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties.¹

—Alexander Hamilton

INTRODUCTION

By design, our constitutional structure is complex and often cumbersome. The founders believed that the structural safeguards provided by federalism and separation of powers outweighed their costs. That calculation, however, has created numerous “questions of intricacy and nicety.” “Federal common law,” in particular, presents such questions. In every case, courts are confronted with a threshold issue: what is the source of the applicable law? In most cases, state law has been thought to establish background rules of decision that apply unless preempted by positive federal law.² In this century, however, federal courts have found it increasingly appropriate in many areas to disregard state law in favor of so-called federal common law.

Federal common law is generally used to refer to “federal judge-made law”³—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.”⁴

¹ THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

² See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In this Article, I use the phrase “positive federal law” to refer to law based on the positive acts of the people and their representatives, that is, federal statutes, treaties, and constitutional provisions.

³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

⁴ PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 863 (3d ed. 1988) [hereinafter *HART & WECHSLER*]; see also Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (“[F]ederal common law’ . . . refer[s] 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.” (footnotes omitted)); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (defining “federal common law” as “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

Thus understood, federal common law raises serious constitutional questions. First, federal common law, because not clearly rooted in statutory or constitutional sources, appears to involve judicial lawmaking—a task at least in tension with federal separation of powers.⁵ To be sure, federal courts undoubtedly engage in interstitial “lawmaking,” as part of the process of interpreting positive law.⁶ By hypothesis, at least, federal common lawmaking begins where interpretation ends.⁷ Such open-ended lawmaking by

or an unconventional sense”).

⁵ See *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (“[F]ederal lawmaking power is vested in the legislative, not the judicial, branch of government”); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 765 (1989) (raising the “fundamental question of legitimacy—whether it is appropriate for the judiciary to exercise this function within the broader political context of a carefully structured system of separation of powers”).

⁶ This phenomenon does not raise the same constitutional concerns as federal common law. Even strict adherents of the constitutional separation of powers acknowledge that “no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.” *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting) (“Congress declares its purpose imperfectly or partially, and compatible judicial construction completes it.”).

⁷ In practice, of course, the distinction between federal common lawmaking and statutory (or constitutional) interpretation is often difficult to discern. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) (“Plainly, any distinction between constitutional exegesis and common law cannot be analytically precise, representing, as it does, differences of degree.”). Indeed, the Supreme Court’s tendency has been “to seek a statutory rationalization for judge-made law in this class of cases.” Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1041 (1967). For example, in *Clearfield Trust Co. v. United States*, after observing that the authority of the United States to issue a check for services rendered under the Federal Emergency Relief Act of 1935 “had its origin in the Constitution and the statutes of the United States,” the Court asserted that “[t]he duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.” 318 U.S. 363, 366 (1943) (footnote omitted). Similarly, in *Lincoln Mills* the Court construed § 301 of the Labor Management Relations Act of 1947 not only to “confer jurisdiction in the federal courts over labor organizations,” but also to express “a federal policy that federal courts should enforce [agreements to arbitrate grievance disputes] on behalf of or against labor organizations.” 353 U.S. at 455. Most recently, in *Boyle v. United Technologies Corp.*, the Court suggested that a provision of the Federal Tort Claims Act retaining the federal government’s sovereign immunity for claims based on the performance of discretionary functions establishes a “federal policy” that “in some circumstances” also requires immunity for federal contractors from state tort liability “for design defects in military equipment.” 487 U.S. 500, 512 (1988).

The Supreme Court’s reliance on “the penumbra of express statutory mandates” or “the policy of the legislation,” *Lincoln Mills*, 353 U.S. at 457, only tends to

courts raises constitutional concerns because it bears a troublesome resemblance to the exercise of legislative power—power apparently reserved by the Constitution to the political branches.⁸

Second, because federal common law preempts state law, federal common law also raises two related federalism concerns, at least as applied to matters within the legislative competence of the states. Federal common law arguably intrudes upon state authority by departing from the Constitution and the Rules of Decision Act,⁹ which—as interpreted in *Erie Railroad Co. v. Tompkins*¹⁰—appear to require *federal courts* to apply state law “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress.”¹¹ Federal common law further threatens the autonomy and independence of the states by requiring *state courts* to apply federal judge-made law notwithstanding contrary state law, even though the Constitution’s

obfuscate the Court’s lawmaking function. If construction of the relevant statute yields the rule in question, then resort to federal common law is unnecessary. If, on the other hand, the rule in question “is more than can be fairly asked even from the alchemy of construction,” *id.* at 462 (Frankfurter, J., dissenting), then the Court should follow Justice Jackson’s advice and acknowledge that it is making its “own law from materials found in common-law sources.” *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 468 (1942) (Jackson, J., concurring). In the end, of course, one’s conception of the scope of federal common lawmaking depends in large part on one’s approach to statutory (and constitutional) interpretation. *See, e.g.,* Merrill, *supra* note 4, at 7 (defining federal common law “extremely broad[ly]” to refer to legal rules that “are not found on the face of an authoritative federal text” and thus to include “rules that are almost never treated as federal common law (such as ‘ordinary’ statutory construction and nonoriginalist judicial review)”).

⁸ *See* U.S. CONST. art. I, § 1; *infra* notes 106-20 and accompanying text; *see also* *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”). The “delicate and difficult inquiry” whether, and to what extent, Congress may delegate lawmaking authority to the federal courts, *see* *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825), presents distinct considerations beyond the scope of this Article. *Cf.* *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 699-701 (1927) (stating that Congress may not vest Article III courts “with administrative or legislative functions which are not properly judicial”); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 444 (1923) (stating that the jurisdiction of Article III courts is limited to deciding cases and controversies and “does not extend to . . . administrative or legislative issues or controversies”); *Muskrat v. United States*, 219 U.S. 346, 352 (1911) (stating that “neither the legislative nor executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner” (quoting *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 (1792))).

⁹ 28 U.S.C. § 1652 (1994).

¹⁰ 304 U.S. 64 (1938).

¹¹ *Id.* at 78.

reference to the "supreme Law of the Land" does not obviously include federal judge-made law.¹²

The Supreme Court has responded to these concerns by purporting to limit the scope of federal common law to several well-recognized enclaves. These 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."¹³ Although this "enclave" approach to federal common law may mitigate the constitutional difficulties identified above, it "simply list[s] areas of law or categories of cases in which federal common law is permissible" without providing any "underlying rationale other than grandfathering."¹⁴

Commentators have suggested several alternatives. At one end of the spectrum, Professor Martha Field has argued that "judicial power to act is not limited to particular enclaves,"¹⁵ and that "limits on federal common law are incoherent."¹⁶ In her view, "federal [common] law can apply whenever federal interests require a federal solution."¹⁷ At the other end of the spectrum, Professor Martin Redish has argued that federalism and separation of powers concerns inherent in the Rules of Decision Act instruct "that there can be no such thing as 'federal common law,' at least to the extent it is used to provide a 'rule of decision' and to the extent that the

¹² See U.S. CONST. art. VI, cl. 2 ("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."); cf. Hill, *supra* note 7, at 1073-74 (observing that although it is unclear whether the founding fathers intended the Supremacy Clause to embrace "federal judge-made law," the "point has been settled in practice").

¹³ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (footnotes omitted); see also *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (stating that federal courts have authority "to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States or the resolution of interstate controversies" (footnotes omitted)).

¹⁴ Field, *supra* note 4, at 911-12; see also *Texas Indus.*, 451 U.S. at 641 (listing enclaves of federal common law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964) (same).

¹⁵ Field, *supra* note 4, at 887.

¹⁶ *Id.* at 884; see also Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989) ("[T]here are no fundamental constraints on the fashioning of federal rules of decision.").

¹⁷ Field, *supra* note 4, at 983 (emphasis omitted).

phrase 'common law' is construed as a category of lawmaking distinct from constitutional or statutory 'interpretation.'"¹⁸

This Article does not propose to embrace either of these approaches. Rather, it attempts to provide an alternative explanation for at least a portion of the rules that fall within the traditional enclaves of federal common law identified by the Supreme Court. This attempt rests largely upon "the [neglected] method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."¹⁹ Relying on various inferences from the constitutional structure, this Article seeks to show that an important subset of federal common law rules has essentially been mischaracterized by courts and commentators. Careful analysis demonstrates that judicial adherence to these rules is consistent with, and frequently required by, the constitutional structure. So understood, the rules in question do not constitute "federal judge-made law," and therefore do not raise the constitutional difficulties traditionally associated with such law.

In order to qualify under the proposed reconceptualization, a rule must satisfy two criteria derived from the constitutional structure. First, the transactions governed by the rule must fall beyond the legislative competence of the states. Second, the rule must operate 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.

Distinguishing between federal common law rules that satisfy the proposed criteria and those that do not places the former on a

¹⁸ Redish, *supra* note 5, at 792; see also MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 29-46 (1991). Several commentators have attempted to justify limited conceptions of federal common law that fall somewhere between these two poles. See George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 261 (1992) (taking a "stand grounded more on federalism than separation of powers, although [recognizing that] the two are closely intertwined"); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 356 (1992) (attempting to "rescue . . . what has been called federal common law without giving up on the idea that there are inherent constraints on judicial powers"); Merrill, *supra* note 4, at 36 ("When a court engages in preemptive lawmaking, it still may be said to be carrying out the original intentions of the enacting body . . . by asking what collateral or subsidiary rules are necessary in order to effectuate or to avoid frustrating the specific intentions of the draftsmen.").

¹⁹ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969).

firmer constitutional foundation. The first criterion relies on constitutional preemption of state authority in certain areas to resolve federalism concerns.²⁰ The Constitution places certain matters beyond the legislative competence of the states—most notably, matters integral to the conduct of foreign affairs.²¹ With respect to such matters, states—whether acting through courts or legislatures—generally lack authority to establish binding rules of decision. Thus, to the extent that federal common law rules concern matters beyond the legislative competence of the states, it is difficult to see how the federal courts' application of such rules could invade rights reserved by the Constitution to the states.

The second criterion alleviates separation of powers concerns. Many of the rules that the Supreme Court today characterizes as federal common law are merely background rules that federal and state courts apply in order to avoid encroaching upon authority committed by the Constitution to Congress and the President. This is particularly true with respect to rules relating to foreign affairs. The Constitution assigns the conduct of foreign relations exclusively to the political branches of the federal government. On occasion, this allocation of power requires federal courts (and states) to adhere to traditional rules derived from the law of nations in order to avoid usurping the political branches' power to conduct foreign affairs. Such adherence does not constitute improper judicial legislation. To the contrary, application of these doctrines furthers the Constitution's allocation of powers by ensuring that Congress and the President, rather than the courts (and the states), exercise powers constitutionally committed to the political branches.

This Article contains three parts. Part I analyzes the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins*.²² This analysis suggests that *Erie's* decision to overrule *Swift v. Tyson*²³ rests on principles of "judicial federalism"—the premise that federal courts, acting on their own authority, have no power to displace state law in areas over which the states possess legislative competence. Next, Part I surveys the rise of modern federal common law

²⁰ Cf. Merrill, *supra* note 4, at 32-46 (identifying "preemptive lawmaking" as a legitimate form of federal common law). See generally Hill, *supra* note 7, at 1030-68 (surveying "areas that are federalized by force of the Constitution itself").

²¹ See Hill, *supra* note 7, at 1042-44 (asserting that an "area of federal judicial competence by force of a preemption effected by the Constitution is one involving questions of international law"); *infra* notes 237-52 and accompanying text.

²² 304 U.S. 64 (1938).

²³ 41 U.S. (16 Pet.) 1 (1842).

following *Erie* and reviews the Supreme Court's justifications for such law. Finally, Part I critically examines competing proposals to reform federal common law suggested by two of the leading academics in the field.

Part II proposes an approach, derived from the constitutional structure, for reconceptualizing at least a portion of the rules currently thought to be federal common law. This approach suggests that judicial federalism concerns do not apply to "federal common law" rules that satisfy the proposed criteria and that such rules do not, in fact, constitute "federal judge-made law." Rather, rules that satisfy the proposed approach are generally consistent with, and often required by, the constitutional structure.

Next, Part II reexamines the Supreme Court's decision in *Swift v. Tyson* in light of the proposed approach. It concludes that, although *Swift* was constitutionally defensible at the time it was decided, the federal courts' subsequent adherence to, and expansion of, the *Swift* doctrine raised substantial federalism and separation of powers concerns. Nonetheless, this review is useful to the proposed reconceptualization because it illustrates that the federal courts may, under certain circumstances, apply rules derived from customary law without violating federalism and separation of powers principles.

Finally, Part II applies the proposed approach to reconceptualize federal common law rules like the act of state doctrine that govern "international disputes implicating . . . our relations with foreign nations."²⁴ Because such rules generally concern matters beyond the legislative competence of the states—specifically, "our relations with foreign nations"—the constitutional structure permits federal courts to disregard state law in applying these rules. This examination also reveals that the constitutional allocation of powers not only permits, but frequently requires, courts to apply rules of this kind in order to preserve the constitutional prerogatives of the political branches to conduct foreign affairs.

Part III applies the proposed approach to several additional enclaves of federal common law. First, it examines certain cases affecting foreign ambassadors and concludes that, in the absence of a controlling federal statute or treaty, both federal and state courts must apply internationally recognized rules of diplomatic immunity, not because such rules constitute "federal judge-made law," but

²⁴ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (footnote omitted).

because refusal to apply them would encroach upon the exclusive authority of the political branches over foreign relations.

Next, Part III analyzes “federal common law” rules governing “interstate . . . disputes implicating the conflicting rights of States.”²⁵ Because neither the states nor Congress generally possess unilateral legislative competence to resolve interstate disputes, the Constitution necessarily contemplates that the Supreme Court will resolve such disputes. The rules adopted and applied by the Court in these cases are best understood, not as federal common law, but as rules designed to implement the constitutional structure—specifically, the constitutional equality of the states.

Part III also examines what is perhaps the best-known enclave of federal judge-made law—rules governing “Cases of admiralty and maritime Jurisdiction.”²⁶ Specifically, it compares and contrasts two types of admiralty disputes, prize cases and private maritime claims. Prize cases directly implicate foreign relations and are therefore beyond the authority of the states to regulate. In such cases, both federal and state courts should apply principles derived from the law of nations and leave policymaking to the political branches. On the other hand, under the Court’s modern expansion of admiralty jurisdiction, private maritime claims frequently concern matters within the traditional legislative competence of the states. Such cases are difficult to reconcile with *Erie* and thus remain constitutionally suspect.

Finally, Part III briefly examines the application of the proposed approach to one of the more troublesome enclaves of federal common law—rules governing “the rights and obligations of the United States.”²⁷ Initially, this Part examines the Supreme Court’s decisions in *Clearfield Trust Co. v. United States*²⁸ and *O’Melveny & Myers v. FDIC*.²⁹ Although the federal common law rules sought to be applied in these cases arguably govern matters beyond the legislative competence of the states, they are not readily derived from the constitutional structure and thus cannot be reconceptualized under the proposed approach. Next, this Part examines the Supreme Court’s adoption of the military contractor defense in

²⁵ *Id.*

²⁶ U.S. CONST. art. III, § 2, cl. 1.

²⁷ *Texas Indus.*, 451 U.S. at 641 (footnote omitted).

²⁸ 318 U.S. 363 (1943).

²⁹ 114 S. Ct. 2048 (1994).

*Boyle v. United Technologies Corp.*³⁰ The proposed approach suggests that recognition of this defense is simply a means of implementing the constitutional preemption of state authority to regulate military procurement matters. Thus, *Boyle's* adoption of this defense does not appear to raise significant federalism or separation of powers concerns.

I. FEDERAL COMMON LAW AND THE CONSTITUTIONAL STRUCTURE

Federal common law is a modern phenomenon.³¹ Prior to this century, the Supreme Court confidently asserted that “[t]here is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union.”³² In this century, by contrast, the Court has increasingly recognized various “enclaves of federal judge-made law.”³³ The rise of federal common law is problematic because such law is at least in tension with important features of the constitutional structure, particularly federalism and the separation of powers.

This Part begins with a review of the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*.³⁴ A proper understanding of *Erie* is necessary to any evaluation of federal common law. As discussed below, *Erie* established the general rule—based on mutually reinforcing principles of federalism and separation of powers—that federal courts must apply the substantive law of the state in which they sit in the absence of positive federal law to the contrary. Federal common law appears to represent a departure from this rule. Next, this Part summarizes the rise of modern federal common law following *Erie* and examines the justifications for such law offered by the Supreme Court. Finally, this Part critically evaluates both Professor Field’s proposal for the expansion of federal common law and Professor Redish’s apparent attempt to significantly narrow the field.

³⁰ 487 U.S. 500 (1988).

³¹ Federal common law is to be distinguished from the “general common law” applied during the *Swift* era. See *infra* notes 105-07 and accompanying text.

³² *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657-58 (1834); see also *id.* (“It is clear, there can be no common law of the United States.”).

³³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964).

³⁴ 304 U.S. 64 (1938).

A. *Erie and Judicial Federalism*

For almost one hundred years, federal courts claimed authority to disregard state court decisions with respect to matters governed by "general law." This doctrine is typically associated with the Supreme Court's decision in *Swift v. Tyson*,³⁵ which held that federal courts exercising diversity jurisdiction need not follow state court decisions on matters of "general commercial law."³⁶ Rather, with respect to such questions, federal courts considered themselves free "to express [their] own opinion"³⁷ concerning the content of the applicable law. The so-called *Swift* doctrine gradually expanded to encompass not only commercial law, but also such historically local matters as punitive damages, property, and torts.³⁸

In *Erie Railroad Co. v. Tompkins*,³⁹ the Supreme Court instituted something of a constitutional revolution by concluding that the *Swift* doctrine represented "an unconstitutional assumption of powers by the courts of the United States"⁴⁰ and should be overruled. *Erie* began as a routine application of the *Swift* doctrine. Tompkins, a citizen of Pennsylvania, was injured while walking alongside railroad tracks in that state when he was struck by an object protruding from a passing train. Tompkins sued the railroad, which was incorporated in New York, in federal court on the basis of diversity of citizenship.⁴¹ The case turned on the duty of care owed by a railroad to a pedestrian walking along the right of way. The railroad argued that under Pennsylvania law, Tompkins was a trespasser and "that the railroad is not liable to undiscovered trespassers resulting from its negligence, unless it be wanton or willful."⁴² Tompkins, by contrast, argued that "the railroad's duty and liability is to be determined in federal courts as a matter of general law."⁴³ The

³⁵ 41 U.S. (16 Pet.) 1 (1842).

³⁶ *Id.* at 18.

³⁷ *Id.* at 19.

³⁸ See TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 71 (1981) ("[T]he federal judiciary continued to enlarge the body of general law so that by 1890 it included some 26 doctrines."); *infra* notes 211-13 and accompanying text.

³⁹ 304 U.S. 64 (1938).

⁴⁰ *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

⁴¹ See *id.* at 69.

⁴² *Id.* at 70.

⁴³ *Id.*

court of appeals agreed with Tompkins,⁴⁴ and the railroad brought the case to the Supreme Court.

The Supreme Court reversed and, although neither party asked it to do so, overruled *Swift*. The Court initially noted its disagreement with *Swift's* interpretation of section 34 of the Judiciary Act. According to the Court, *Swift* "held that federal courts exercising [diversity] jurisdiction . . . need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court."⁴⁵ Although it found this construction of the Act to be "erroneous," the Court expressly declined to rest its decision on this ground. Rather, the Court based its decision on the Constitution: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."⁴⁶

The Supreme Court explained the constitutional basis for its decision in the following brief, and somewhat cryptic, passage:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.⁴⁷

Upon analysis, this passage reveals three mutually reinforcing grounds of decision. The first sentence establishes that the federal courts have a general duty to apply "the law of the State" to matters not governed by positive federal law and suggests that federal judge-made law does not provide a legitimate basis for displacing state

⁴⁴ See *id.* ("[I]t is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law." (quoting *Tompkins v. Erie R.R.*, 90 F.2d 603, 604 (2d Cir. 1937))).

⁴⁵ *Id.* at 71.

⁴⁶ *Id.* at 77-78.

⁴⁷ *Id.* at 78. Professor Field finds "[t]his discussion [to be] highly ambiguous, and even inconsistent, in the scope it suggests for federal common law." Field, *supra* note 4, at 905. Professor Field's views are discussed *infra* notes 95-120 and accompanying text.

law. The second sentence makes clear that state law (unlike federal law) may be adopted by courts as well as legislatures and that both sources of state law are equally applicable in federal court. The remainder of the passage asserts that neither Congress nor the federal judiciary has power under the Constitution "to declare substantive rules of common law applicable in a State."

The last ground is perhaps the most curious. *Erie* was decided in 1938, just one year after the Supreme Court upheld the National Labor Relations Act as a proper exercise of Congress's power to regulate interstate commerce,⁴⁸ and just four years before the Court would uphold Congress's regulation of wheat production "not intended in any part for commerce but wholly for consumption on the farm."⁴⁹ Given these decisions, *Erie's* suggestion that Congress lacks power to regulate the duty of care owed by companies like the Erie Railroad Company seems dubious.⁵⁰

It does not follow, however, that *Erie* was wrongly decided. *Erie's* statement regarding the lack of congressional power was dictum. No federal statute prescribed a rule of decision to govern the matters at issue in the case. Only the Court's assertion that "no clause in the Constitution purports to confer such a power upon the federal courts"⁵¹ was necessary to the Court's decision. This assertion recalls the Court's first ground of decision—federal courts have no power to disregard state law "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress."⁵² In other words, even assuming that Congress had power to adopt a statute to govern a given controversy, the Constitution would require federal courts to follow applicable state law unless Congress adopted

⁴⁸ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 6 (1937) ("The National Labor Relations Act is an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife.").

⁴⁹ *Wickard v. Filburn*, 317 U.S. 111, 118 (1942).

⁵⁰ See Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974) ("It would seem reasonably clear that even by then contemporary standards, Congress would have been seen as having power to prescribe a substantive rule of liability for the specific accident in *Erie*."); see also Field, *supra* note 4, at 926 ("Surely Congress has power to regulate interstate railroads' liability to trespassers, if it wishes to do so."); *cf. id.* at 975 ("There may be an area that Congress cannot reach, even under its expansive Commerce power, and where state law accordingly 'operates of its own force.'" (footnote omitted)).

⁵¹ Thus, *Erie* clearly holds that the Constitution's conferral of diversity jurisdiction upon the federal courts does not carry with it substantive lawmaking power.

⁵² Of course, federal courts may also disregard state law in favor of "Treaties made, or which shall be made, under the Authority of the United States." See U.S. CONST. art. VI, cl. 2.

such a statute (or the Constitution itself supplied a rule of decision).⁵³

Reading the first and third grounds together, *Erie* is best understood as resting on principles of *judicial federalism*.⁵⁴ Judicial federalism posits that the federal courts unconstitutionally invade “the autonomy and independence of the States”⁵⁵ whenever they unilaterally apply a rule of their own choosing in lieu of substantive state law—that is, in the absence of a controlling federal constitutional, statutory, or treaty provision requiring application of that rule.⁵⁶ In this way, *Erie* “recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.”⁵⁷

⁵³ Cases decided under the “dormant” Commerce Clause appear to present a limited exception. Whatever their legitimacy generally, these cases provide no authority for federal judge-made law. Under the dormant commerce power, courts exercise only the negative power to invalidate state law. They neither claim nor exercise the affirmative power to adopt federal rules of decision. It is worth noting, moreover, that *Erie* was written in 1938, the same year that the Court decided *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177 (1938). The latter arguably represents the low-water mark of dormant Commerce Clause jurisprudence. *See id.* at 192-93 (upholding a state’s weight limit on trucks because the regulation was not “arbitrary or unreasonable”).

⁵⁴ *See, e.g.*, Merrill, *supra* note 4, at 15 (arguing that “the federalism principle identified by *Erie* still exists but has been silently transformed from a general constraint on the powers of the federal government into an attenuated constraint that applies principally to one branch of that government—the federal judiciary”).

⁵⁵ *Erie*, 304 U.S. at 78 (quoting *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

⁵⁶ *See* Mishkin, *supra* note 50, at 1688 (stating that *Erie* and “the second sentence of the Rules Enabling Act” “reflect and restate constitutional principles which restrain the power of the federal courts to intrude upon the states’ determination of substantive policy in areas which the Constitution and Congress have left to state competence”). Objections based on judicial federalism do not apply to the federal courts’ failure to follow state *procedural* rules. “Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.” *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Such implied powers include the authority to adopt rules of practice and procedure, notwithstanding a state’s adoption of contrary rules to govern proceedings in state court. *See Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 221-23 (1818) (rejecting the argument that § 34 of the Judiciary Act of 1789 required federal courts to follow state practice rather than general equity remedies and common law procedures); *cf.* *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-44 (1825) (upholding Congress’s delegation of rulemaking power to courts because such power is not “strictly and exclusively legislative”).

⁵⁷ Monaghan, *supra* note 7, at 11-12 (footnotes omitted); *see also* *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (“[N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common

Erie's conception of judicial federalism rests upon mutually reinforcing principles of federalism and separation of powers. To avoid what the founders regarded as a dangerous concentration of power in the same hands, the Constitution both divides and separates governmental power.⁵⁸ In creating a federal system, the Constitution assigns limited powers to the federal government and reserves the balance to the states and to the people.⁵⁹ The Constitution further ensures "the preservation of liberty" by "requir[ing] that the three great departments of power should be separate and distinct."⁶⁰ In these ways, the Constitution not only limits the powers available to the federal government, but also restricts the manner in which that government may exercise them.⁶¹

law to govern those areas until Congress acts.").

⁵⁸ See THE FEDERALIST No. 47 (James Madison).

⁵⁹ This division of power is both inherent in the constitutional structure and explicit in the constitutional text. See U.S. CONST. amend. X.

⁶⁰ THE FEDERALIST No. 47, *supra* note 58, at 301 (Clinton Rossiter ed., 1961).

⁶¹ For example, Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. CONST. art. I, § 1, and establishes an intricate system of checks and balances with respect to the enactment of federal law. Under § 7 of Article I, every proposed federal law, "before it [shall] become a Law," must pass both houses of Congress and meet with the approval of the President. U.S. CONST. art. I, § 7, cl. 2. If the President disapproves, he generally must return the proposal to the house in which it originated for reconsideration. The proposal will then become law only if two thirds of the members of each house vote to override the President's veto. See *id.*

Significantly, the founders rejected the practice employed by several states, during both the colonial and Confederation eras, of combining legislative and judicial authority in the same hands. See generally THE FEDERALIST Nos. 47, 48 (James Madison) (describing the Framers' conception of the separation of powers); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 119-75 (1967) (describing various influences on the development of separation of powers); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 154, 549-50 (1969) (contrasting the views of separation of powers during various stages of the eighteenth century). Specifically, the Constitutional Convention considered and rejected Edmund Randolph's proposal to establish a council of revision consisting of "the Executive and a convenient number of the National Judiciary," with authority "to examine every act of the National Legislature before it shall operate." James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter Farrand] (recounting Randolph's proposed resolutions). Disapproval by the council would have "amount[ed] to a rejection" of the proposed legislation unless a supermajority in each house reenacted it. See *id.* The Convention rejected Randolph's proposal on the ground that it made "the Expositors of the Laws, the Legislators which ought never to be done." James Madison, Notes on the Constitutional Convention (July 21, 1787), in 2 Farrand, *supra*, at 75 (recounting statements of Gerry); see also *id.* ("MR. STRONG thought with MR. GERRY that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established.").

Both constraints are designed to protect the states and the people from unwarranted federal action. Thus, it is commonplace to characterize federal action that exceeds delegated authority as violating constitutional principles of federalism. As *Erie* demonstrates, however, federal action that violates the Constitution's separation of powers may also "invade[] rights which . . . are reserved by the Constitution to the several states."⁶² The founders did not establish a federal government, comprised of distinct branches exercising separate powers, and subject to numerous checks and balances, merely to create an interesting system of government. Rather, the founders incorporated these features in order to make the exercise of governmental authority—specifically, *federal* governmental authority—more difficult.⁶³ The Constitution thus reserves substantive lawmaking power to the states and the people *both* by limiting the powers assigned to the federal government *and* by rendering that government frequently incapable of exercising them.⁶⁴

Thus, even if the Constitution authorizes the federal government to adopt rules of decision to govern matters like those involved in *Swift* and *Erie*, judicial federalism prohibits federal courts from adopting such rules on their own.⁶⁵ An essential premise of the

⁶² *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938). This conclusion draws support from the negative implication of what Professor Wechsler described as the "political safeguards of federalism." See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *infra* notes 127-34 and accompanying text.

⁶³ See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary government acts to go unchecked.").

⁶⁴ *Cf. United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) ("Provisions for separation of powers within the Legislative Branch are . . . *not* different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.").

⁶⁵ The Court confronted a similar question in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). The issue before the Court was "whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases." *Id.* at 32. The Court held that they could not. See *id.* at 34. Proponents of such jurisdiction contended "that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it." *Id.* at 33. The Court's response to this argument is instructive:

If it may communicate certain implied powers to the general government, it would not follow that the Courts of that government are vested with

Court's decision in *Erie*, therefore, appears to be that unilateral lawmaking by federal courts in this context violates the Constitution's separation of powers.⁶⁶ Such a violation, in turn, "invade[s] rights which . . . are reserved by the Constitution to the several states,"⁶⁷ specifically, the right to have state law govern matters within the legislative competence of the states unless and until the federal government—acting pursuant to the various and often cumbersome means prescribed by the Constitution—adopts "supreme Law of the Land" to displace state law.⁶⁸ This suggests, as *Erie* held, that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."⁶⁹

This holding required the Supreme Court to define "the law of the state" with precision. In so doing, *Erie* adopted two important principles of legal positivism. First, quoting Justice Holmes, the Court asserted that law is comprised exclusively of sovereign commands: "[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it."⁷⁰ Thus,

jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Id. at 34.

⁶⁶ The federal courts' unilateral adoption of rules of decision under the expanded *Swift* doctrine thus raises much greater separation of powers concerns than did the Supreme Court's application of the law merchant in the *Swift* case itself. To be sure, the *Swift* Court undoubtedly engaged in some degree of interstitial lawmaking. But some degree of lawmaking necessarily inheres in the judicial function. See *infra* notes 196-98 and accompanying text.

⁶⁷ *Erie*, 304 U.S. at 80.

⁶⁸ U.S. CONST. art. VI, cl. 2. *Erie* may not sweep as broadly as its language suggests. As discussed in Part II, the principles of judicial federalism recognized in *Erie* should not be interpreted to apply to matters beyond the legislative competence of the states. See *infra* notes 127-36 and accompanying text. This limitation represents an important qualification of *Erie*'s otherwise sweeping pronouncements.

⁶⁹ *Erie*, 304 U.S. at 78; see also U.S. CONST. art. VI, cl. 2 ("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 . . ."). Thus, *Erie* appears to foreclose any argument that "the Laws of the United States" as used in the Supremacy Clause encompasses judge-made law of the sort adopted under *Swift*. To the contrary, *Erie* necessarily limits such laws to "Acts of Congress." 304 U.S. at 78. This view is consistent with historical practice. Even under *Swift*, the general common law rules adopted by federal courts were binding only in federal court; state courts remained free to disregard them in subsequent cases. If the Supremacy Clause were meant to encompass federal judge-made law, it is odd that neither federal nor state courts noticed this fact for most of our constitutional history.

⁷⁰ *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown*

Erie rejected the “fallacy” underlying *Swift* that “there is ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.’”⁷¹ This meant that “[t]he common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State.”⁷²

Second, the *Erie* Court recognized that state courts, no less than state legislatures, can and do make law on behalf of the states.⁷³ Traditionally, judges and legal commentators believed that common law judges did not make law in any significant sense. Such judges were simply thought to “discover” rules inherent within the common law itself.⁷⁴ By the end of the nineteenth century, however, the legal positivists’ conception of law as the creation of human will had transformed the common law. Under this view, judges did not merely discover common law rules, but rather affirmatively created them.⁷⁵

Erie applied these principles to state law. According to the Court, “[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”⁷⁶ Rather, in the absence of a contrary

& Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

⁷¹ *Id.* (same).

⁷² *Id.* (same).

⁷³ Both tenets embraced by the Court derive from notions of legal positivism advanced by John Austin. See William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 921-22 (1988) (describing Austin’s view that “the common law is a system of positive law set by the sovereign using the medium of judicial opinions”); *infra* note 75.

⁷⁴ See 1 WILLIAM BLACKSTONE, COMMENTARIES *68 (“[T]he only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.”); see also GRANT GILMORE, THE AGES OF AMERICAN LAW 14 (1977) (“Courts decided cases in the light of preexisting common law or statutory rules. Only the legislature could change the rules.”); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 17, 45 (Charles M. Gray ed., Univ. of Chicago 1971) (1713) (noting that common law rules “acquire[] their binding Power and the Force of Laws by a long and immemorial Usage”).

⁷⁵ See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 30-33 (Isaiah Berlin ed., Noonday Press 1954) (1832) (positing that “judge-made law” is the law of the sovereign); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) (“You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges.”).

⁷⁶ *Erie*, 304 U.S. at 78. The only potential federal restriction on the way in which the states adopt state law appears to be the Guarantee Clause. See U.S. CONST. art. IV, § 4 (guaranteeing that each state shall have a “Republican Form of Government”). The Supreme Court, however, has long held the Guarantee Clause to be nonjustici-

rule supplied by positive federal law (such as "the Federal Constitution or . . . Acts of Congress"⁷⁷), each source of state law is equally binding upon the federal courts under principles of judicial federalism.

B. "The New Federal Common Law"⁷⁸

Notwithstanding *Erie's* embrace of judicial federalism, and its oft-quoted assertion that "[t]here is no federal general common law,"⁷⁹ the Supreme Court has subsequently recognized numerous "enclaves of federal judge-made law which bind the States."⁸⁰ In *Erie*, of course, the Court refused to interpret the constitutional and statutory provisions conferring jurisdiction over controversies "between Citizens of different States"⁸¹ to imply federal common lawmaking authority as well. Since 1917, however, the federal courts have claimed just such authority in cases falling within their "admiralty and maritime Jurisdiction."⁸²

In addition, on the very day that *Erie* was decided, the Supreme Court applied "federal common law" to apportion the water of an interstate stream between states,⁸³ and has since routinely applied such law to resolve disputes within its jurisdiction over "Controversies between two or more States."⁸⁴ The Court has also recognized the existence of federal common law governing areas concerned with "international disputes implicating . . . our relations with foreign nations."⁸⁵ Finally the Court has applied federal

able. See *Baker v. Carr*, 369 U.S. 186, 209 (1962) (discussing cases).

⁷⁷ *Erie*, 304 U.S. at 78.

⁷⁸ The phrase is Judge Friendly's. See Henry J. Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

⁷⁹ *Erie*, 304 U.S. at 78.

⁸⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964).

⁸¹ U.S. CONST. art. III, § 2.

⁸² *Id.*; see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) ("[I]n the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."); *American Dredging Co. v. Miller*, 114 S. Ct. 981, 989 (1994) ("[T]here is an established and continuing tradition of federal common lawmaking in admiralty.").

⁸³ See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁸⁴ U.S. CONST. art. III, § 2; see also *infra* part III.B.

⁸⁵ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (footnote omitted); see also *infra* notes 220-308 and accompanying text.

common law to adjudicate cases involving “the rights and obligations of the United States.”⁸⁶

Contrary to the approach suggested in *Erie*,⁸⁷ modern conceptions of federal common law posit that “[i]n [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.”⁸⁸ As discussed below, such conceptions of the federal judicial power raise substantial federalism and separation of powers concerns.

The Supreme Court has responded to these concerns in two ways. First, the Court has attempted to restrict the application of federal common law to several well-established enclaves, such as those described above. Representative of this approach is the Court’s assertion that,

absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in 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.⁸⁹

To be sure, limiting federal common law to these areas mitigates the constitutional difficulties associated with such law. This approach, however, provides “no underlying rationale other than grandfathering”⁹⁰ because it “simply list[s] areas of law or categories of cases in which federal common law is permissible . . . without supplying any overriding principle or test.”⁹¹

Second, the Supreme Court has suggested that the federal courts’ authority to fashion federal common law is limited to “cases raising issues of uniquely federal concern.”⁹² Although the Court sometimes describes the enclaves listed above as examples of areas that satisfy this standard,⁹³ the precise scope of this restriction

⁸⁶ *Texas Indus.*, 451 U.S. at 641; see also *infra* notes 569-635 and accompanying text.

⁸⁷ See *Erie*, 304 U.S. at 78 (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

⁸⁸ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); cf. *supra* note 4 and accompanying text (defining “federal common law”).

⁸⁹ *Texas Indus.*, 451 U.S. at 641 (footnotes omitted).

⁹⁰ Field, *supra* note 4, at 912.

⁹¹ *Id.* at 911.

⁹² *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (footnotes omitted).

⁹³ See *id.* (stating that federal courts have authority “to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights

remains unclear. For example, the Court has recently gone so far as to hold that this requirement permits the adoption of federal common law to govern disputes between private parties when "the interests of the United States will be directly affected."⁹⁴

Professor Martha Field has criticized the Supreme Court's approach on the ground that "limits on federal common law are incoherent"⁹⁵ and has asserted that "judicial power to act is not limited to particular enclaves."⁹⁶ In Professor Field's view, "*federal law can apply whenever federal interests require a federal solution.*"⁹⁷ Under "this broad formulation of judicial power," the judiciary is generally free "to choose between state and federal law," and state law "operat[es] of its own force" only with respect to "a very small amount of state law."⁹⁸ In all other cases, the judiciary possesses "[t]otal flexibility . . . in the choice of governing law."⁹⁹

Professor Field's broad conception of judicial power to adopt federal common law raises substantial federalism and separation of powers concerns. In analyzing these concerns, it is useful to identify three distinct allocations of power created by the Constitution's complex division of governmental authority between the federal government and the states. First, because the federal government is one of enumerated powers, the states retain exclusive authority (at least in theory) to govern certain matters.¹⁰⁰ Thus, at least in this sphere, the imposition of *any* federal rule of decision—whether adopted by Congress or the courts—would invade the

or duties of the United States or the resolution of interstate controversies" (footnotes omitted)).

⁹⁴ *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988), discussed *infra* notes 603-35 and accompanying text. The Court has also stated that the application of federal common law is appropriate only when there is a "significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1963); *see also Boyle*, 487 U.S. at 507 (quoting *Wallis*, 384 U.S. at 68). Whether the Court will find the conflict sufficient depends on the nature of the competing federal and state interests.

⁹⁵ Field, *supra* note 4, at 884.

⁹⁶ *Id.* at 887.

⁹⁷ *Id.* at 983.

⁹⁸ *Id.* at 888.

⁹⁹ *Id.* at 930. Professor Field, however, would guide the exercise of judicial discretion by adopting a presumption that "*state law should apply when it is not inconsistent with federal interests* for it to do so." *Id.* at 983.

¹⁰⁰ *See United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (reciting the "first principles" that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined" and that "[t]hose which are to remain in the State governments are numerous and indefinite" (first alteration in original) (quoting THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961))).

constitutional prerogatives of the states.¹⁰¹ Second, and conversely, the Constitution vests exclusive authority over at least some matters in the federal government.¹⁰² Because the states are completely without authority to govern matters of this kind, judicial creation of federal common law rules to govern matters within this sphere raises only negligible federalism concerns, if any.

Finally, with respect to a broad array of matters, the Constitution recognizes overlapping state and federal sovereignty to establish governing rules of decision. The matters at issue in *Swift* and *Erie*, for example, appear to fall within this category because Congress, at least, appears to have power to regulate such matters under the Commerce Clause, and nothing in the Constitution appears to oust state authority.¹⁰³ As discussed in the preceding section, despite the existence of federal power, the judiciary's unilateral adoption of federal common law rules to govern matters that fall within this broad category gives rise to federalism and separation of powers concerns.

In other words, to the extent that the various enclaves of federal common law recognized by the Supreme Court, or the even broader conception of federal common law proposed by Professor Field, govern matters within the legislative competence of the states, such law appears to contradict the principles of judicial federalism recognized in *Erie*. The federal courts' application of federal common law appears to threaten legitimate state authority no less than the application of "general common law" under *Swift*. In both instances, federal courts disregard state law in favor of unwritten law of their choosing. *Erie* condemned this practice in sweeping terms: "Except in matters governed by the Federal Constitution or

¹⁰¹ Madison's arguments against the proposition that "the common law is established by the Constitution" are worth noting in this context. As Madison explained, acceptance of this proposition would imply congressional power "coextensive with the objects of the common law" and "would confer on the judicial department a discretion little short of a legislative power." Madison's Report on the Virginia Resolutions (1800), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 565-66 (Jonathan Elliot ed., New York, Burt Franklin 2d ed. n.d.) (1st ed. 1888) [hereinafter ELLIOT'S DEBATES]; cf. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954) (stating that, unlike state law, federal law is necessarily interstitial in character).

¹⁰² See *infra* notes 237-52 and accompanying text.

¹⁰³ The Supremacy Clause, of course, was designed to mediate the conflicts between federal and state law that were sure to arise following the states' adoption of the Constitution. See U.S. CONST. art. VI, cl. 2.

by Acts of Congress, the law to be applied in any case is the law of the state."¹⁰⁴ At least with respect to matters within the legislative competence of the states, the federal judiciary's unilateral disregard of state law—whether in favor of federal common law or general common law—appears to “invade[] rights which . . . are reserved by the Constitution to the several States.”¹⁰⁵

If anything, federal common law appears to raise even greater federalism concerns than general common law. Although the *Swift* doctrine permitted federal courts to apply general law in place of state law, the doctrine applied only in federal court. Thus, for most of our constitutional history, state courts remained free to apply state judge-made law in any case brought before them.¹⁰⁶ *Federal* common law, by contrast, “is truly uniform because, under the supremacy clause, it is binding in every forum.”¹⁰⁷

Modern conceptions of federal common law have undoubtedly been influenced by the principles of legal positivism embraced in *Erie*. Just as state courts are recognized to make state law on behalf of their respective state sovereigns,¹⁰⁸ federal courts are thought to make federal law on behalf of the federal sovereign.¹⁰⁹ But the analogy is inapt, and thus does nothing to resolve the constitutional difficulties associated with federal judge-made law. “[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.”¹¹⁰ The Constitution carefully separates legislative power from judicial power by vesting the former in Congress¹¹¹ and the

¹⁰⁴ *Erie*, 304 U.S. at 78.

¹⁰⁵ *Id.* at 80.

¹⁰⁶ See *infra* note 217.

¹⁰⁷ Friendly, *supra* note 78, at 405; see also Field, *supra* note 4, at 897 (“Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state judges through the supremacy clause.” (footnote omitted)).

¹⁰⁸ See *supra* notes 70-77 and accompanying text.

¹⁰⁹ As Judge Friendly stated:

The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made.

Friendly, *supra* note 78, at 422.

¹¹⁰ *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

¹¹¹ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested

latter in the federal judiciary.¹¹² Given this separation of powers, whether the law of the *United States* shall be declared by its legislature in a statute or by its highest court in a decision surely is “a matter of federal concern.”¹¹³

The Constitution establishes intricate procedures for the adoption of the various forms of positive federal law. Significantly, these procedures neither require nor permit participation by the federal judiciary.¹¹⁴ For example, the Constitution may be amended only in accordance with Article V, which envisions action by Congress and the states.¹¹⁵ Likewise, every federal legislative proposal, “before it [shall] become a Law,” must either meet with the approval of both houses of Congress and the President or be approved by two-thirds of both houses.¹¹⁶ Finally, all treaties must be made by the President “by and with the Advice and Consent of the Senate.”¹¹⁷

Open-ended federal common lawmaking by courts enables the judiciary to evade the safeguards inherent in this carefully wrought scheme. Such evasion is at least in tension with the constitutional separation of powers.¹¹⁸ This tension, moreover, triggers federal-

in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”).

¹¹² 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.”). For an excellent discussion of the founders’ fundamental decision to separate lawmaking from law-exposition, see generally John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. (forthcoming April 1996).

¹¹³ *Erie*, 304 U.S. at 78. Certainly, in this respect, there is a constitutionally significant disparity between federal and state courts. Cf. Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 594 (1991) (“[T]he Court has used federalism as the basis for restricting federal judicial authority and for deferring to state courts.”); Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 652 (1991) (agreeing that strong parity does not exist); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 610-11 (1991) (noting that “strong” parity, meaning “the fungible nature of state and federal courts,” does not exist).

¹¹⁴ Indeed, the founders specifically considered, and repeatedly rejected, proposals in the Constitutional Convention to include the judiciary in federal lawmaking by permitting it to exercise the veto power jointly with the President. See *supra* note 61.

¹¹⁵ See U.S. CONST. art. V. But see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 45, 69-70 (1991) (characterizing certain historical events as attempts to amend the Constitution by means other than those prescribed in Article V).

¹¹⁶ See U.S. CONST. art. I, § 7, cl. 2; see also *supra* note 61. These requirements are often referred to as “bicameralism” and “presentment.”

¹¹⁷ U.S. CONST. art. II, § 2, cl. 2.

¹¹⁸ Significantly, the Constitution invariably requires the participation of multiple

ism concerns because, as *Erie* held, the states have a legitimate expectation under the constitutional scheme that state law will govern all matters subject to state authority unless and until positive federal law is adopted to preempt such law.¹¹⁹ As discussed, the constitutional scheme renders adoption of positive federal law cumbersome and often difficult. These constitutional impediments necessarily serve to safeguard state authority. Thus, the federal courts' application of federal common law, no less than their application of general common law under *Swift*, appears to constitute an unconstitutional "invasion of the authority of the state."¹²⁰

Thus, there appears to be much substance to Professor Redish's assertion that "there can be no such thing as 'federal common law,' at least to the extent it is used to provide a 'rule of decision' and to the extent the phrase 'common law' is construed as a category of lawmaking distinct from constitutional or statutory 'interpretation.'"¹²¹ The difficulty with Professor Redish's approach, however, is that his conception of "constitutional interpretation" is too narrow in that it appears to exclude "the method of inference from the structures and relationships created by the constitution."¹²² For example, he regards the Supreme Court's adoption of rules of decision that implicate foreign relations or that govern disputes between states as the creation of "discrete areas of purely judge-made substantive federal law,"¹²³ in disregard of "the overriding institutional questions posed by fundamental principles of American

actors in order to create federal law. The establishment of such "checks and balances" reflects the founders' view that "the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest." THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹¹⁹ See *supra* notes 54-69 and accompanying text. Professor Field attempts to blunt these constitutional concerns by suggesting several alternative interpretations of *Erie*. See Field, *supra* note 4, at 915-24. In the end, however, Professor Field concludes that "[t]he *Erie* Court's constitutional holding is fundamentally unclear." *Id.* at 924. Thus, even Professor Field acknowledges that "[c]onsiderations of federalism and separation of powers combine to make us skeptical about courts formulating very broad federal common law." *Id.* at 931.

¹²⁰ *Erie*, 304 U.S. at 79 (quoting *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

¹²¹ Redish, *supra* note 5, at 792.

¹²² BLACK, *supra* note 19, at 7.

¹²³ Redish, *supra* note 5, at 761; see also *id.* at 761 n.2 (citing cases).

political and constitutional theory."¹²⁴ As the next Part of this Article suggests, however, many of these areas can be reconceptualized as rules of decision implied by, or otherwise necessary to implement, the constitutional structure.

II. RECONCEPTUALIZING MODERN FEDERAL COMMON LAW

Notwithstanding the federalism and separation of powers concerns identified above, not all of the rules currently thought to be "federal judge-made law" in fact raise these concerns. Some federal common law rules govern matters beyond the legislative competence of the states.¹²⁵ By definition, application of federal common law in this context raises few, if any, federalism concerns. Similarly, some federal common law rules are not, in fact, "federal judge-made law." Rather, such rules frequently represent the application of various customary rules that federal courts apply to further some basic aspect of the constitutional scheme. As discussed below, judicial adherence to rules of this kind does not constitute improper judicial lawmaking. Rather, such adherence is generally consistent with, and may sometimes be required by, the constitutional structure.

This Part contains three sections. The first section identifies criteria for reconceptualizing at least a portion of the rules regarded today as federal common law. To qualify for the proposed reconceptualization, a federal common law rule must satisfy two criteria. First, the rule in question must concern matters that fall beyond the legislative competence of the states. Second, the rule must be necessary to further some aspect of the constitutional scheme. The proposed criteria provide useful tools for evaluating the legitimacy of various federal common law rules. Rules that satisfy these criteria do not raise the federalism and separation of powers concerns traditionally associated with federal judge-made law, and thus should not be regarded as "federal common law."

¹²⁴ *Id.* at 762.

¹²⁵ "Legislative competence" refers to the areas subject to governmental regulation under the federal Constitution. For example, the Constitution leaves the states substantially free to regulate vast areas of human behavior, subject only to specific constitutional prohibitions and to preemption under statutes enacted by Congress pursuant to constitutional authority. At least at the state level, it "is not a matter of federal concern" whether the legislative competence of a state is exercised by its legislature in a statute or its highest court in a decision. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *supra* text accompanying notes 73-77.

Rules that fail to satisfy the proposed criteria, by contrast, remain constitutionally suspect.

The second section reexamines the Supreme Court's landmark decision in *Swift v. Tyson*¹²⁶ in light of the proposed criteria. This reexamination reveals, contrary to modern accounts, that *Swift* was constitutionally defensible at the time it was decided. The subsequent development of the *Swift* doctrine, as well as changing conceptions of state law, combined to render judicial application of general common law in this context unconstitutional under the principles of judicial federalism recognized in *Erie*. Nonetheless, a proper understanding of the *Swift* paradigm is useful to the proposed reconceptualization, because it provides an example of judicial application of customary law that was arguably consistent with both federalism and separation of powers constraints at the time it was decided.

Finally, the third section applies the proposed criteria to several rules of decision derived from traditional principles of the law of nations, including the so-called act of state doctrine—a rule of decision currently thought to constitute federal common law. Application of the proposed approach reveals that rules like the act of state doctrine are not, in fact, “federal judge-made law.” These rules concern matters beyond the legislative competence of the states and thus raise few, if any, federalism concerns. In addition, rules like the act of state doctrine are based on traditional principles of the law of nations, and thus judicial application of such rules does not appear to require the federal courts to engage in improper judicial lawmaking. Indeed, judicial adherence to rules of this nature is arguably necessary to ensure that the judiciary does not encroach on the exclusive constitutional authority of the political branches to conduct foreign relations. Under these circumstances, judicial application of rules like the act of state doctrine further, rather than impede, the constitutional structure.

A. *The Proposed Approach*

The constitutional impediments to the federal courts' exercise of broad federal common lawmaking authority derive from two primary features of the constitutional structure—federalism¹²⁷ and

¹²⁶ 41 U.S. (16 Pet.) 1 (1842).

¹²⁷ Federalism refers to the Constitution's division of governmental power between the federal government and the states.

the separation of powers.¹²⁸ As *Erie* reveals, both features of the constitutional scheme serve to insulate the states and the people from unwarranted federal intervention. By enumerating the powers delegated to the federal government, the Constitution reserves the remaining powers to the states and the people. In the modern era, the judiciary has been reluctant to enforce strict limits on federal power.¹²⁹ This reluctance has left the boundaries of federal power to be worked out largely by the political branches, and the states' interests to be protected by what Professor Herbert Wechsler referred to as "the political safeguards of federalism."¹³⁰

Professor Wechsler's thesis is that the states' participation in choosing the members of the political branches of the federal government ensures that the states' interests will be adequately represented in the national political arena, and that strict judicial review of the boundary between federal and state power is therefore unnecessary.¹³¹ The Supreme Court's embrace of Professor Wechsler's thesis underscores the importance of strict adherence to the doctrine of judicial federalism recognized in *Erie*. Because "the states, and their interests as such, are represented in the Congress but not in the federal courts,"¹³² the displacement of state law by the federal judiciary raises greater federalism concerns than displacement of state law by Congress.¹³³ For the political safeguards of federalism to function effectively, the federal government must adhere closely to the detailed procedures required for the

¹²⁸ The separation of powers refers to the Constitution's allocation, and general separation, of federal powers among three separate and distinct branches of government.

¹²⁹ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528-29 (1985) ("The States' continued role in the federal system is primarily guaranteed not by any externally imposed limits [on federal power], but by the structure of the Federal Government itself."). But cf. *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (invalidating the Gun-Free School Zones Act of 1990 rather than "proceed[ing] any further" "down that road [toward] giving great deference to congressional action").

¹³⁰ Wechsler, *supra* note 62, at 543; see also *Garcia*, 469 U.S. at 551 (embracing Professor Wechsler's theory).

¹³¹ See Wechsler, *supra* note 62, at 544.

¹³² Mishkin, *supra* note 50, at 1685.

¹³³ See *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 n.9 (1981) (noting that "the States are represented in Congress but not in the federal courts"); cf. Merrill, *supra* note 4, at 17 (arguing that because Professor Wechsler's thesis applies only to action by the political branches and not to action by the unelected federal judiciary, "the 'political safeguards' that have been invoked to rationalize the elimination of constraints on congressional power do not justify abolition of all constraints on judicial power").

adoption of positive federal law—most notably, the requirements of bicameralism and presentment.¹³⁴ At least with respect to matters over which the states retain substantive lawmaking authority, adoption of federal common law by the unelected and politically unaccountable federal judiciary would circumvent “the political safeguards of federalism.”

Thus, *Erie*'s conception of judicial federalism—supported by the negative implication of the political safeguards of federalism—suggests the first criterion for reconceptualizing at least a portion of modern federal common law rules. This criterion asks whether the matters governed by the rule in question fall within, or beyond, the legislative competence of the states.¹³⁵ If the matters fall beyond the legislative competence of the states, then the principles of judicial federalism recognized in *Erie* do not function as a serious constraint on the federal courts' application of “federal judge-made law.” By hypothesis, the states retain few, if any, rights to invade in this context.¹³⁶ If, on the other hand, the matters in question fall within the legislative competence of the states, then judicial application of a federal common law rule in derogation of state law would suffer from the same constitutional infirmities as did the lower court's application of “general common law” in *Erie*.

Even if a federal common law rule governs matters beyond the legislative competence of the states and thus satisfies the first criterion, it remains subject to more conventional separation of powers concerns—specifically, the concern that federal common lawmaking appears to be inconsistent with the founders' fundamental decision to separate the legislative power from the judicial power

¹³⁴ See *supra* notes 114-17 and accompanying text.

¹³⁵ Matters *beyond* the legislative competence of the states necessarily fall within the exclusive authority of the federal government. Matters *within* the legislative competence of the states, by contrast, fall either within the exclusive power of the states or the concurrent power of the federal government and the states. See *supra* notes 100-03 and accompanying text. Practically speaking, given the expansive interpretation of federal power in the modern era, very few matters fall within the exclusive power of the states. For this reason, this Article's use of the phrase “matters within the legislative competence of the states” generally refers to matters subject to the authority of both the federal government and the states.

¹³⁶ Of course, federal common law rules that govern matters beyond the legislative competence of the states remain subject to other potential constitutional constraints, including the constitutional separation of powers. It adds little, if anything, to the analysis, however, to suggest that a potential separation of powers violation also gives rise to a federalism violation in areas over which the states retain no substantive authority.

at the federal level.¹³⁷ This concern suggests the second criterion for reconceptualizing federal common law. This criterion asks whether judicial application of the rule in question constitutes either the application of rules implied directly from the constitutional structure, or adherence to customary rules of decision necessary to implement a basic feature of the constitutional scheme.¹³⁸ In either case, the rule in question does not in fact constitute improper judicial lawmaking, and furthers, rather than impedes, the constitutional structure.

Application of the proposed criteria suggests that many of the rules currently thought to be "federal common law" have been mischaracterized. Strictly speaking, rules that satisfy the proposed criteria are not, in fact, "federal judge-made law."¹³⁹ Rather, as shown below, judicial application of such rules has a strong basis in the constitutional structure. Identifying the structural foundations of "federal common law" places a number of these rules on a firmer constitutional footing by dispelling the federalism and separation of powers concerns traditionally associated with such law. Federal common law rules that do not satisfy the proposed criteria remain constitutionally suspect.¹⁴⁰

¹³⁷ See *supra* notes 108-18 and accompanying text.

¹³⁸ Examples of "federal common law" rules that satisfy this criterion include rules like the act of state doctrine that prevent the judiciary from encroaching upon authority vested exclusively in the political branches of the federal government, see *infra* notes 257-82 and accompanying text, and rules necessary to maintain the constitutional equality of the states, see *infra* notes 393-408 and accompanying text.

¹³⁹ Although I use the phrases "federal judge-made law" and "federal common law" interchangeably throughout this Article, see *supra* notes 3-4 and accompanying text, there is at least an arguable distinction to be drawn in this context. Rules that satisfy the criteria set forth in the text are not "federal judge-made law" in the sense that their content is supplied at least in part by external sources. Whether such rules are "federal common law" in the sense that their "content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command," HART & WECHSLER, *supra* note 4, at 863, is debatable. Strictly speaking, the Constitution itself does not supply the customary rules applied by federal courts in a number of these contexts. See *infra* notes 451-61 and accompanying text. By hypothesis, however, application of such rules is necessary to implement some aspect of the constitutional scheme. Under these circumstances, it is probably inaccurate to characterize such rules as "federal common law."

¹⁴⁰ This Article does not attempt to establish that federal common law rules that fail to satisfy the proposed criteria are necessarily unconstitutional. Such an attempt is beyond the scope of this Article. Rather, the Article seeks to show only that "federal common law" rules that satisfy the proposed criteria do not raise the constitutional concerns traditionally associated with federal judge-made law.

B. *Swift v. Tyson Revisited*

Swift v. Tyson provides an example of the federal courts' application of unwritten law that appears to have been consistent with both federalism and separation of powers principles. Understanding the *Swift* paradigm points the way towards reconceptualizing at least a portion of modern federal common law, by demonstrating that federal courts may sometimes apply unwritten law without raising substantial constitutional concerns. For most of this century, courts and commentators generally have regarded the Supreme Court's decision in *Swift* as an unconstitutional invasion of rights "reserved by the Constitution to the several states."¹⁴¹ This account, however, fails adequately to distinguish between the Court's decision in *Swift* and the subsequent development of the so-called "*Swift* doctrine."

At the time *Swift* was decided, the states did not clearly conceive of "general commercial law" as state law. Rather, state and federal courts appeared to be jointly administering a customary body of rules common to many jurisdictions. Thus, because the states had not yet clearly established binding principles of commercial law as a matter of state law, the Supreme Court's exercise of independent judgment with respect to such questions did not raise significant federalism concerns. In the decades following *Swift*, however, states increasingly understood such unwritten law as a creation of their sovereign will. At the same time, federal courts expanded the *Swift* doctrine to permit federal courts to disregard state judicial decisions on an ever-expanding range of issues. By the time *Erie* was decided, the Court recognized that state courts can, and do, make law on behalf of the states. These developments led the Court to abandon the *Swift* doctrine as "an unconstitutional assumption of powers by courts of the United States."¹⁴²

Nor did *Swift* raise significant separation of powers concerns at the time it was decided. The law applied by the Supreme Court—the law merchant—was a customary body of rules derived from the law of nations. Such rules provide the judiciary with substantial guidance, and thus do not leave courts free to formulate rules of decision according to their own standards. Moreover, as discussed below in connection with the act of state doctrine, in some instances

¹⁴¹ *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938).

¹⁴² *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

the constitutional structure may require courts to apply rules derived from the law of nations in order to avoid usurping powers given exclusively to the political branches of government.¹⁴³

Swift involved a suit between citizens of different states brought in federal court on the basis of diversity jurisdiction.¹⁴⁴ The case presented an unsettled question of commercial law—whether acceptance of a negotiable instrument in satisfaction of a preexisting debt rested upon sufficient consideration to confer upon the recipient the status of “a *bona fide* holder.”¹⁴⁵ Although past decisions by New York courts suggested that such consideration was not sufficient,¹⁴⁶ the Supreme Court did not consider itself bound by these decisions, and ruled to the contrary.¹⁴⁷ The Court characterized the question as one of “general commercial law,”¹⁴⁸ upon which the Court was free “to express our own opinion.”¹⁴⁹

¹⁴³ See *infra* notes 265-73 and accompanying text.

¹⁴⁴ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 3 (1842). The suit was authorized under the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332 (1994)) (granting the circuit courts original jurisdiction over suits “between a citizen of the State where the suit is brought, and a citizen of another State”).

¹⁴⁵ See *Swift*, 41 U.S. (16 Pet.) at 16.

¹⁴⁶ In *Coddington v. Bay*, 20 Johns. 637 (N.Y. 1822), the New York Supreme Court for the Correction of Errors recognized “[t]he general rule . . . that where negotiable paper is transferred for valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner.” *Id.* at 644-45 (Woodworth, J.). The court, however, concluded that the defendants in *Coddington* were not entitled to the benefit of the rule because they had not given “valuable consideration” for the notes. Strictly speaking, the question whether the release of a preexisting debt constitutes valuable consideration was not presented in *Coddington* because the defendants admitted that at the time they received the notes, the persons from whom they received them “were not, in a strict legal sense, indebted to [the defendants] in any amount whatever.” *Id.* at 644 (Woodworth, J.). Nonetheless, several of the opinions suggested that an antecedent debt is not a valuable consideration under the rule. See *id.* at 648 (Woodworth, J.); *id.* at 651 (Spencer, C.J.); *id.* at 655 (Viele, Sen.). Although the Supreme Court for the Correction of Errors had not “pronounced any positive opinion upon” the question when *Swift* was decided, see *Swift*, 41 U.S. (16 Pet.) at 18, several lower court decisions had ruled in accordance with *Coddington*’s dicta. See, e.g., *Payne v. Cutler*, 13 Wend. 605 (1835); *Rosa v. Brotherson*, 10 Wend. 85 (1833); *Wardell v. Howell*, 9 Wend. 170 (1832). The Court in *Swift* noted that “the more recent [New York] cases . . . have greatly shaken, if they have not entirely overthrown [the earlier] decisions,” 41 U.S. (16 Pet.) at 17, but the Court was willing to assume *arguendo* that “the doctrine [was] fully settled in New York” that “a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders,” *id.* at 17-18.

¹⁴⁷ See *Swift*, 41 U.S. (16 Pet.) at 19-22.

¹⁴⁸ *Id.* at 18.

¹⁴⁹ *Id.* at 19.

The modern view, established in *Erie*, dismisses *Swift* on the grounds that the Court's approach was not only inconsistent with section 34 of the Judiciary Act of 1789,¹⁵⁰ but also unconstitutional.¹⁵¹ Section 34 provided "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."¹⁵² According to modern accounts, *Swift* misinterpreted the phrase "the laws of the several states" to apply only to written law (such as state statutes) and not to unwritten law (such as state common law decisions).¹⁵³ *Erie* is thought to have corrected this mistake by reinterpreting section 34, in light of newly discovered historical evidence, to require "federal courts exercising jurisdiction in diversity of citizenship cases [to] apply as their rules of decision the law of the State, unwritten as well as written."¹⁵⁴

In addition, modern accounts embrace *Erie's* assertion that *Swift* rested on the fallacy "that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"¹⁵⁵ According to *Erie*, the better view is that "[t]he common law so far as it is enforced in a State . . . is not the common law generally but the law" as declared by the courts of that state.¹⁵⁶ Thus, *Erie* suggests that the *Swift* Court's failure to follow state common law decisions not only violated the Rules of Decision Act, but also unconstitutionally invaded "the autonomy and independence of the States."¹⁵⁷

¹⁵⁰ See *Erie*, 304 U.S. at 72 (stating that "the construction given § 34 . . . by the Court [in *Swift*] was erroneous").

¹⁵¹ See *id.* at 79 (concluding that "the doctrine of *Swift v. Tyson* is . . . 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct'" (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

¹⁵² Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1994)).

¹⁵³ See, e.g., JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.1, at 192 (2d ed. 1993) ("As a result of *Swift*, the laws of the states that would be regarded as rules of decision in the federal courts under Section 34 of the Judiciary Act were limited to state constitutions, statutes, and state judicial opinions interpreting them.")

¹⁵⁴ *Erie*, 304 U.S. at 73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923)).

¹⁵⁵ *Id.* at 79 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 78 (quoting *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 401 (1893))

Neither critique of *Swift* is historically accurate. Contrary to modern assumptions, *Swift* did not interpret section 34 to encompass only written state law. The Court's opinion expressly acknowledged that section 34's command applied not only to "local statutes," but also to "long-established local customs having the force of laws."¹⁵⁸ The opinion leaves no doubt that the Court understood such "local customs" to be a form of unwritten state law binding in federal court. Thus, *Swift's* interpretation of section 34 did not rest on a simple distinction between written and unwritten law, but rather on the more complex dichotomy between local statutes and customs, on the one hand, and "questions of a more general nature, . . . especially . . . questions of general commercial law," on the other.¹⁵⁹ Although this dichotomy is unfamiliar to us today, it was well known in 1842.

Justice Story's dichotomy reflected the well-established distinction between *lex loci*, or local law, and *jus gentium*, or the law of nations. The *lex loci* comprehended "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character."¹⁶⁰ The *jus gentium*, by contrast, encompassed "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation."¹⁶¹

It is difficult for modern lawyers fully to appreciate the nature and significance of the law of nations at the time *Swift* was decided. In order to understand why the *Swift* Court applied general law, we must examine the way in which late-eighteenth- and early-nineteenth-century lawyers and judges perceived such law. The law of nations was not "law" as we usually think of it today—that is, a sovereign command. But neither was it a "brooding omnipresence in the sky."¹⁶² Rather, as *Swift* suggests, the law of nations was an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years.¹⁶³ Indeed, many of the basic concepts of the law of nations

(Field, J., dissenting)).

¹⁵⁸ *Swift*, 41 U.S. (16 Pet.) at 18.

¹⁵⁹ *Id.* at 18-19.

¹⁶⁰ *Id.* at 18; see also 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, 1532 (1984) (stating that federal courts "regularly found that a law was local when the subject matter was of peculiarly local concern, such as title to real estate").

¹⁶¹ *Swift*, 41 U.S. (16 Pet.) at 18-19.

¹⁶² *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

¹⁶³ See *Swift*, 41 U.S. (16 Pet.) at 19. The Court stated:

were recognized during Roman times.¹⁶⁴ Nations (and states) adhered voluntarily to these customary rules, to foster peaceful coexistence and to facilitate mutually beneficial transactions among their citizens.¹⁶⁵ In essence, the law of nations operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary. Because of the character of such law, federal and state courts had no occasion to characterize the various branches of the law of nations as either federal or state law.¹⁶⁶ At the time, it was thought to be neither.

The law of nations had three principal branches¹⁶⁷—the law merchant, the law maritime,¹⁶⁸ and the law governing the rights

The law respecting negotiable instruments may be truly declared in the languages of Cicero . . . to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit* [There will not be one law in Rome, another in Athens; one now, another later; but both among all nations, and at all times, one and the same law will obtain].

Id. Today, the law of nations is known as customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

¹⁶⁴ See, e.g., *Nebraska v. Iowa*, 143 U.S. 359, 362, 364 (1892) (stating that “the received rule[s] of the law of nations” respecting accretion and avulsion are “transmitted to us from the laws of Rome”). See generally FREDERIC R. SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW 200 (1930) (“Just as we find the Roman law responsible for certain legal principles in the sister field of maritime law, . . . so too do we find that the Roman law was the general basis of commercial contracts, and, consequently, of much of commercial law.”); Edwin D. Dickinson, *The Law of Nations As Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26, 29 (1952) (stating that “the law of states,” a branch of the law of nations that developed into public international law, “denote[s] the amorphous but considerable body of usage and agreement with respect to international matters which had come into being with the rise of a European state system, [and] which had been enriched by borrowings and adaptations from the Roman Law”).

¹⁶⁵ Vattel, the leading treatise writer in the field, described the law of nations as consisting of “[c]ertain maxims and customs, consecrated by long use, and observed by nations in their mutual intercourse with each other.” VATTEL, THE LAW OF NATIONS at lxx (Joseph Chitty ed., Phila., T. & J.W. Johnson & Co. 1859) (1758).

¹⁶⁶ Courts did not attempt to characterize the law of nations as either federal or state law because, by definition, such law was not considered to be the command of either sovereign. See Fletcher, *supra* note 160, at 1517 (“The underlying premise was that the general law was not attached to any particular sovereign; rather, it existed by common practice and consent among a number of sovereigns.”).

¹⁶⁷ In addition, the law of conflicts of laws is sometimes cited as a branch of the law of nations. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 805 (1955).

¹⁶⁸ The law maritime was a body of rules and customs governing the rights and duties of nations and their citizens with respect to maritime activity. Many nations

and duties of sovereign states.¹⁶⁹ As Blackstone explained, the law merchant—the branch at issue in *Swift*—was “a particular system of customs . . . which, however different from . . . the common law, is . . . allowed, for the benefit of trade,” and “which all nations agree in and take notice of.”¹⁷⁰ At the time *Swift* was decided, both federal and state courts confronted with commercial cases “considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal.”¹⁷¹ Historically, such law was based on the commercial customs and practices of merchants and was applied by all “civilized” nations to resolve disputes among merchants from different countries.¹⁷² The law merchant facilitated trade and commerce among nations by establishing uniform rules to govern transactions among citizens of different nations.¹⁷³

By the eighteenth century, the law of nations was well established. It was the subject of scholarly treatises in a variety of languages and was adhered to in one form or another by the entire community of civilized nations.¹⁷⁴ The newly formed United

maintained specialized courts comprised of individuals with special expertise to hear and resolve maritime disputes. See W. MITCHELL, *ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 39-78 (1904). Like the law merchant, the law maritime fostered trade among nations. But the law maritime also served to maintain peace and harmony among nations. Failure to resolve admiralty and maritime disputes satisfactorily could create tensions among nations and even lead to war. Thus, nations had a strong incentive to adhere to accepted rules and customs. See *infra* notes 424-50 and accompanying text.

¹⁶⁹ This branch of the law of nations deals with matters touching on the rights and duties of nations themselves, such as diplomatic immunity, captures, war, and neutrality. See Dickinson, *supra* note 164, at 29-34; see also *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (“The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America.”).

¹⁷⁰ 1 BLACKSTONE, *supra* note 74, at *75, *264.

¹⁷¹ Fletcher, *supra* note 160, at 1554.

¹⁷² See 1 BLACKSTONE, *supra* note 74, at *75 (“[A] particular system of customs . . . called the custom of merchants, or *lex mercatoria* . . . is . . . allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions . . .”).

¹⁷³ See 1 *id.* at *264 (“[A]s these are transactions carried on between the subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by . . . the law merchant or *lex mercatoria*, which all nations agree in and take notice of.”); ZEPHANIAH SWIFT, *A Digest of the Law of Evidence, in CIVIL AND CRIMINAL CASES. AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES* at ix (Hartford, Oliver D. Cooke 1810) (“In questions of commercial law, the decisions of Courts, in all civilized, and commercial nations, are to be regarded, for the purpose of establishing uniform principles in the commercial world.”). See generally Francis M. Burdick, *What Is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902).

¹⁷⁴ According to Blackstone:

States was no exception. Thus, from the beginning, both the federal judiciary and the political branches recognized the importance of adhering to the law of nations, especially the law governing the rights and duties of sovereign states.¹⁷⁵ In the late eighteenth century, for example, “[c]abinet meetings and memoranda to the President from the Cabinet officers . . . involved detailed discussions of issues concerning the law of nations.”¹⁷⁶ During the same era, the federal courts regularly resolved cases according to the law of nations.¹⁷⁷ The states, too, generally followed the law of

[I]n mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

4 BLACKSTONE, *supra* note 74, at *67.

¹⁷⁵ See THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (noting the “high importance to the peace of America that she observe the laws of nations towards all these powers”). For example, concern for adherence to the law of nations led to the famous attempt by the Washington Administration to obtain an advisory opinion from the Supreme Court. In 1793, Secretary of State Thomas Jefferson wrote to Chief Justice John Jay and the Associate Justices of the Supreme Court seeking their advice concerning various questions arising under “the laws of nature and nations.” Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices (July 18, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486, 486 (Henry P. Johnston ed., Burt Franklin 1970) (1890). Jefferson stated that President Washington sought their advice to “secure us against errors dangerous to the peace of the United States.” *Id.* at 486-87. Although recognizing the importance of these questions “to the preservation of the rights, peace, and dignity of the United States,” the Justices declined to decide these questions extrajudicially in light of “the lines of separation drawn by the Constitution between the three departments of the government.” Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra*, at 488, 488-89.

¹⁷⁶ Jay, *supra* note 167, at 839. In 1792, for example, Attorney General Edmund Randolph advised the Secretary of State as follows:

The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference. Indeed a people may regulate it so as to be binding upon the departments of their own government, in any form whatever; but with regard to foreigners, every change is at the peril of the nation which makes it.

1 Op. Att’y Gen. 9, 9 (1792).

¹⁷⁷ Many of these cases concerned the law maritime. See, e.g., *Reed v. Hussey*, 20 F. Cas. 440, 445 (S.D.N.Y. 1836) (No. 11,646) (applying the law maritime to determine whether a seaman can recover either wages or an allowance for salvage

nations, even in areas in which they possessed unquestioned authority to adopt local law. In commercial matters especially, the states tended to follow the law merchant, because adherence to such law fostered interstate and international trade with their citizens.¹⁷⁸ Thus, during the late eighteenth and early nineteenth centuries, federal and state courts jointly administered the various branches of the law of nations—including the law merchant—in cases where they applied.

Because the law of nations did not appear to consist of sovereign commands, the courts of one sovereign had no authority to bind those of another as to the proper content of that law. Rather, the courts of each sovereign considered themselves free to exercise independent judgment in cases arising under the law of nations.¹⁷⁹

services from the owner of a ship that wrecked prior to completion of its voyage); *The Phebe*, 19 F. Cas. 418, 420 (D. Me. 1834) (No. 11,064) (looking to “the maritime usages and customs of the middle ages” to determine the scope of a master’s authority to bind a vessel); *Granon v. Hartshorne*, 10 F. Cas. 965, 968 (S.D.N.Y. 1834) (No. 5689) (applying the law maritime to determine whether a seaman forfeited certain wages by leaving his ship one day after it reached its berth); *The Elizabeth Frith*, 8 F. Cas. 481, 484 (S.D.N.Y. 1831) (No. 4361) (interpreting the law maritime concerning desertion). Others concerned the law merchant. *See, e.g., Burrows v. Hannegan*, 4 F. Cas. 843, 843 (C.C.D. Ind. 1838) (No. 2205) (stating that promissory note is governed by the law merchant whether “considered as having been made at the city of Washington, or at Cincinnati”); *Maisonnaire v. Keating*, 16 F. Cas. 513, 516 (C.C.D. Mass. 1815) (No. 8978) (referring to the law merchant to determine whether the capture of a vessel was legal); *Bank of Columbia v. French*, 2 F. Cas. 631, 632 (C.C.D.D.C. 1804) (No. 867) (referring to the law merchant to determine the requirements of a bill of exchange); *Thurston v. Koch*, 23 F. Cas. 1183 (C.C.D. Pa. 1800) (No. 14,016) (referring to the principles of the law merchant, as articulated by English courts, to determine a case of double insurance), *rev’d*, 8 U.S. (4 Cranch) 141 (1807).

¹⁷⁸ Professor Fletcher points out that “[t]he concept of a uniform law merchant was quite naturally imported into the treatment of commercial law by American courts,” Fletcher, *supra* note 160, at 1518, because the general common law was regarded at the time as a “great universal law,” “regularly and constantly adhered to.” 4 BLACKSTONE, *supra* note 74, at *67; *cf. Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (“When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.” (emphasis added)).

¹⁷⁹ As Blackstone explained in his famous *Commentaries*:

However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations; entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called ‘the law of nations,’ which, as none of these states will acknowledge a superiority in the other, cannot be dictated by either

1 BLACKSTONE, *supra* note 74, at *43.

The federal and state judiciaries were no exception. In applying the various branches of the law of nations, neither considered itself bound by the decisions of the other.¹⁸⁰ For example, in deciding a question of general commercial law in 1822, the Pennsylvania Supreme Court declared that “[t]he decisions of the Supreme Court of the *United States* have no obligatory authority over this court, except in cases growing out of the constitution, of which this is not one.”¹⁸¹ Conversely, in *Swift*, the Supreme Court looked to “the principles established in the general commercial law,” rather than to the decisions of New York state courts, in deciding a dispute

¹⁸⁰ See Fletcher, *supra* note 160, at 1561 (“State courts generally followed common law decisions by the United States Supreme Court, but they were quite explicit in stating that they did not do so because of any legal compulsion.”).

¹⁸¹ *Waln v. Thompson*, 9 Serg. & Rawle 115, 122 (Pa. 1822) (emphasis added). While asserting the right to exercise independent judgment, the court recognized the “importance of preserving the uniformity of commercial law throughout the *United States*.” *Id.* (emphasis added). Accordingly, Justice Tilghman stated, “I shall always be inclined to adopt [the] opinions [of the Supreme Court], rather than those of any foreign court, unless when I am well satisfied, it is in the wrong.” *Id.*

Seven years earlier, Chief Justice Marshall hoped to foster such deference by supporting a bill to create a permanent court reporter:

It is a minor consideration, but not perhaps to be entirely overlooked, that, even in cases where the decisions of the Supreme Court are not to be considered as authority except in the courts of the United States, some advantage may be derived from their being known. It is certainly to be wished that independent tribunals having concurrent jurisdiction over the same subject should concur in the principles on which they determine the causes coming before them. This concurrence can be obtained only by communicating to each the judgments of the other, and by that mutual respect which will probably be inspired by a knowledge of the grounds on which their judgments respectively stand. *On great commercial questions, especially, it is desirable that the judicial opinions of all parts of the Union should be the same.*

Letter from Chief Justice Marshall to U.S. Senator Dudley Chase (Feb. 7, 1817), in 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1246 (1953) (emphasis added). The state courts’ view that they were entitled to exercise independent judgment on questions arising under the law of nations—including the law respecting sovereign states—persisted well into this century. See, e.g., *Dougherty v. Equitable Life Assurance Soc’y*, 266 N.Y. 71, 84-91 (1934) (applying the law of nations to determine the effect to be given to the Soviet Union’s decree creating a state monopoly over insurance); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y.S. 693, 697-700 (App. Div. 1933) (applying “well-established principles of international law” to decide whether the Soviet Union’s nationalization decrees were open to challenge in New York courts); *Fritz Schulz, Jr., Co. v. Raimés & Co.*, 164 N.Y.S. 454 (N.Y. City Ct. 1917) (applying the law of nations to determine whether an “alien enemy” could sue to recover debts); cf. *infra* notes 332-55 and accompanying text (discussing whether New York law governs the rights of foreign ambassadors in transit).

between citizens of different states arising under the law merchant.¹⁸² The *Swift* Court considered the decisions of New York courts as “at most, only evidence” of such law.¹⁸³

In light of the foregoing, it is difficult to conclude that the Supreme Court’s exercise of independent judgment in *Swift* either “invaded rights which . . . are reserved by the Constitution to the several States”¹⁸⁴ or violated the constitutional separation of powers. At the time, both federal and state courts regarded the question at issue in *Swift*—whether a preexisting debt constitutes adequate consideration to confer the status of “a bona fide holder”—as arising under the general law merchant rather than under distinctively state (or federal) law.¹⁸⁵ Thus, in deciding this question, the *Swift* Court did nothing more than a New York court would have done at the time—exercise independent judgment to ascertain the applicable rule of decision supplied by the law of nations.¹⁸⁶

Swift made this point explicitly: “It is observable, that the courts of New York do not found their decisions [regarding the adequacy

¹⁸² See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842). Just as the Supreme Court did not consider itself bound to follow New York decisions, New York courts considered themselves free to disregard the Supreme Court’s decisions on questions of general commercial law. For example, two years after *Swift*, New York’s highest court was urged to conform its decision “to the opinion of Mr. Justice Story in the recent case of *Swift v. Tyson*.” *Stalker v. M’Donald*, 6 Hill 93, 95 (N.Y. 1843). The court recognized that,

[o]n a question of commercial law, . . . it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several states and of the United States, but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive.

Id. The court nonetheless declined to follow the rule announced by the Supreme Court in *Swift*. See *id.* at 112. The court described the Supreme Court as a “tribunal, whose decisions are not of paramount authority.” *Id.*

¹⁸³ *Swift*, 41 U.S. (16 Pet.) at 18.

¹⁸⁴ *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938).

¹⁸⁵ See *Fletcher*, *supra* note 160, at 1521 (noting that throughout the first half of the nineteenth century “there had always been, and still remained, a substantial core of uniform law that was administered by the federal and state courts as a general American common law”); *id.* at 1554 (stating that federal and state courts “considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal”).

¹⁸⁶ Presumably for this reason, “*Swift* appears to have been regarded when it was decided as little more than a decision on the law of negotiable instruments.” *Id.* at 1514; see also *Casto*, *supra* note 73, at 922 n.103 (“During the ninety-six years between *Swift* and *Erie*, only three lower federal courts published opinions criticizing the *Swift* doctrine.”).

of consideration], upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law."¹⁸⁷ On questions of this kind, "the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial law to govern the case."¹⁸⁸

If *Swift* was correct that New York courts decided interstate commercial disputes according to "general principles of commercial law" rather than "local usage,"¹⁸⁹ then the Court's approach in *Swift* was quite defensible, when taken in historical context, against the charge that it violated rights reserved to the states. At the time, New York courts did not clearly conceive of themselves as establishing binding principles of state law distinct from the general law merchant. Rather, these courts appeared to be applying the law of nations directly.¹⁹⁰ Thus, it is not surprising that *Swift* concluded that such decisions did not, "of themselves," constitute "the laws of the several states" under section 34, but were "at most, only evidence of what the laws are."¹⁹¹

In fact, the *Swift* Court itself acknowledged that had New York adopted "local statutes or local usages of a fixed and permanent operation," the federal courts would have been bound to apply them.¹⁹² This is not a concession of a Court bent on usurping

¹⁸⁷ *Swift*, 41 U.S. (16 Pet.) at 18.

¹⁸⁸ *Id.* at 19.

¹⁸⁹ *Id.* at 18.

¹⁹⁰ In *Coddington v. Bay*, 20 Johns. 637 (N.Y. 1822), for example, the New York Court for the Correction of Errors recognized "[t]he general rule . . . that where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner." *Id.* at 644-45 (Woodworth, J.). The court considered the rule to be "well established," *id.* at 647 (Woodworth, J.), and consistent with "the usual course of trade." *Id.* at 651 (Spencer, C.J.). That the court recognized this rule as part of the general law merchant is suggested by Chief Judge Spencer's observation that the rule "is not only right in itself, but the contrary doctrine would destroy the circulation of notes, and would justly alarm the mercantile world." *Id.*

¹⁹¹ *Swift*, 41 U.S. (16 Pet.) at 18-19. The Court's characterization was also in accord with prevailing conceptions of unwritten law. See 1 BLACKSTONE, *supra* note 74, at *71 (stating that "the law, and the opinion of the judge, are not always convertible terms," but "we may take it as a general rule, 'that the decisions of courts of justice are the evidence of what is common law'").

¹⁹² See *Swift*, 41 U.S. (16 Pet.) at 18-19; see also *Jackson v. Chew*, 25 U.S. (12 Wheat.) 153, 162 (1827) ("[W]here any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court, that would be applied by the state tribunals."); *Mandeville & Jameson v. Joseph*

state authority.¹⁹³ So long as the New York courts themselves decided commercial cases under the general law merchant rather than local law, federal courts were free to act as a state court would in deciding cases brought before them—that is, to look to “the general principles and doctrines of commercial jurisprudence.”¹⁹⁴

Nor did the *Swift* Court’s application of the general law merchant raise significant separation of powers concerns. Because courts applying the law merchant were attempting to discern a preexisting body of law, they were not engaged in unrestrained judicial lawmaking.¹⁹⁵ Although the application of rules derived from the law of nations may require courts to engage in limited norm elaboration at the margins,¹⁹⁶ this task is inherent in the adjudication of cases arising under customary law. So long as courts remain “confined from molar to molecular motions”¹⁹⁷ in performing this task, any interstitial lawmaking incident to the application of the law of nations is plausibly regarded as a proper exercise of “[t]he judicial Power.”¹⁹⁸

Riddle & Co., 5 U.S. (1 Cranch) 290, 298 (1803) (invoking a rule, which had “at length been settled in Virginia,” on the liability of an assignor to an assignee); Fletcher, *supra* note 160, at 1534 (“State deviation from the general common law was most frequently accomplished by statute, but on those occasions when a state had clearly established its own judicial variation on the common law, the federal courts also followed that local law.”). Of course, “it was sometimes unclear whether a state had established its own local version of the common law or had merely entertained a different idea of what the general common law required,” *id.* at 1537, but “once a local rule was clearly established, the federal courts were compelled to follow it,” *id.* at 1538.

¹⁹³ In fact, Justice Story, sitting on circuit, previously acknowledged his obligation to apply Massachusetts decisions establishing a local rule with respect to a question otherwise subject to general commercial law. See *Omalv v. Swan*, 18 F. Cas. 689, 690 (C.C.D. Mass. 1824) (No. 10,508) (noting that the question whether a creditor who forecloses on a mortgage can later sue a mortgagee for any deficiency “has been long since settled by the local law” and stating that “[i]t is too late now to controvert it”).

¹⁹⁴ *Swift*, 41 U.S. (16 Pet.) at 19; *cf.* Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284, 296 (1969) (“Though on its face *Swift* appears to be an expansion of federal power *tout court*, it need not be so treated. In 1842, it could not be predicted with certainty that the federal common law which was to be developed in the future would conflict with the common law of any state.”).

¹⁹⁵ See *Jay*, *supra* note 167, at 832 (“Courts and others seeking to apply the law of nations assumed without hesitation that they were referring to an objectively identifiable body of law . . .”).

¹⁹⁶ See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235-37 (1985) (identifying “law declaration,” “fact identification,” and “law application” as distinct judicial functions and concluding that “law application frequently entails some attempt to elaborate the governing norm”).

¹⁹⁷ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

¹⁹⁸ U.S. CONST. art. III, § 2, cl. 1.

Both the text and history of Article III confirm this understanding. Many of the cases and controversies to which "[t]he judicial Power shall extend"¹⁹⁹ were included in Article III of the Constitution precisely because they were likely to require application of the law of nations. In drafting Article III, the founders sought to extend the federal judicial power to cases and controversies that "involve the national Peace and Harmony"²⁰⁰—that is, cases implicating the United States's relations with other nations (the national "peace")²⁰¹ and the states' relations with one another (the national "harmony").²⁰² By their nature, cases falling within these categories were likely to be governed by the various branches of the law of nations.²⁰³ Because the founders believed that failure to resolve such cases satisfactorily threatened the national peace and harmony, they regarded the availability of federal jurisdiction over such cases as essential. Thus, it should come as no surprise that

¹⁹⁹ *Id.*

²⁰⁰ Committee of Detail, Proceedings of the Convention (June 19-July 23, 1787), in 2 Farrand, *supra* note 61, at 133.

²⁰¹ These include "[c]ases affecting Ambassadors," "[c]ases of admiralty and maritime Jurisdiction," and "[c]ontroversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1. The founders regarded federal jurisdiction over these cases "essential to . . . the security of the public tranquillity" because "the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war." THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁰² "Controversies between two or more States," U.S. CONST. art. III, § 2, cl. 1, posed the greatest threat to national "harmony" because they had the potential to destroy the Union. See generally THE FEDERALIST No. 7, at 60-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the major disputes between the states that threatened the Union during the Confederation period); *infra* note 414 (noting that the founders established the Supreme Court in part to resolve potentially disruptive disputes between the states). In addition, the founders regarded jurisdiction over controversies "between a State and Citizens of another State[, and] between Citizens of different States," U.S. CONST. art. III, § 2, cl. 1, as no less "essential to the peace of the Union," THE FEDERALIST No. 80, *supra* note 201, at 477, because "the State tribunals cannot be supposed to be impartial" in such cases, *id.* at 475.

²⁰³ The cases selected by the Committee of Detail as involving the national "peace and harmony" implicated all three primary branches of the law of nations. Cases affecting ambassadors, controversies between two or more states, and controversies involving foreign states were generally governed by the law respecting sovereign states. See *infra* notes 311-414 and accompanying text. Cases of admiralty and maritime jurisdiction generally required the application of the law maritime. See *infra* notes 415-539 and accompanying text. Controversies between citizens of different states and those involving foreign citizens were most often commercial in nature and thus generally governed by the law merchant. See *infra* notes 506-09 and accompanying text.

federal courts are frequently called upon to ascertain and apply the law of nations in adjudicating the various cases and controversies set forth in Article III.

For example, as Hamilton explained in *The Federalist*, “[a]ll questions in which [ambassadors] are concerned are . . . directly connected with the public peace.”²⁰⁴ Under the law of nations, one nation’s failure to accord an ambassador traditional diplomatic privileges and immunities was considered an affront to the other nation’s sovereign and thus a potential cause of war.²⁰⁵ Similarly, according to Hamilton, admiralty and maritime causes “so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.”²⁰⁶ In sum, the founders concluded that federal jurisdiction was necessary in cases like these because “the peace of the WHOLE ought not to be left at the disposal of a PART.”²⁰⁷

Because Article III specifically contemplated that federal courts would adjudicate cases and controversies governed by the law of nations, it is difficult to conclude that such adjudication—including any interstitial lawmaking inherent in the enterprise—violates Article III or is otherwise inconsistent with the separation of powers. This is not to say that federal courts may engage in unlimited judicial lawmaking in the guise of adjudication. As Justice Holmes suggested, when the federal courts move beyond “molecular” motions,²⁰⁸ they risk intruding upon authority committed to the states, the political branches, or both.²⁰⁹ The subsequent expansion and

²⁰⁴ THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁰⁵ See *infra* notes 318-27 and accompanying text. Indeed, the Convention considered cases affecting ambassadors so important that it not only subjected such cases to federal jurisdiction, but also provided “that such questions should be submitted in the first instance to the highest judicatory of the nation,” THE FEDERALIST No. 81, *supra* note 204, at 487. See U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, . . . the supreme Court shall have original Jurisdiction.”).

²⁰⁶ THE FEDERALIST No. 80, *supra* note 201, at 478; see also *infra* notes 424-50 and accompanying text (discussing prize cases).

²⁰⁷ THE FEDERALIST No. 80, *supra* note 201, at 467.

²⁰⁸ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

²⁰⁹ I readily acknowledge that the line between “adjudication” and “lawmaking” often will be difficult to draw with precision in practice. See *supra* note 7. Nonetheless, recognition that there is such a line in theory is essential if the Article I “legislative Power” is to remain distinct from the Article III “judicial Power.” See *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 97 (1981) (“[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.”).

ultimate repudiation of the *Swift* doctrine illustrate Holmes's point.

Although *Swift* was defensible at the time it was decided, two subsequent developments seriously undermined its continued legitimacy. First, state courts increasingly abandoned reliance on the general law merchant in favor of truly localized commercial doctrines. State courts no longer conceived of their task in commercial cases as applying a general body of law common to many jurisdictions. Rather, they increasingly claimed or exercised authority to formulate commercial doctrines as a matter of state law. By the end of the nineteenth century, commercial law varied widely from state to state.²¹⁰ Nevertheless, invoking *Swift*, federal courts frequently failed to apply state judge-made law. Rather, they continued to adhere to their own conception of a general law merchant in commercial cases they adjudicated.

Second, not content merely to apply "general law" in commercial cases, the federal courts vastly expanded the range of legal questions subject to the *Swift* doctrine.²¹¹ By the time *Erie* was decided, federal courts claimed the right to exercise independent judgment with respect to such historically local matters as punitive damages, property, and torts.²¹² Unlike commercial disputes, such matters

²¹⁰ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 355 (1973) ("[E]ach state from Maine to the Pacific was a petty sovereignty, with its own brand of law."); Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 *YALE L.J.* 132, 140 (1897) (arguing for "statutory unity rather than diversity, in matters of common interest"). Not all of the changes in commercial law were attributable to the courts. Many were due to the enactment of specialized statutes by state legislatures. See E. ALLAN FARNSWORTH & JOHN HONNOLD, *COMMERCIAL LAW* 5 (4th ed. 1985) (noting that "[b]y 1890 every state had at least one statute on negotiable instruments"). The resulting disuniformity gave rise to efforts around the turn of the century to have the states adopt uniform commercial laws. See FRIEDMAN, *supra*, at 355, 471 ("By 1900, [the uniform Negotiable Instruments Law] had been widely enacted . . ."). Such laws were designed to perform the function historically performed by the law merchant—that is, to encourage trade by subjecting commercial transactions to uniform rules of commercial law. See Brewster, *supra*, at 134 ("[G]reat care is taken to preserve the use of words which have had repeated legal constructions and become recognized terms in the Law Merchant.").

²¹¹ See generally FREYER, *supra* note 38, at 45-75.

²¹² See *id.* at 71 ("[T]he federal judiciary continued to enlarge the body of general law so that by 1890 it included some 26 doctrines."). Under this expanded *Swift* doctrine,

"general law" was held to include the obligations under contracts entered into and to be performed within the State, the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right

were never thought to be subject to the law of nations, but had always been governed by the *lex loci*.²¹³

These two developments created an ever-widening legitimacy gap. Under *Swift*'s original conception of section 34, federal courts were required to follow "long-established local customs having the force of laws."²¹⁴ Under the expanded *Swift* doctrine, by contrast, federal courts disregarded even the most well-established local customs in favor of so-called "general" law. In light of these developments, the Supreme Court eventually overruled *Swift* on the ground "that in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which . . . are reserved by the Constitution to the several States."²¹⁵ As discussed in Part I, federal courts violated principles of judicial federalism by disregarding state law in areas over which the states possessed undoubted legislative competence²¹⁶ and over which Congress either lacked constitutional power or at least had failed to exercise such power.²¹⁷

Unless *Erie* is to be read as placing substantial limits on the scope of federal power generally, the Court's decision must rest on the premise that the *federal courts*' application of "general common law" was inconsistent with the separation of powers, and thus with principles of judicial federalism.²¹⁸ In the case of tort law, the federal courts' disregard of state court decisions in favor of "general law" was illegitimate from the start. Unlike commercial law, tort law was always considered part of the *lex loci* rather than the *jus gentium*.²¹⁹ Even with respect to commercial law, the states'

conferred by the State; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.

Erie R.R. v. Tompkins, 304 U.S. 64, 75-76 (1938) (footnotes omitted).

²¹³ See Edwin D. Dickinson, *The Law of Nations As Part of the National Law of the United States* (pt. 2), 101 U. PA. L. REV. 792, 799 (1953) ("[W]ithin two decades, the Court's formula descriptive of the federal law, assumed to be controlling in the federal courts in diversity cases, had metamorphosed from 'general commercial law' into 'general law' into 'common law.'").

²¹⁴ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

²¹⁵ *Erie*, 304 U.S. at 80.

²¹⁶ See *supra* notes 54-69 and accompanying text.

²¹⁷ Because the general law applied by federal courts was not binding in state courts, the *Swift* doctrine also created serious practical problems of forum shopping and inequitable administration of the law. See *Erie*, 304 U.S. at 74-78 (noting the political and social defects of the *Swift* doctrine).

²¹⁸ See *supra* notes 58-69 and accompanying text.

²¹⁹ The Supreme Court did not treat tort law as part of the "general law" until its

decision to abandon general law in favor of state judge-made law transformed the federal courts' defensible application of customary law into improper judicial lawmaking.

C. *The Federal Common Law of Foreign Relations*

One of the more prominent modern enclaves of federal common law consists of rules of decision that govern "international disputes implicating . . . our relations with foreign nations."²²⁰ Rules of this kind are typically derived from traditional principles of the law of nations, particularly the branch concerning the rights and duties of sovereign states, known today as public international law.²²¹ Specifically, this section examines the contemporary act of state doctrine and the historical immunity of foreign warships from judicial process. Although other rules derived from the law of nations could be characterized as part of the federal common law of foreign relations,²²² the rules in this section suffice to illustrate the capacity of the proposed approach to reconceptualize various rules currently thought to constitute "federal judge-made law."

1. The Act of State Doctrine

The Supreme Court's landmark decision in *Banco Nacional de Cuba v. Sabbatino*²²³ purported to adopt the so-called "act of state doctrine in its traditional formulation"²²⁴ as a matter of "federal judge-made law." Notwithstanding this characterization, the Court's decision is readily reconceptualized using the criteria proposed in this Article. The case developed out of the deteriorating relations between the United States and Cuba following Fidel Castro's takeover of the island. In response to the United States's reduction of the Cuban sugar quota, Cuba nationalized various sugar companies in which Americans held an interest, including Compania

decision in *Chicago v. Robbins*, 67 U.S. (2 Black) 418, 428-29 (1862) (stating in a case concerning liability for negligently inflicted injuries that "where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions").

²²⁰ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

²²¹ See *supra* note 169 and accompanying text.

²²² These include rules of decision that implement the rights of foreign ambassadors or that govern prize cases. Because these rules implicate specific jurisdictional grants under Article III, they are discussed separately in Part III.

²²³ 376 U.S. 398 (1964).

²²⁴ *Id.* at 401.

Azucarera Vertientes-Camaguey de Cuba ("C.A.V."), and prevented all export of their products without government consent. Before these events, C.A.V. had contracted with an American commodities broker for the sale of Cuban sugar. In order to obtain the sugar after the expropriation, the broker entered into identical contracts with the Cuban government. The broker obtained the sugar, but subsequently refused to pay after being notified of C.A.V.'s claim that it was entitled to the proceeds of the sale as the rightful owner of the sugar.²²⁵

Banco Nacional de Cuba, an instrumentality of the Cuban government, sued the broker in federal court on the basis of diversity of citizenship. The complaint sought recovery of the proceeds for conversion of the sugar. The broker's defense was that Cuba never obtained valid title to the sugar. The district court and the court of appeals agreed, holding that the act of state doctrine is inapplicable when the act itself violates international law—in this case, "those principles of international law which have long been accepted by the free countries of the West" against confiscation of private property.²²⁶

The Supreme Court reversed, upholding the "act of state doctrine in its traditional formulation."²²⁷ Rather than follow *Erie's* admonition to apply state law except in matters governed by positive law,²²⁸ *Sabbatino* characterized the act of state doctrine as one of several "enclaves of federal judge-made law,"²²⁹ and reached the seemingly inconsistent conclusion that both federal and state courts are required to disregard state law and apply the so-called "act of state doctrine in its traditional formulation."²³⁰ That formulation "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."²³¹ According to the

²²⁵ See *id.* at 401-06.

²²⁶ See *id.* at 402-03.

²²⁷ *Id.* at 401. According to the Court:

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

Id. at 428.

²²⁸ See *Eric R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

²²⁹ *Sabbatino*, 376 U.S. at 426.

²³⁰ *Id.* at 401.

²³¹ *Id.*

Court, neither federal nor state courts have authority to “narrow[] . . . the apparent scope of the rule,” notwithstanding “various considerations of policy” favoring its restriction.²³²

a. *Application of the First Criterion*

Sabbatino's attempt to distinguish *Erie* consisted of little more than the assertion that “the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.”²³³ Nonetheless, there is an important distinction between *Sabbatino* and *Erie*, which illustrates the application of the first criterion to the act of state doctrine. The matter at issue in *Erie*—the duty of care required of railroads operating within a state's territory—was undoubtedly within the legislative competence of the states. Whether Congress in fact lacks constitutional power over such matters, as *Erie* suggested, or merely failed to exercise such power, does not affect the analysis. In either case, because positive federal law did not govern the matter in question, and because the states possessed at least concurrent legislative competence over such matters, principles of judicial federalism required the federal courts to apply state law.²³⁴

By contrast, the question at issue in *Sabbatino*—whether “the courts of this country” are free to reject “the validity of the public acts a recognized foreign sovereign power committed within its own territory”²³⁵—is a matter beyond the legislative competence of the states.²³⁶ The resolution of this question directly implicates the

²³² *Id.* at 424.

²³³ *Id.* at 425.

²³⁴ See *supra* text accompanying notes 54-69. For this reason, “constitutional common law”—a collection of “substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions”—remains constitutionally problematic to the extent that it purports to bind the states in areas over which the states retain legislative competence. See Monaghan, *supra* note 7, at 2-3; see also *id.* at 18, 35. Examples of such rules include the exclusionary rule and the requirement that police give *Miranda* warnings. See *id.* at 3, 20. Because rules like these do not establish constitutional imperatives, but merely provide examples of “a reasonably safe course of conduct for public officials to follow,” *id.* at 22, both Congress and the states arguably remain free to establish alternative means of satisfying whatever minimum constitutional requirements exist. *But cf. id.* at 18-19, 26-30, 35-38 (suggesting that Congress, but not the states, may supplant constitutional common law rules with constitutionally adequate alternatives).

²³⁵ *Sabbatino*, 376 U.S. at 401.

²³⁶ *Cf. Tennessee v. Davis*, 100 U.S. 257, 266-67 (1880) (“[W]hen the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects

foreign relations of the United States, and is therefore committed by the Constitution to the exclusive authority of the federal government.

Exclusive federal authority over the conduct of foreign affairs is well established.²³⁷ The Constitution contains no single clause vesting exclusive authority over this area in the federal government. But the sum of its parts, considered in light of the constitutional structure, leaves little doubt in this regard.²³⁸ With the exception of the powers vested in the President by Article II,²³⁹ “the enumeration of Article I covered the whole area of external affairs as comprehensively in its time as exceptional foresight and superior craftsmanship could cover it.”²⁴⁰ Taken together, Articles I and II vest virtually complete authority over foreign relations in Congress and the President. At the same time, the Constitution disables the states from conducting foreign relations of their

thus surrendered the sovereignty of the States ceased to extend.”).

²³⁷ See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936) (noting that there are “fundamental” differences “between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs”).

²³⁸ See *Sabbatino*, 376 U.S. at 427 n.25 (“Various constitutional and statutory provisions . . . reflect[] a concern for uniformity in this country’s dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions.”).

²³⁹ Article II provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States,” U.S. CONST. art. II, § 2, cl. 1, and that “[h]e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,” *id.* cl. 2, and “he shall receive Ambassadors and other public Ministers,” *id.* § 3, cl. 1.

²⁴⁰ Dickinson, *supra* note 164, at 42. Specifically, § 8 of Article I grants Congress power “to . . . provide for the common Defence . . . of the United States,” U.S. CONST. art. I, § 8, cl. 1, “[t]o regulate Commerce with foreign Nations,” *id.* cl. 3, “[t]o establish an uniform Rule of Naturalization,” *id.* cl. 4, “[t]o . . . regulate the Value . . . of foreign Coin,” *id.* cl. 5, “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” *id.* cl. 10, “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” *id.* cl. 11, “[t]o raise and support Armies,” *id.* cl. 12, “[t]o provide and maintain a Navy,” *id.* cl. 13, “[t]o make Rules for the Government and Regulation of the land and naval Forces,” *id.* cl. 14, and “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” *id.* cl. 18.

own.²⁴¹ By simultaneously granting authority to the political branches and denying power to the states, the Constitution appears to vest exclusive and plenary control over foreign relations in the federal government.²⁴²

Ordinarily, one might expect that the Constitution's enumeration of specific federal powers would preclude the exercise of any others and that its enumeration of specific prohibitions on state power would be exhaustive.²⁴³ Such an argument, however, is unpersuasive in this context. As the Supreme Court has long recognized, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."²⁴⁴ Whereas the federal government's authority over internal affairs is derived exclusively from the Constitution, "the powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution."²⁴⁵

²⁴¹ Section 10 of Article I provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal," U.S. CONST. art. I, § 10, cl. 1, that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: . . . and all such Laws shall be subject to the Revision and Controll of the Congress," *id.* cl. 2, and that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," *id.* cl. 3.

²⁴² See THE FEDERALIST No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); Jay, *supra* note 167, at 829 ("Given the importance of the law of nations to national affairs, the Framers assumed as a matter of course that the federal government should have the ability to dominate most of the decisionmaking related to that law. . . . [T]he persistent idea was to provide a national monopoly of authority in order to assure respect for international obligations."). Even antifederalists like Thomas Jefferson considered "it indispensably necessary that with respect to everything external we be one nation firmly hooped together." Letter from Thomas Jefferson to James Madison (Oct. 8, 1786), in CHARLES WARREN, THE MAKING OF THE CONSTITUTION 46 (1937).

²⁴³ See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

²⁴⁴ United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936).

²⁴⁵ *Id.* at 318.

Rather, such powers are "vested in the federal government as necessary concomitants of nationality."²⁴⁶ For example, the Supreme Court has long recognized that the United States possesses all powers of external sovereignty recognized under the law of nations, including "[t]he power to acquire territory by discovery and occupation, the power to expel undesirable aliens, [and] the power to make such international agreements as do not constitute treaties in the constitutional sense."²⁴⁷ These powers are not to be found "in the provisions of the Constitution, but in the law of nations" and are "inherently inseparable from the conception of nationality."²⁴⁸

The constitutional structure strongly suggests that the states conferred all rights of external sovereignty on the federal government and retained none for themselves. Unlike power over domestic matters, power over foreign affairs cannot be shared without substantially impairing its effective exercise.²⁴⁹ The founders were aware that the states' exercise of concurrent authority over matters touching on "external sovereignty" would be incompatible with the conduct of foreign relations. As Hamilton wrote in *The Federalist*, "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members."²⁵⁰ For this reason, the Constitution appears to preclude the states from exercising direct authority over foreign relations, even in the absence of specific prohibitions.²⁵¹ Thus, few would argue

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 318 (citations omitted).

²⁴⁸ *Id.* After declaring their independence from Great Britain, the states acquired the status of "Free and Independent States," with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). This residual category was an obvious reference to the law of nations, which defined the "Things which Independent States may of right do." See Dickinson, *supra* note 164, at 35 ("Full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do' came straight from that universal jurisprudence which had been elaborated in the treatises of Grotius, Pufendorf, Burlamaqui, Vattel and others.").

²⁴⁹ See THE FEDERALIST No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the Constitution conferred exclusive federal power and alienated state sovereignty "where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*"); THE FEDERALIST No. 82, *supra* note 1, at 492 (stating that "where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible," such authority is "exclusively delegated to the federal head").

²⁵⁰ THE FEDERALIST No. 80, *supra* note 201, at 476; see also *infra* notes 552-54 and accompanying text.

²⁵¹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED

that states possess authority to send and receive ambassadors, even though the Constitution does not explicitly deny this power to the states. The reason is simple. Florida's decision to establish diplomatic relations with Cuba, for example, would necessarily undermine the foreign relations of the United States as a whole.²⁵²

Given the Constitution's allocation of exclusive authority over foreign affairs to the federal government (and the corresponding lack of legislative competence in the states), it is not surprising that the *Sabbatino* Court found that *Erie* was inapposite and that the federal courts were under no obligation to apply state law regarding "the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory."²⁵³ Whether the United States recognizes the validity of foreign acts of state has obvious and important foreign policy implications.²⁵⁴ As *Sabbatino* recognized,

STATES § 1 reporter's note 5 (1986) ("A state of the United States is not a 'state' under international law, since by its constitutional status it does not have capacity to conduct foreign relations." (citation omitted)); cf. *Curtiss-Wright*, 299 U.S. at 316 ("[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 626 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833) ("[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.")

²⁵² See Hill, *supra* note 7, at 1048 (stating that "some kinds of governmental action affect our relations with foreign nations so intimately and sensitively that they must be deemed to be within the exclusive competence of the federal government"). The precise scope of this structural preemption of state law is unclear, but the Supreme Court has on occasion even invalidated state action that indirectly interferes with foreign relations. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432-34 (1968) (invalidating an Oregon probate statute requiring inquiry "into the type of governments that obtain in particular foreign nations" as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"). Professor Hill has observed that "by force of the Constitution there is a general ouster of state competence respecting issues which international custom deems not properly the subject of unilateral action by a sovereign nation," Hill, *supra* note 7, at 1060, and has suggested "the possibility that the ouster of state competence may extend as well to certain issues in respect of which unilateral action is acceptable to the international community," *id.*

²⁵³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); see also *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (stating that *Erie* "had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings").

²⁵⁴ THE FEDERALIST No. 3, *supra* note 175, at 43 ("It is of high importance to the

the act of state doctrine “rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.”²⁵⁵ The federal government’s exclusive constitutional power over foreign affairs suggests that states simply lack authority to prescribe rules of decision on questions of this nature.²⁵⁶ Thus, an essential predicate for the operation of judicial federalism—the existence of state legislative competence—is lacking in this context.

peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.”).

²⁵⁵ *Sabbatino*, 376 U.S. at 417-18 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) (internal quotation marks omitted).

²⁵⁶ *See id.* at 424-25 (stating that “rules of international law should not be left to divergent and perhaps parochial state interpretations,” because “the problems involved are uniquely federal in nature”); Hill, *supra* note 7, at 1041-42 (“State law does not apply of its own force in such cases not because state interests are necessarily lacking but because they are constitutionally irrelevant in the face of the overriding federal interest . . .”). Professor Monaghan finds difficulty with Hill’s “zone of preemption” on the ground that “the usual mode of preemption analysis is not to carve out a priori zones of preemption but to consider the specific impact of state law upon federal policy.” Monaghan, *supra* note 7, at 14 n.75. Professor Hill’s approach, however, seems more appropriate in this context. For reasons previously discussed, *see supra* notes 237-252 and accompanying text, there is a strong argument that federal authority over foreign relations “occupies the field,” thus obviating the need “to consider the specific impact of state law upon federal policy.” *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that an “[a]ct of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”). In addition, it is difficult, if not impossible, for courts to ascertain the precise content of a controlling “federal policy” in the context of foreign relations. At the time of adjudication, federal officials may not yet have formulated U.S. policy on the question at hand. In any event, even if a federal policy exists, the means by which such policy may be implemented is itself a question reserved to the political branches rather than the courts. *See Williams v. Armroyd*, 11 U.S. (7 Cranch) 423, 433-34 (1813) (Marshall, C.J.) (refusing to invalidate foreign condemnations of American ships and cargo pursuant to an edict Congress had declared to be “a direct and flagrant violation of national law” because “the legislature has not chosen to declare sentences of condemnation, pronounced under this unjustifiable decree, absolutely void”); *see also The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815) (“The degree and the kind of retaliation [against a foreign sovereign for its unjust proceedings toward our citizens] depend entirely on considerations foreign to this tribunal.”); *infra* notes 280-82 and accompanying text.

b. *Application of the Second Criterion*

Sabbatino also illustrates the application of the second criterion proposed in this Article. The initial conclusion under the first criterion—that the act of state doctrine governs matters beyond the legislative competence of the states—establishes that federal courts need not apply state law in adjudicating such matters. It does not speak, however, to the precise content of the rule that federal courts should adopt in these cases. The Supreme Court's characterization of the act of state doctrine as "federal judge-made law" might be read to suggest that federal courts are free "to fashion [the doctrine] according to their own standards."²⁵⁷ This characterization thus raises substantial separation of powers concerns about potential judicial lawmaking in this context.

Elsewhere in its opinion, however, the *Sabbatino* Court made clear that the judiciary is not, in fact, free to adopt its own conception of the act of state doctrine but must adhere to the doctrine "in its traditional formulation."²⁵⁸ Although the *Sabbatino* Court asserted that "international law does not require application of the [act of state] doctrine," in the sense that most countries "fail to follow the rule rigidly,"²⁵⁹ the Court acknowledged that the doctrine reflects "deep seated" "concept[s] of territorial sovereignty" shared by many nations.²⁶⁰ In other words, the act of state doctrine *derives* from well-established principles of the law of nations, particularly the principle that "[t]he jurisdiction of [every] nation, within its own territory, is necessarily exclusive and absolute."²⁶¹

²⁵⁷ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

²⁵⁸ *Sabbatino*, 376 U.S. at 401.

²⁵⁹ *Id.* at 421. *But see* Hill, *supra* note 7, at 1063 n.193 ("The authorities cited by the Court as excluding act of state from the compass of international law can also be viewed as tending to establish the contrary of this proposition. For they seem to show that the basic rule of act of state is universally recognized—that the disagreement concerns only the exceptions." (citation omitted)).

²⁶⁰ *Sabbatino*, 376 U.S. at 432.

²⁶¹ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). That principle stems from "the equality and absolute independence of sovereign states" under the law of nations. *See* *L'Invincible*, 14 U.S. (1 Wheat.) 238, 254 (1816). As the Supreme Court explained in an early case, for the courts of one country to inquire into the means by which another acquired title to property "would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822).

"The classic American statement of the act of state doctrine . . . began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth

Application of these principles does not require the courts to engage in constitutionally questionable lawmaking activities, but merely to ascertain and apply a preexisting practice suggested by traditional and verifiable principles of the law of nations.²⁶² In this sense, judicial application of the act of state doctrine is much like application of the rule derived from the law merchant in *Swift*. In neither case did the federal courts create the governing rule of decision according to their own standards. Rather, they ascertained the applicable rule by reference to a preexisting body of customary law.²⁶³ That countries may no longer “follow the [act of state doctrine] rigidly”²⁶⁴ does not alter the nature and source of the “traditional formulation” of the doctrine. Accordingly, judicial application of the doctrine is well insulated from the charge that it constitutes improper judicial lawmaking.

In fact, judicial application of the act of state doctrine appears to be not only consistent with, but affirmatively required by, the constitutional structure. The act of state doctrine does not result from interpretation of a specific constitutional provision. Rather, as the Court has recognized, the doctrine is “a consequence of domestic separation of powers”²⁶⁵ because it ensures that “the

centuries.” *Sabbatino*, 376 U.S. at 416 (citing cases). Thus, by the time *Sabbatino* was decided, the traditional formulation of the doctrine was well-established. *See id.* (“None of this Court’s subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from [the classic American statement of the doctrine found in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1857)].”).

²⁶² By “verifiable” principles of the law of nations, I mean those that judges attempted to find as a matter of historical fact and custom, rather than those that they prescribed as a matter of policy or divined as a matter of natural order. As Professor Jay has recounted:

In ascertaining principles of the law of nations, lawyers and judges of [the eighteenth century] relied heavily on continental treatise writers, Vattel being the most often consulted by Americans. An essential part of a sound legal education consisted of reading Vattel, Grotius, Pufendorf, and Burlamaqui, among others. Quotations from these sources appeared not only in briefs and opinions, but also in discussions of critical foreign policy matters by the President’s Cabinet and in the popular press. Implicit in this widespread usage was acceptance of the validity of the law of nations as knowable doctrine.

Jay, *supra* note 167, at 823 (footnote omitted); *see also* Dickinson, *supra* note 164, at 35 (“[T]he treatises of Grotius, Pufendorf, Burlamaqui, Vattel and others . . . were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century.”); Jay, *supra* note 167, at 832 (“Courts and others seeking to apply the law of nations assumed without hesitation that they were referring to an objectively identifiable body of law . . .”).

²⁶³ *See supra* notes 195-209 and accompanying text.

²⁶⁴ *Sabbatino*, 376 U.S. at 421.

²⁶⁵ *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int’l*, 493 U.S. 400,

political departments of our Government,"²⁶⁶ rather than the courts, exercise the sovereign prerogative to invalidate foreign acts of state. In this way, the doctrine maintains "the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs."²⁶⁷

The Court's approach has merit. The Constitution vests exclusive authority over foreign affairs in the federal government generally,²⁶⁸ and in the political branches specifically.²⁶⁹ As discussed above, the act of state doctrine is based on traditional principles of the law of nations, specifically those governing the rights and duties of sovereign states. Because nations generally expect one another to follow such principles,²⁷⁰ judicial adherence to rules like the act of state doctrine may be necessary to avoid interfering with the political branches' conduct of foreign relations.²⁷¹ Given the constitutional separation of powers, even if

404 (1990); see also *Sabbatino*, 376 U.S. at 423 (suggesting that the judicial obligation to apply the act of state doctrine flows from "the basic relationships between branches of government in a system of separation of powers").

²⁶⁶ *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918).

²⁶⁷ *Sabbatino*, 376 U.S. at 427-28; see also *id.* ("If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.").

²⁶⁸ See *supra* notes 235-52 and accompanying text.

²⁶⁹ See *Sabbatino*, 376 U.S. at 427-37. The Supreme Court's prior opinions have been even more explicit on this point. See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); see also *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812) (stating that "the questions to which [wrongs committed by a foreign sovereign] give birth are rather questions of policy than law" and accordingly "are for diplomatic, rather than legal discussion").

²⁷⁰ See *supra* notes 162-78 and accompanying text.

²⁷¹ See *La Amistad de Rues*, 18 U.S. (5 Wheat.) 385, 390-91 (1820). In *La Amistad de Rues*, the Supreme Court acknowledged the traditional rule "of the general law of nations" "that whenever a capture is made by any belligerent, in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners." *Id.* at 389. The Court, however, refused to go "beyond the authority to decree restitution," "consider[ing] it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents." *Id.* at 389-90.

The Court's rationale essentially rested upon the separation of powers. Given the risk that judicial action would jeopardize our peaceful relations with foreign nations, the Court held that Congress, rather than the courts, must authorize any

other countries no longer strictly follow the act of state doctrine, judicial adherence to that doctrine “in its traditional formulation” appears necessary to preserve the political branches’ power over foreign relations.

As the Court itself explained in *Sabbatino*, judicial decisions declaring foreign acts of state invalid would

often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect.²⁷²

Because failure to give effect to foreign acts of state could seriously undermine foreign relations, the *Sabbatino* Court concluded that neither federal nor state courts have authority to “narrow[] . . . the apparent scope of the rule,” notwithstanding “various considerations of policy” favoring its restriction.²⁷³

proceedings beyond those contemplated by the law of nations:

Such a course of things would necessarily create irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties. Considerations of public policy come, therefore, in aid of what we consider the law of nations on this subject; and we may add, that congress, in its legislation, has never passed the limit which is here marked out. Until congress shall choose to prescribe a different rule, this Court will, in cases of this nature, confine itself to the exercise of the simple authority to decree restitution, and decline all inquiries into questions of damages for asserted wrongs.

Id. at 391.

As this case suggests, the Court has long recognized that *Congress* has power to enact laws that depart from the law of nations. To be sure, such departures may adversely affect foreign relations, but “whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt, that courts of justice are bound to obey and administer them.” *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826).

²⁷² *Sabbatino*, 376 U.S. at 432.

²⁷³ *Id.* at 424; see also *id.* at 427 (stating that “the act of state doctrine is a principle of decision binding on federal and state courts alike”). As discussed in the text, the requirement that *federal courts* adhere to the act of state doctrine stems from the constitutional *separation* of powers—specifically, the Constitution’s exclusive allocation of power over foreign affairs to the political branches of government rather than the courts. The requirement that *state courts* comply with the doctrine, by contrast, derives from the constitutional *division* of power between the federal government and

To be sure, *the United States* may depart from traditional principles of the law of nations²⁷⁴—including the act of state doctrine²⁷⁵—even though such departures may “imperil the amicable relations between governments and vex the peace of nations.”²⁷⁶ *Sabbatino* holds only that, in light of the Constitution’s allocation of power over foreign affairs, the decision to do so should be made by the political branches rather than the courts.²⁷⁷

the states, under which the former is given exclusive power to conduct foreign relations. See *supra* notes 237-52 and accompanying text. Departures from the act of state doctrine by either federal or state courts would be inconsistent with the constitutional structure because departure by either has the potential to “imperil the amicable relations between governments and vex the peace of nations.” *Sabbatino*, 376 U.S. at 417-18 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918)) (internal quotation marks omitted); cf. *id.* at 424 (stating that if “the state courts are left free to formulate their own rules, the purposes behind the doctrine could be . . . effectively undermined”). Under the constitutional scheme, the decision to depart from the act of state doctrine must be made by the *political branches of the federal government*, which possess exclusive constitutional authority over foreign affairs.

²⁷⁴ See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (stating that “[w]ithout doubt, the sovereign of the place is capable of destroying [the] implication” that under the law of nations, foreign ships of war are exempt from the sovereign’s jurisdiction). Professor Henkin has reached the same conclusion with respect to the modern law of nations:

For every State has the power—I do not say the legal right—to denounce or breach its treaties, or to violate obligations of customary international law. The Constitution does not allude to such power, but it is inconceivable that the Constitution intended to make it impossible or impermissible—unconstitutional—for the United States to violate a treaty or other international obligation.

Louis Henkin, *International Law As Law in the United States*, 82 MICH. L. REV. 1555, 1568 (1984). But see Jay, *supra* note 167, at 833-34 (“[I]t is hard to imagine how or why the Framers might have resolved a putative question of who in the government could violate the law of nations since the dogma was that no one could.”).

²⁷⁵ The leading act of state cases expressly acknowledge that although “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory,” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1857) (emphasis added), the *sovereign* itself is free to redress grievances arising from such acts “through the means open to be availed of by sovereign powers as between themselves.” *Id.* In the United States, the political branches, rather than the judiciary, are ordinarily thought to possess “the sovereign power of the nation.” See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146, discussed *infra* notes 283-308 and accompanying text.

²⁷⁶ *Sabbatino*, 376 U.S. at 418 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (internal quotation marks omitted)).

²⁷⁷ In *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), the Supreme Court suggested, in an analogous context, that

such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers

One might think *Sabbatino* a poor case by which to demonstrate the perils of the judiciary's departure from the act of state doctrine. After all, the political branches had already expressed their displeasure with Cuba by reducing its sugar quota and condemning its confiscation of American-owned companies.²⁷⁸ In addition, following the Supreme Court's decision in *Sabbatino*, Congress enacted the second Hickenlooper amendment, which both limited the general availability of the act of state doctrine and applied retroactively to defeat Cuba's claim on remand.²⁷⁹ In hindsight, then, the federal courts' failure to adhere to the act of state doctrine might have offended Cuba, but it would not have been obviously inconsistent with subsequent expressions of United States foreign policy.

Hindsight, however, cannot be the measure of judicial interference with foreign relations. It is difficult, if not impossible, for courts to predict with precision whether a decision to invalidate a foreign act of state will ultimately further or impede the conduct of foreign affairs. More fundamentally, however, the decision is not theirs to make. The Supreme Court has long recognized that whether and how to retaliate against a foreign sovereign for "its unjust proceedings towards our citizens, is a political not a legal measure."²⁸⁰ As Chief Justice Marshall explained in *The Nereide*:

It is for the consideration of the government not of its Courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights, and not to avenge them at all. It is not for its Courts to interfere with the proceedings of the nation and to thwart its views.²⁸¹

as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.

Id. at 634 (discussing "the conduct which must be observed by the courts of the Union towards the subjects" "of a part of a foreign empire, which asserts, and is contending for its independence").

²⁷⁸ See *Sabbatino*, 376 U.S. at 402-03.

²⁷⁹ See Foreign Assistance Act of 1964 (Hickenlooper Amendment), Pub. L. No. 88-633, sec. 301(d)(4), § 620(e)(2), 78 Stat. 1009, 1013 (1964) (codified as amended at 22 U.S.C. § 2370(e) (1994)); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967).

²⁸⁰ *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815).

²⁸¹ *Id.*

In short, the constitutional structure precludes both federal and state courts from invalidating acts taken by foreign sovereigns within their own territory because the Constitution commits to the political branches alone the decision whether and how to respond to such acts.²⁸²

2. *The Schooner Exchange v. McFaddon*: An Historical Example

The Supreme Court's decision in *The Schooner Exchange v. McFaddon*²⁸³ provides another opportunity to reconceptualize a rule of decision based on traditional principles of the law of nations. This case involved the rule that "a public armed ship, in the service of a foreign sovereign, . . . [is generally] exempt from the jurisdiction of the country."²⁸⁴ Although *The Schooner Exchange* was decided well before the rise of modern federal common law, the rule it applied would undoubtedly be regarded today—like the act of state doctrine following *Sabbatino*—as "federal judge-made law."

The case began on August 24, 1811, when McFaddon filed a libel against the *Schooner Exchange* in the United States District Court for the District of Pennsylvania, seeking judicial restoration of the ship on the ground that he was its rightful owner.²⁸⁵ McFaddon alleged that, while sailing from Baltimore to Spain, the ship was "violently and forcibly taken by certain persons, acting under the decrees and orders of NAPOLEON, Emperor of the French," in violation of the law of nations.²⁸⁶ Following its capture, the ship was refitted as an armed public vessel of France, and "having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs."²⁸⁷ McFaddon attached the vessel and sought its return. France registered a protest through diplomatic channels, and the United States Attorney for the District of Pennsylvania, "at the instance of the executive department of the government of the United States," denied the substance of the allegations on behalf of

²⁸² See *Sabbatino*, 376 U.S. at 436 ("If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of the national interest which the judiciary would be ill-advised to undermine indirectly.").

²⁸³ 11 U.S. (7 Cranch) 116 (1812).

²⁸⁴ *Id.* at 147.

²⁸⁵ See *id.* at 117.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 118.

France.²⁸⁸ Although the district court dismissed the suit, the circuit court reversed, and the United States Attorney took an immediate appeal to the Supreme Court.²⁸⁹

It is difficult to overstate the importance of this case at the time. The question presented was “the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel [of a foreign sovereign], found within the waters of the United States.”²⁹⁰ The circuit court permitted such a claim, which prompted the United States Attorney to argue that “[i]f the courts of the United States should exercise such a jurisdiction, it will amount to a judicial declaration of war.”²⁹¹ At the time of the circuit court’s decision, the United States was on the brink of war with England and could hardly afford war with France as well. For this reason, the Attorney General requested, and the Supreme Court ordered, that this case be heard “in preference to other causes which stood before it on the docket.”²⁹²

On the merits, the Supreme Court reversed and held that a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, . . . must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.²⁹³

Chief Justice Marshall’s opinion relied heavily on traditional principles of the law of nations. Reasoning from “the usages and received obligations of the civilized world,”²⁹⁴ the Court concluded that a public armed ship possesses an “implied license” to enter a friendly port “exempt[] from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.”²⁹⁵

²⁸⁸ *Id.*

²⁸⁹ *See id.* at 119-20.

²⁹⁰ *Id.* at 135.

²⁹¹ *Id.* at 126.

²⁹² *Id.* at 116. The circuit court ruled in favor of the libellants on October 28, 1811. The Supreme Court heard oral argument on February 24, 1812 and handed down its opinion a week later on March 3, 1812. *See id.* at 120.

²⁹³ *Id.* at 147.

²⁹⁴ *Id.* at 137.

²⁹⁵ *Id.* at 144.

The Court did not hold, however, that the mere existence of this implied "principle of public law" prevented the United States from denying immunity to such vessels.²⁹⁶ To the contrary, the Court expressly acknowledged that "[w]ithout doubt, the sovereign of the place is capable of destroying this implication . . . [by] claim[ing] and exercis[ing] jurisdiction."²⁹⁷ The question to be decided, therefore, was whether "the sovereign" of the United States had claimed or exercised jurisdiction "either by employing force, or by subjecting such vessels to the ordinary tribunals."²⁹⁸ The Court found that "the sovereign power of the nation" had not done so, or, more precisely, that it had not done so "in a manner not to be misunderstood."²⁹⁹ Thus, the Court held that the circuit court erred in subjecting the Exchange to jurisdiction.

The application of the proposed criteria to the rule of decision used in *The Schooner Exchange* is similar to the application of these criteria to the act of state doctrine. The first criterion is satisfied because the matter in question—whether a public armed ship, in the service of a foreign sovereign, is subject to judicial process—appears to fall beyond the legislative competence of the states. This question is intimately bound up with the conduct of foreign

²⁹⁶ Rules derived from the law of nations were not considered to be binding of their own force. Rather, the nations of "the civilized world" were assumed to have agreed implicitly to adhere to such law because of the "common interest impelling them to mutual intercourse, and an interchange of good offices with each other." *Id.* at 137.

²⁹⁷ *Id.* at 146. Under first principles of the law of nations, each sovereign "possess[ed] equal rights and equal independence" and thus remained free to adhere to, or depart from, the law of nations as it saw fit. *See id.* at 136. To be sure, a nation's departure from the law of nations might adversely affect its relations with other nations, but such consequences did not affect its ability to do so.

²⁹⁸ *Id.* at 146.

²⁹⁹ *Id.* In effect, the Court adopted a plain statement requirement. Although acknowledging "[t]hose general statutory provisions . . . which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found," the Court concluded that such provisions "ought not . . . to be so construed, as to give [the judicial tribunals] jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction." *Id.*; *see also* *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804) ("The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government . . ."); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1143 (1990) (stating that *The Schooner Charming Betsy* "limits the application of domestic statutes in extraterritorial concerns").

relations, an area committed under the constitutional structure to exclusive federal control.³⁰⁰

The second criterion is also satisfied. Given the nature and source of the rule, its application does not require courts to engage in improper judicial lawmaking.³⁰¹ Moreover, as in the case of the act of state doctrine, judicial application of the rule appears to be required to implement the Constitution's allocation of exclusive authority over foreign affairs to the political branches of the federal government. Under these circumstances, neither federal nor state courts possessed constitutional authority to depart from the rule.³⁰²

In establishing the structural allocation of power required by the second criterion, *The Schooner Exchange* raises the rather complex question of which branch of government exercises the sovereign power of the United States in the context of this case. Although the Court did not attempt to resolve all facets of this question, it did make clear that the Constitution assigns exclusively to the political branches the sovereign power to "avenge wrongs committed by a sovereign."³⁰³ "[T]he questions to which such wrongs give birth,

³⁰⁰ See *supra* notes 237-52 and accompanying text.

³⁰¹ See *supra* notes 195-209 and accompanying text.

³⁰² *The Schooner Exchange* well illustrates Professor Jay's observation that the Constitution's allocation of power over foreign affairs "must be interpreted in light of America's status in the world" at the time the Constitution was drafted and ratified. Jay, *supra* note 167, at 821. "America was, after all, a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating many nations." *Id.* The founders were keenly aware of these facts. A principal defect of the Articles of Confederation was the lack of any centralized authority over foreign affairs, and the ability of the states "by their conduct [to] provoke war without controul." James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 Farrand, *supra* note 61, at 19; see also James McHenry, Notes on the Constitutional Convention (May 29, 1787), in 1 Farrand, *supra* note 61, at 24-25 (noting that the confederation "cannot punish" "a State [for] acts against a foreign power contrary to the laws of nations" and "therefore cannot prevent a war"); Jay, *supra* note 167, at 825 ("One of the main reasons for convening the Philadelphia Convention in 1787 was the transgression of [the law of nations] by various states."). The founders sought to remedy that defect by vesting complete control over foreign relations in the hands of the federal government generally, and in Congress and the president specifically. Their rationale was simple. Neither the states nor the unelected federal judiciary should be in a position to "imperil the amicable relations between governments and vex the peace of nations," *Sabbatino*, 376 U.S. at 418 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (internal quotation marks omitted)). See THE FEDERALIST No. 80, *supra* note 201, at 476 (stating that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members," and that some departures from the law of nations are "classed among the just causes of war").

³⁰³ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146. The Court drew a sharp

are rather questions of policy than of law," and accordingly "are for diplomatic, rather than legal discussion."³⁰⁴ Should diplomatic efforts fail, the sovereign remains free to "claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals."³⁰⁵ Significantly, all of these means contemplate action by the political branches rather than the judiciary.³⁰⁶ Because the political branches had taken neither step in this case, the Supreme Court reversed the circuit court's assertion of jurisdiction over the Exchange in contravention of the law of nations,³⁰⁷ and agreed, at least in principle, with the United States Attorney's argument that the judiciary's "exercise [of] jurisdiction upon subjects of this nature . . . [would] absorb all the functions of government, and leave nothing for the legislative or executive departments to perform."³⁰⁸

distinction between "the judicial power"—which cannot "enforce its decisions in cases of this description"—and "the sovereign power of the nation"—which "is alone competent to avenge wrongs committed by a sovereign." *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Putting the judiciary aside, "no provision of the Constitution conclusively resolves any question about the extent of powers given by the Constitution to Congress or the executive over matters touching on the law of nations." Jay, *supra* note 167, at 834. In *The Schooner Exchange*, the Court appears to have rejected Attorney General Pinkney's position that "the executive department . . . alone represents the sovereignty of the nation in its intercourse with other nations." 11 U.S. (7 Cranch) at 132. Indeed, two years later, the Court suggested that the exercise of sovereign prerogatives "is proper for the consideration of the legislature, not of the executive or judiciary." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814). For purposes of this Article, the important point is that neither case suggests that the judiciary may unilaterally exercise "the sovereign power of the nation." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

³⁰⁷ See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 147; see also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("If it be the will of the government to apply to Spain any rule respecting captures, which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Until such an act be passed, the court is bound by the law of nations, which is a part of the law of land.")

³⁰⁸ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 126. There was no suggestion in *The Schooner Exchange* that the federal courts were obligated to apply state law to the case. To the contrary, state law was inapplicable because the matter in question was intimately tied to the conduct of foreign relations—an area beyond the legislative competence of the states. Similarly, had this case arisen in state court—an impossibility given the federal courts' exclusive jurisdiction over prize cases, see *infra* notes 516-30 and accompanying text—a state court would have been required to apply the immunities conferred by the law of nations notwithstanding contrary state law. Failure to do so would have encroached upon exclusive federal power over foreign affairs.

In sum, rules of decision like those applied in *Sabbatino* and *The Schooner Exchange* are binding in both federal and state courts, not because they are “federal judge-made law” and thus constitute “the supreme Law of the Land,” but because the judiciary’s failure to apply them would interfere with powers assigned by the Constitution exclusively to the political branches of the federal government. Classifying these rules as “federal common law” not only is inaccurate, but also serves to obfuscate the constitutional basis for judicial adherence to such rules. Worse, such characterizations cast doubt on the constitutional legitimacy of the rules themselves by raising federalism and separation of powers concerns that more appropriately apply to federal common law rules that either concern matters within the legislative competence of the states or are unnecessary to implement a basic feature of the constitutional scheme, such as the political branches’ exclusive authority to conduct foreign affairs.

III. FURTHER APPLICATION OF THE PROPOSED APPROACH

This Part attempts to reinterpret what are currently thought to be several additional enclaves of federal judge-made law in light of the proposed approach. The enclaves considered here roughly correspond to several of the jurisdictional grants set forth in Article III. These enclaves consist of rules governing “Cases affecting Ambassadors, other public Ministers and Consuls,” “Controversies between two or more States,” “Cases of admiralty and maritime Jurisdiction,”³⁰⁹ and cases concerning “the rights and obligations of the United States.”³¹⁰

A. *Cases Affecting Ambassadors*

Before turning to the jurisdictional grants that traditionally have been associated with the creation of federal common law, this section briefly examines one Article III grant that has *not* been thought to implicate such law. Strictly speaking, “Cases affecting Ambassadors,” within the meaning of Article III, are not governed by federal common law. Rather, such cases are governed by positive federal law adopted to comply with the United States’s obligations under the law of nations. Yet, historically, such law has not

³⁰⁹ U.S. CONST. art. III, § 2.

³¹⁰ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

encompassed all questions relating to foreign diplomats. In some cases, courts have had to look to the law of nations directly to ascertain the governing rules of decision. In such cases, the law of nations applied not as a matter of federal common law, but as a means of implementing the constitutional allocation of power between the federal government and the states, on the one hand, and between the political branches and the courts, on the other.

Article III extends the judicial power "to all Cases affecting Ambassadors, other public Ministers and Consuls" and specifies that "the Supreme Court shall have original Jurisdiction" in such cases.³¹¹ This provision is limited to cases affecting "diplomatic and consular representatives accredited to the United States by foreign powers",³¹² it does not encompass cases affecting diplomats accredited from one foreign country to another traveling through the United States.

The Supreme Court has had no occasion to develop a "federal common law" of diplomatic immunity in the course of deciding "Cases affecting Ambassadors" under Article III because the First Congress acted swiftly to confer broad statutory immunity from suit on diplomats accredited to the United States.³¹³ Diplomats in transit, by contrast, were accorded no special privileges or immunities by positive federal law until the enactment of the Diplomatic Relations Act of 1978.³¹⁴ Nevertheless, diplomats in transit were not without protection. Their treatment by the courts provides insight into the application of the proposed reinterpretation of federal common law. As discussed below, the law of nations required the United States (and therefore its courts) to accord *all* foreign ambassadors diplomatic immunity. Had Congress failed to establish this immunity by statute, the Constitution's allocation of

³¹¹ U.S. CONST. art. III, § 2.

³¹² *Ex parte Gruber*, 269 U.S. 302, 303 (1925); *see also* *Bergman v. De Sieyes*, 71 F. Supp. 334, 335 (S.D.N.Y. 1946), *aff'd*, 170 F.2d 360 (2d Cir. 1948).

³¹³ *See infra* notes 315-29 and accompanying text.

³¹⁴ By enacting the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified as amended at 22 U.S.C. §§ 254a-254e (1994)), Congress adopted in its entirety the Vienna Convention on Diplomatic Relations. Article 40 of the Convention extends immunity to diplomatic agents and their families in transit. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 40, 23 U.S.T. 3227, 500 U.N.T.S. 95, 118; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 461 (1987) ("A state is not immune from the jurisdiction to prescribe of another state, except to the extent provided in respect of diplomatic and consular activities . . .").

power over foreign affairs would have required federal and state courts to recognize the full scope of such immunity.

Congress implemented jurisdiction over “Cases affecting Ambassadors,” within the meaning of Article III, by enacting the Judiciary Act of 1789.³¹⁵ Section 13 of the Act provides that the Supreme Court

shall have exclusively all such jurisdiction of suits or proceedings *against* ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits *brought by* ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.³¹⁶

The relevant portions of Article III (and presumably of the Judiciary Act) were adopted “in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments.”³¹⁷

The law of nations conferred broad immunity from suit upon ambassadors as the official representatives of foreign sovereigns in the United States. According to Blackstone:

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside.³¹⁸

The Judiciary Act attempted to ensure that the United States would adhere to this immunity by drawing a distinction between suits against ambassadors and suits by ambassadors.³¹⁹ This distinction

³¹⁵ Ch. 20, 1 Stat. 73.

³¹⁶ § 13, 1 Stat. at 80-81 (emphasis added).

³¹⁷ *Ex parte Gruber*, 269 U.S. 302, 303 (1925).

³¹⁸ 1 BLACKSTONE, *supra* note 74, at *253; *see also* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816) (“[A]mbassadors, other public ministers, and consuls . . . are emphatically placed under the guardianship of the law of nations . . .”).

³¹⁹ The Act also drew a distinction between ambassadors and other public ministers, on the one hand, and consuls and vice consuls, on the other. Suits against the former were committed to the exclusive original jurisdiction of the Supreme Court, whereas suits brought by or against the latter were left to the original, but not exclusive, jurisdiction of the Supreme Court. *See* § 13, 1 Stat. at 80. This dichotomy was likewise drawn from the law of nations:

A consul is not entitled, by the law of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits,

was necessary because the law of nations regarded even the assertion of jurisdiction over a foreign ambassador as an affront to his sovereign.³²⁰ The Judiciary Act specifically sought to avoid such transgressions by both excluding the lower federal courts and the state courts from exercising jurisdiction over "suits or proceedings against ambassadors," and conferring upon the Supreme Court only "such jurisdiction . . . as a court of law can have or exercise consistently with the law of nations."³²¹

In addition to these jurisdictional restrictions, Congress passed the Crimes Act of 1790, which provided in pertinent part:

That if any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state, . . . whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, . . . may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void . . .³²²

The Act further provided that those who prosecute, solicit, or execute any such writ or process, "being thereof convicted, *shall be deemed violaters of the laws of nations*, and disturbers of the public repose, and imprisoned not exceeding three years and fined at the discretion of the court."³²³

These provisions "were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations," and which "was passed in consequence of the arrest of an ambassador of Peter the

like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offence he may commit against its laws.

Gittings v. Crawford, 10 F. Cas. 447, 451 (C.C.D. Md. 1838) (No. 5465) (Taney, C.J.); see also *The Anne*, 16 U.S. (3 Wheat.) 435, 445 (1818) ("A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes.").

³²⁰ See Dickinson, *supra* note 164, at 30; see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) at 335 (noting that cases affecting ambassadors "affect not only our internal policy, but our foreign relations").

³²¹ § 13, 1 Stat. at 80.

³²² Crimes Act of 1790, ch. 9, § 25, 1 Stat. 112, 117-18.

³²³ § 26, 1 Stat. at 118 (emphasis added). The Act also provided "[t]hat if any person . . . shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court." § 28, 1 Stat. at 118 (emphasis added).

Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death."³²⁴ Under the law of nations, "[t]he person of a public minister is sacred and inviolable" because if "his freedom of conduct is taken away, the business of his sovereign cannot be transacted, and his dignity and grandeur will be tarnished."³²⁵ Thus, it was apparently not enough for Congress to rely upon the judiciary to decline jurisdiction in appropriate cases. Congress took additional steps to punish and deter both public and private actors from engaging in conduct that would interfere with the privileges and immunities of ambassadors and public ministers.³²⁶ As Justice Washington subsequently recognized, "[a] neglect, or refusal to perform this duty might lead to retaliation upon our own ministers abroad, and even to war."³²⁷

The Crimes Act of 1790 had its intended effect: "[T]here do not appear to have been any cases brought successfully within [the Supreme Court's] exclusive original jurisdiction" against ambassadors or other public ministers.³²⁸ More importantly for purposes

³²⁴ *In re Baiz*, 135 U.S. 403, 420 (1890); see also 1 BLACKSTONE, *supra* note 74, at *255 (stating that "[t]o satisfy . . . the clamors of the foreign ministers, . . . as well as to appease the wrath of Peter," following the arrest of "an ambassador from Peter the Great . . . in London for a debt of fifty pounds which he had there contracted," "a bill was brought into parliament, and afterwards passed into a law, to prevent and punish such outrageous insolence for the future").

³²⁵ *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116-17 (1784).

³²⁶ See *United States v. Ortega*, 27 F. Cas. 359, 360 (C.C.E.D. Pa. 1825) (No. 15,971) (Washington, J.) ("[T]he government of the United States, like that of all civilized nations, is bound to afford redress for the violation of those privileges and immunities which the law of nations confers upon foreign ministers, and which are consecrated by the practice of the civilized world."), *aff'd*, 24 U.S. (11 Wheat.) 467 (1826) (Washington, J.).

³²⁷ *Id.*

³²⁸ 17 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4050, at 238-39 (1988). There have been, however, at least two cases prosecuted to judgment under the Supreme Court's original nonexclusive jurisdiction over suits in which a consul is a party. See *Casey v. Galli*, 94 U.S. 673, 681 (1876) (holding an Italian vice-consul who was a stockholder in an insolvent banking association liable to pay the sum determined by the comptroller); *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798) (summarizing the Court's decision that a foreign consul was not personally liable on a bill of exchange, drawn on the public treasury of his government); 17 WRIGHT ET AL., *supra*, at 240-41. Under the Judiciary Act, the Supreme Court's jurisdiction over suits involving consuls or vice consuls was largely concurrent with that of the lower federal courts, which were generally given "jurisdiction exclusively of the courts of the several States, of all suits *against* consuls or vice-consuls." Ch. 20, § 9, 1 Stat. at 77 (emphasis added). The Supreme Court recognized an implied exception to exclusive federal jurisdiction in a case in which an American citizen sued the Vice Consul of Romania for divorce in state court. See *Ohio ex rel. Popovici v.*

of this Article, Congress's codification and enforcement of the privileges and immunities of ambassadors and other public ministers obviated the need for federal courts to undertake an independent assessment of the law of nations, and thus undoubtedly preempted the development of "federal common law" under this head of federal jurisdiction.³²⁹

Had Congress failed to take the initiative, however, there is a strong argument that the Constitution would have required both federal and state courts to recognize the rights of ambassadors under the law of nations—no less than the act of state doctrine—in order to avoid interfering with the political branches' conduct of foreign relations. In this century, such recognition undoubtedly would have been characterized as an instance of "federal common lawmaking." Such characterizations, however, would have been both inaccurate and unnecessary because rules implementing the rights of ambassadors under the law of nations readily could be reconceptualized under the proposed approach. The first criterion would be satisfied because such rules directly implicate the United States's relations with foreign nations—a matter beyond the legislative competence of the states. The second criterion would also be met because adherence to such rules is necessary to preserve a basic feature of the constitutional scheme—the Constitution's separation and allocation of powers in the field of foreign relations.

It is possible to test this hypothesis in the context of suits against diplomats accredited by one foreign country to another traveling through the United States. Such diplomats have never been considered "Ambassadors, other public Ministers [or] Consuls" within the meaning of Article III and, until 1978, were accorded no

Aglar, 280 U.S. 379, 383-84 (1930) ("If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly . . ."). For insightful criticism of the domestic relations exception to federal jurisdiction generally, and *Popovici* specifically, see Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1094-1111 (1994).

³²⁹ In 1972, the United States became a party to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, which codified customary international law regarding the privileges and immunities afforded to the diplomatic representatives of sovereign states. Congress implemented the provisions of the Vienna Convention by enacting the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified as amended at 22 U.S.C. §§ 254a-254e (1994)), which supersedes the relevant provisions of the Crimes Act of 1790.

special privileges or immunities under positive federal law.³³⁰ Accordingly, diplomats in this position were more likely to be sued, both in federal and state court. Federal subject matter jurisdiction rested not on the defendant's status as an "Ambassador," but on the existence of foreign diversity.³³¹

*Bergman v. De Sieyes*³³² provides an example. The case originated when Bergman sued De Sieyes for deceit in state court and caused De Sieyes to be "personally served with process in New York, while on his way to the Republic of Bolivia, to which he had been accredited as minister by the Republic of France."³³³ De Sieyes, a citizen of France, removed the case to federal district court on the basis of foreign diversity. At the trial level, he defended on the ground that, as a diplomatic minister en route to his assigned country, he was "immune from service of civil process in a third country through which he [was] passing on the way to his post."³³⁴

Because the Crimes Act of 1790 did not apply to diplomats in transit, the district court looked to the "Law of Nations" to ascertain "what immunities and privileges are accorded to diplomats" in De Sieyes's position.³³⁵ After examining both foreign and domestic decisions, as well as scholarly treatises on the law of nations, the district court concluded "that a foreign minister en route, either to or from his post in another country, is entitled to innocent passage through a third country," including "the same immunity from the jurisdiction of the courts of the third country that he would have if he were resident therein."³³⁶ Accordingly, the court upheld De Sieyes's defense of diplomatic immunity.³³⁷

The court of appeals affirmed, although on somewhat different grounds. Chief Judge Learned Hand began his opinion by noting that jurisdiction was based on diversity of citizenship and then addressed an issue that the district court had all but ignored—the source of law to be applied:

[S]ince the defendant was served while the cause was in the state court, the law of New York determines its validity, and, although

³³⁰ See *supra* notes 311-14 and accompanying text.

³³¹ See U.S. CONST. art. III, § 2 (extending the judicial power to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

³³² 170 F.2d 360 (2d Cir. 1948).

³³³ *Id.* at 361.

³³⁴ *Bergman v. De Sieyes*, 71 F. Supp. 334, 334 (S.D.N.Y. 1946).

³³⁵ *Id.* at 335.

³³⁶ *Id.* at 341.

³³⁷ See *id.*

the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves.³³⁸

Applying state law, the court concluded "that the courts of New York would today hold that a diplomat in transitu would be entitled to the same immunity as a diplomat in situ."³³⁹

The Second Circuit's approach draws apparent support from the Supreme Court's decision in *Erie*. On its face, *Erie* states that when the matter in question—here, the rights of diplomats in transit—is not "governed by the Federal Constitution or by Acts of Congress, the law to be applied . . . is the law of the State."³⁴⁰ Yet, as in the case of the act of state doctrine, there is good reason to suppose that the Court was not contemplating diplomatic immunity rules when it decided *Erie*.³⁴¹ Unlike the matter at issue in *Erie*, the rights of diplomats in transit do not fall within the legislative competence of the states. To be sure, the underlying cause of action in *Bergman*—deceit—is a matter within the traditional scope of state authority, but the defense—diplomatic immunity—is not.³⁴²

Bergman itself hinted at the possibility that deferring to state court "interpretation[s] of international law"³⁴³ might interfere with federal authority. The court's opinion includes the following reservation: "Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for

³³⁸ *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948). Despite the unqualified nature of this statement, as discussed below, the court left open the possibility that state law might not control in all instances. See *infra* note 344 and accompanying text.

³³⁹ *Bergman*, 170 F.2d at 363.

³⁴⁰ *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

³⁴¹ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

³⁴² See *infra* notes 345-48 and accompanying text; cf. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 474-75 n.(a) (1826) (reporter's note).

The question as to what is the law by which cases affecting ambassadors, other public ministers and consuls, are to be determined in the courts of the Union, in the absence of any legislative provisions by congress applicable to the particular case, would lead into too wide a field of discussion to be embraced by the present note. It is obvious, that the law of nations would, in some instances, form the rule of decision; in others, such as civil causes arising out of contract, and questions of property, the laws of the several states would form the rule . . .

Id.

³⁴³ *Bergman*, 170 F.2d at 361.

neither is present here."³⁴⁴ Because New York courts had interpreted international law to confer immunity, the court of appeals was content to follow their lead.

There were good reasons for the court's concern. A state's insistence upon applying its law to foreign ambassadors in violation of "well-established doctrine[s] of international law" would undoubtedly interfere with the United States's conduct of foreign relations. Such violations are attributable to the United States under international law and could "lead to retaliation upon our own ministers abroad, and even to war."³⁴⁵ For this reason, states, acting either through courts or legislatures, lack authority to disavow the rights of ambassadors under the law of nations because such authority is necessarily part of the United States's exclusive power over foreign affairs.³⁴⁶ Thus, the first of the proposed criteria—that the matter fall beyond the legislative competence of the states—was satisfied in *Bergman*.

The second criterion was also met. As in *Sabbatino*, the *Bergman* court was required to exercise independent judgment to ascertain and apply a rule of decision that would preserve a basic feature of our constitutional scheme—the exclusive power of the political branches to conduct foreign relations. On this occasion, the courts could prevent interference with the conduct of foreign relations simply by adopting the rule supplied by the law of nations—that ambassadors in transit are entitled to the same immunity as that afforded ambassadors in residence. The decision whether and how to depart from such law is "a question rather of policy than of law"³⁴⁷ and is thus committed to the discretion of the political branches.³⁴⁸ Thus, absent contrary direction from the political

³⁴⁴ *Id.*

³⁴⁵ *United States v. Ortega*, 27 F. Cas. 359, 360 (C.C.E.D. Pa. 1825) (No. 15,971), *aff'd*, 24 U.S. (11 Wheat.) 467 (1826).

³⁴⁶ See *supra* notes 268-71 and accompanying text.

³⁴⁷ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814); see also *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) ("[T]he questions to which [wrongs committed by a sovereign] give birth are rather questions of policy than of law . . .").

³⁴⁸ In the context of diplomatic immunity, Congress has recognized the need for flexibility in conducting foreign relations by creating a reservation to the Vienna Convention on Diplomatic Relations that permits the President "on the basis of reciprocity . . . [to] specify privileges and immunities . . . which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention." Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 4, 92 Stat. 808, 809 (codified as amended at 22 U.S.C. § 254c (1994)); cf. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) ("[W]here the Executive Branch,

branches, the Constitution's separation of powers requires federal courts to recognize and apply diplomatic immunities recognized by the law of nations.

Because both of the proposed criteria are met, a *federal* court's application of international law in contravention of a state court's past "avowed refusal" to follow, or "plain misapprehension" of, such law would not raise significant federalism or separation of powers concerns. To the contrary, as discussed, a federal court's failure to recognize and apply diplomatic immunity would usurp the exclusive power of the political branches to conduct foreign affairs.

For similar reasons, a *state* court's "avowed refusal" to follow well-established principles of diplomatic immunity arguably would present a federal question subject to the Supreme Court's appellate jurisdiction.³⁴⁹ States have no authority to refuse to accord ambassadors the privileges and immunities recognized under international law. Such an "avowed refusal" would encroach upon exclusive federal authority over foreign affairs.

Whether a state court's "plain misapprehension" of the rights of ambassadors in transit presents a federal question is a more difficult question. It is one thing to say that state courts must interpret and apply international law in this context; it is quite another to say that state courts must defer to the federal courts' interpretation of such law. State courts generally have concurrent jurisdiction over federal question cases³⁵⁰ and are entitled to exercise independent judgment when interpreting and applying federal law, subject to

charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.").

³⁴⁹ Under the proposed reconceptualization, a foreign ambassador's assertion of diplomatic immunity under well-recognized principles of international law would arguably constitute a "title, right, privilege, or immunity . . . specially set up or claimed under the Constitution" within the meaning of 28 U.S.C. § 1257(a) (1994). Although the Constitution is not itself the *source* of the particular rules of immunity in question, the constitutional allocation of power over foreign affairs arguably requires state and federal courts to *apply* such rules in the absence of positive federal law. Therefore, refusal to apply such rules appears to present a federal question.

³⁵⁰ See, e.g., *Grubb v. Public Util. Comm'n*, 281 U.S. 470, 476 (1930) ("[T]he state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States . . ."); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 920 (1984) (stating that Congress has the power to rely "on the state courts to enforce federal rights, part of their traditional, originally contemplated role").

appellate review by the Supreme Court.³⁵¹ To the extent that state courts also have jurisdiction over cases likely to implicate the law of nations, it is difficult to see why such courts are not likewise entitled to exercise independent judgment in ascertaining and applying that law, even if the result is a plain mistake. When such cases fall within the jurisdictional categories set forth in Article III, Congress has power to subject them (like federal question cases) to appellate review by the Supreme Court³⁵² and, if necessary, to vest concurrent (or even exclusive) jurisdiction in the lower federal courts.³⁵³ In addition, as the Crimes Act of 1790 demonstrates, Congress always has the option of enacting rules vital to foreign relations into positive federal law. Such law would unquestionably bind the states as the "supreme Law of the Land."³⁵⁴ These devices generally provide ample means to correct or prevent a state court's "plain misapprehension" of relevant principles of international law.³⁵⁵

³⁵¹ See 28 U.S.C. § 1257(a) (1994); 16 WRIGHT ET AL., *supra* note 328, § 4006, at 544.

³⁵² Article III provides, for example, that the Supreme Court shall have appellate jurisdiction in controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." See U.S. CONST. art. III, § 2.

³⁵³ See *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943) ("Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive . . .'" (citations omitted)). Under the Judiciary Act of 1789, for example, the circuit courts were given "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where . . . an alien is a party." Ch. 20, § 11, 1 Stat. 73, 78.

³⁵⁴ U.S. CONST. art. VI, cl. 2. Congress in fact enacted legislation governing the application of the act of state doctrine following the Supreme Court's decision in *Sabbatino*. See Foreign Assistance Act of 1964, Pub. L. No. 88-633, sec. 301(d)(4), § 620(e)(2), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (1994)) ("[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim . . . is asserted by any party including a foreign state . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . ."). The political branches could also adopt treaties that would bind the states. See *Missouri v. Holland*, 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.").

³⁵⁵ *Bergman v. De Sieyes*, 170 F.2d 360, 361 (1948). A state court's "plain misapprehension" of international law is arguably less intrusive of federal authority than is "an avowed refusal" to follow such law. On the one hand, some degree of misinterpretation is inherent in adjudication. No court can be correct 100% of the time. On the other hand, as *Erie* recognizes, a state court's departure from traditional judicial doctrines is sometimes a means by which the state makes state law. See *supra* notes 73-77 and accompanying text. Because the states lack legislative competence over foreign affairs, state lawmaking in the guise of misinterpretation would be constitutionally problematic. Ascertaining the line between (mis)interpre-

B. *Controversies Between Two or More States*

This section considers the law to be applied in suits between states. Although, in the modern era, such law has been characterized as federal common law, application of the proposed criteria suggests that the rules applied in these cases may often be implied by the constitutional structure. Specifically, many such rules appear to implement the constitutional equality of the states. After suggesting how the proposed criteria apply in this context, this section examines two of the more frequent types of controversies between states—the location of interstate boundaries and the apportionment of water from interstate streams—in light of the proposed approach.

Article III's grant of jurisdiction over "Controversies between two or more States" has given rise to a significant enclave of "federal judge-made law."³⁵⁶ The Supreme Court has decided countless controversies between states, involving a wide range of issues. Such controversies most often concern the location of interstate boundaries,³⁵⁷ but have also dealt with such diverse matters as water rights,³⁵⁸ interstate pollution,³⁵⁹ and the apportionment of public debts.³⁶⁰

At the outset of every case, the Supreme Court is confronted "by the question what rule is to be applied."³⁶¹ Historically, the Court's opinions do not reveal a consistent answer. For example, in an early boundary dispute, the Court simply declared its "power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them."³⁶² Subsequently,

tation and lawmaking, however, would impose a difficult, if not impossible, burden on the federal courts.

³⁵⁶ In addition to extending the judicial power to these controversies, U.S. CONST. art. III, § 2, cl. 1, Article III specifies that "when a State shall be a Party, the supreme Court shall have original Jurisdiction," U.S. CONST. art. III, § 2, cl. 2.

³⁵⁷ See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

³⁵⁸ See, e.g., *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

³⁵⁹ See, e.g., *Missouri v. Illinois*, 200 U.S. 496 (1906).

³⁶⁰ See, e.g., *Virginia v. West Virginia*, 220 U.S. 1 (1911).

³⁶¹ *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

³⁶² *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737 (1838) (citation omitted); see also *id.* ("[A controversy between states] comes to the court, to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.").

the Court emphasized the quasi-sovereign nature of disputes between states: "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand"³⁶³ In the modern era, the Court has characterized rules of decision that govern disputes between states as "federal common law."

In this context, however, this characterization is largely a misnomer and serves only to cast unnecessary doubt on the constitutional legitimacy of the governing rules of decision. For the most part, the Supreme Court does not in fact devise rules to resolve controversies between states according to its own standards. Rather, the Court generally resolves such disputes "on the basis of equality of right"³⁶⁴—a principle inferred from the constitutional structure and borrowed from background assumptions of the law of nations.³⁶⁵ The approach proposed in Part II goes a long way toward reconceptualizing rules of this kind. Application of the first criterion is relatively straightforward. Because the states generally lack legislative competence to establish rules of decision to govern disputes among themselves, federalism does not require the Supreme Court to apply state law to such disputes.³⁶⁶

The application of the second criterion is more complex. Congress generally lacks unilateral power to "make compacts between the States" or "by legislation [to] compel their separate action."³⁶⁷ Thus, the judiciary's application of "federal judge-

³⁶³ *Kansas v. Colorado*, 185 U.S. 125, 146-47 (1902).

³⁶⁴ *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931).

³⁶⁵ See *infra* notes 393-94 and accompanying text.

³⁶⁶ See *infra* notes 373-85 and accompanying text.

³⁶⁷ *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). That Congress is an integral part of one of the methods for resolving interstate disputes—adoption of interstate compacts—strongly supports the Court's traditional view that Congress lacks power to resolve such disputes through ordinary legislation. Border disputes—paradigmatic interstate controversies—illustrate the point. The states can resolve such disputes by compact or by litigation, but Congress is without power to legislate a new border between states. See U.S. CONST. art. I, § 8, cl. 17 (granting Congress exclusive legislative power "over such District (not exceeding ten Miles square) as may, by *Cession of particular States*, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" (emphasis added)); *id.* art. IV, § 3, cl. 1 ("[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned" (emphasis added)); THE FEDERALIST No. 20, at 134-38 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[A] sovereignty over sovereigns,

made law" to resolve disputes between states does not threaten to encroach upon the exclusive authority of a coordinate branch. It does not follow, however, that the Supreme Court is free "to fashion the governing rule of law according to [its] own standards."³⁶⁸ To the contrary, the rules applied to resolve controversies between states are designed to further another basic feature of the constitutional structure—the constitutional equality of the states. Although this approach may at times entail a significant degree of judicial creativity, that is a function of the founders' decision to assign the Supreme Court ultimate authority to resolve disputes between states and to deny Congress and the individual states unilateral authority to establish binding rules of decision for such disputes.³⁶⁹ In this unique context, therefore, such judicial creativity may be a matter of constitutional necessity.

The modern approach first appeared in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,³⁷⁰ an opinion by Justice Brandeis handed down on the same day as his opinion in *Erie*. In *Hinderlider*, the Supreme Court characterized the apportionment of water in an interstate stream and the location of an interstate boundary as "question[s] of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."³⁷¹ Since then, courts and commentators have understood federal common lawmaking power in these areas to be "inferred from the jurisdictional grant over interstate controversies."³⁷² The modern approach rests on two related propositions. First, state law cannot provide the rules of decision applicable to disputes between states. Second, such rules must be supplied by federal courts in the form of "federal judge-made law."

The first proposition is generally unexceptional. Contrary to modern accounts, however, this is not because "state competence is

a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity . . ."); Hill, *supra* note 7, at 1070 (stating that "as the Court has recognized, there is little if anything that Congress can do about the historic boundaries of states" (citing *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726-27 (1838))).

³⁶⁸ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). Such unbridled judicial lawmaking, even in this unique context, would raise constitutional concerns. See *infra* notes 386-92 and accompanying text.

³⁶⁹ See *supra* notes 381-85 and accompanying text.

³⁷⁰ 304 U.S. 92 (1938).

³⁷¹ *Id.* at 110 (citations omitted).

³⁷² HART & WECHSLER, *supra* note 4, at 884.

excluded by necessary implication from the constitutional grant of jurisdiction.³⁷³ Rather, state competence is generally excluded by broader implications from the constitutional structure.³⁷⁴ Because states are coequal sovereigns under the Constitution,³⁷⁵ neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other.³⁷⁶ It is immaterial that the states once may have possessed full rights of sovereignty as “Free and Independent States,”³⁷⁷ and that, while they enjoyed that status, controversies between them were “political, and not judicial, as none but the sovereign [could] settle them.”³⁷⁸ By ratifying the Constitution, the states ceded important portions of their sovereignty to the federal government. “The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war.”³⁷⁹ The Constitution was specifically designed to restrict these aspects of state sovereignty. Thus, “[t]he states of this Union cannot make war upon each other. They cannot ‘grant letters of marque and reprisal.’ They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.”³⁸⁰

In place of these rights, the Constitution established two alternative and exclusive means of resolving controversies between states. First, the states themselves may voluntarily enter into an “Agreement or Compact” to resolve their differences, but only with “the Consent of Congress.”³⁸¹ Second, the states may seek judi-

³⁷³ Hill, *supra* note 7, at 1031; *see also supra* note 417 and accompanying text.

³⁷⁴ Cf. Monaghan, *supra* note 7, at 14 (stating that “interstate dispute cases present a good example of authority to create federal common law gleaned by implication from the federal structure of the United States”).

³⁷⁵ *See infra* notes 393-98 and accompanying text.

³⁷⁶ *See Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (“Neither State can legislate for or impose its own policy upon the other.”). This point is perhaps best illustrated in the context of an interstate boundary dispute. Because a state’s “legislative power” is “co-extensive with its territory,” *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 387 (1818), “neither state can have any right beyond its territorial boundary,” *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838). *See also id.* (“[W]hen a place is within the boundary, it is a part of the territory of a state; title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession.”). Thus, until the Supreme Court ascertains the boundary, neither state has a better claim to sovereignty over the disputed area than the other.

³⁷⁷ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

³⁷⁸ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) at 737.

³⁷⁹ *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945).

³⁸⁰ *Kansas v. Colorado*, 185 U.S. 125, 143 (1902) (citation omitted in original); *see also supra* note 241 and accompanying text.

³⁸¹ U.S. CONST. art. I, § 10, cl. 3.

cial resolution of their disputes by invoking the original jurisdiction of the Supreme Court.³⁸² Such jurisdiction "is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States."³⁸³ A requirement that the Court apply state law to controversies between states would make little sense.³⁸⁴ As the Supreme Court observed, "the interstate . . . nature of the controversy makes it inappropriate for state law to control."³⁸⁵ Thus, the Supreme Court's failure to adhere to state law in this context raises few, if any, federalism concerns.

The second proposition underlying the modern approach—that "federal judge-made law" governs controversies between states—raises greater difficulties. Because both states and Congress lack legislative competence over the transactions that generally give rise to interstate disputes, courts and commentators are quick to assume that the law governing these disputes must be "federal judge-made law."³⁸⁶ The difficulty with this conception is that it casts the Supreme Court in the role of a legislature. Although similar to traditional separation of powers concerns, the objection is somewhat different in this context. Given Congress's lack of general legislative authority, this objection would be based more on limitations inherent in the nature of an Article III court than on the judiciary's intrusion upon the constitutional authority of a coordinate branch.³⁸⁷

³⁸² See *id.* art. III, § 2.

³⁸³ *Georgia v. Pennsylvania R.R.*, 324 U.S. at 450.

³⁸⁴ See *Monaghan*, *supra* note 7, at 14 (noting that "it is a basic presumption of the Constitution that the state courts may be too parochial to administer fairly disputes in which important state interests are at issue"). This is especially true with respect to the most common source of interstate disputes—the location of interstate boundaries. Even assuming that state law governed such matters, the Supreme Court would not be able to decide *which* state's law to apply without first resolving the dispute according to some other standard.

³⁸⁵ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

³⁸⁶ See, e.g., HART & WECHSLER, *supra* note 4, at 884 ("[L]aw-making power is inferred from the jurisdictional grant over interstate controversies and justified by the inappropriateness of using any one state's law.").

³⁸⁷ Although the Supreme Court does not appear to have declined to adjudicate any controversies between states on this ground, it is at least theoretically possible that some potential controversies are nonjusticiable. Cf. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 751-52 (1838) (Taney, C.J., dissenting) ("[T]he powers given to the courts of the United States by the constitution are judicial powers; and extend to those subjects only which are judicial in their character; and not to those which are political."). On the other hand, Article III arguably transforms nonjustici-

Justice Holmes recognized this difficulty on behalf of the Supreme Court in *Missouri v. Illinois*,³⁸⁸ an interstate dispute that arose prior to the Court's apparent embrace of "federal common law" in *Hinderlider*. In considering the nature and source of the law to be applied, the Court stated that, in the absence of positive federal law, "[t]he only ground on which [a] State's conduct can be called in question is one which must be implied from the words of the Constitution."³⁸⁹ Although acknowledging that "[t]he Constitution extends the judicial power of the United States to controversies between two or more States,"³⁹⁰ Justice Holmes thought that "the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals."³⁹¹

Justice Holmes' reluctance to embrace open-ended judicial lawmaking in this context draws support from both federalism and separation of powers principles. He observed that the Supreme Court has no power to impose its will upon the states unless the Constitution empowers it to do so, and stressed that "the fact that this court must decide [interstate controversies] does not mean, of course, that it takes the place of a legislature."³⁹²

If the Supreme Court is not at liberty simply to devise federal common law rules according to its own standards, then how should

able political questions into legal questions by giving the Supreme Court original jurisdiction over controversies between states. *See id.* at 737-38 ("The submission by the . . . states, to a court of law or equity, of a controversy between them . . . gives power to decide according to the appropriate law of the case . . .").

³⁸⁸ 200 U.S. 496, 522-26 (1906) (rejecting Missouri's attempt to restrain Illinois from discharging sewage into an interstate river, in part, because Missouri permitted "discharges similar to those of which it complain[ed]" and did not prove that its own conduct was not the cause).

³⁸⁹ *Id.* at 519.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 520.

³⁹² *Id.* at 519. Arguably, judicial lawmaking in this context "invade[s] rights which . . . are reserved by the Constitution to the several States." *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938). Although the states ceded significant portions of their sovereignty by adopting the Constitution, it does not follow that the states—by merely agreeing to permit the Supreme Court to adjudicate "controversies between states"—gave the Court absolute discretion "to fashion the governing rule of law according to [its] own standards." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). Although the states retain little or no affirmative authority to adopt the governing rules of decision, they arguably retain a negative right not to have their controversies decided according to "federal judge-made law." *Cf. supra* notes 54-69 and accompanying text (discussing *Erie's* conception of judicial federalism).

the Court ascertain the law to be applied to interstate disputes? The constitutional structure suggests an answer. After achieving their independence from Great Britain, the states declared themselves to be "Free and Independent States," with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."³⁹³ Under the law of nations, such "Free and Independent States" are entitled to the "perfect equality and absolute independence of sovereigns."³⁹⁴ Although the states necessarily compromised their "absolute independence" by uniting under the Constitution, it does not follow that they forfeited their "absolute equality."

To the contrary, the Constitution proceeds on the assumption that the states are coequal sovereigns within the federal union. For example, the Constitution guarantees the states equal representation in the Senate,³⁹⁵ and even exempts this feature of the Constitution from constitutional amendment.³⁹⁶ In addition, the Supreme Court has long recognized as implicit in the constitutional structure a requirement that new states be admitted on an "equal footing" with existing states.³⁹⁷ According to the Court, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."³⁹⁸

Reconceptualizing the federal common law of interstate relations as rules of decision necessary to implement and maintain the constitutional equality of the states resolves the most serious constitutional concerns traditionally associated with federal common law. The structural equality of the states under the Constitution provides the Court with significant guidance. In some cases, it is

³⁹³ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

³⁹⁴ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

³⁹⁵ See U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.").

³⁹⁶ See U.S. CONST. art. V (qualifying the amendment procedures with the proviso that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

³⁹⁷ See, e.g., *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) ("When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . ."); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289 (1992) ("The Supreme Court has long treated the equal footing doctrine as having constitutional significance . . .").

³⁹⁸ *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

possible for the Court simply to borrow international law doctrines, originally developed to implement the "absolute equality" of sovereign nations. In others, the Court may have to exercise equitable discretion. In either case, however, the Court's decisions raise few constitutional difficulties to the extent that they implement the structural equality of the states and reflect the unique role that the founders assigned to the Supreme Court in this context.

Controversies between states concerning the location of interstate boundaries and the apportionment of water in interstate streams illustrate these points. Ascertaining the location of interstate boundaries frequently involves little more than the interpretation of an authoritative text, such as an historic grant from the Crown or a subsequent agreement between states.³⁹⁹ On some occasions, however, a question arises that the relevant texts fail to address. In such cases, the Court frequently turns to doctrines borrowed from international law for guidance.

For example, in *New Jersey v. Delaware*,⁴⁰⁰ New Jersey initiated an action within the original jurisdiction of the Supreme Court to determine the boundary between the two states in the Delaware Bay and River. The Supreme Court applied the international law principle of the *Thalweg* to resolve the controversy. "The *Thalweg*, or downway, is the track taken by boats in their course down the stream, which is that of the strongest current."⁴⁰¹ Thus, the doctrine "divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical center, halfway between the banks."⁴⁰²

International law doctrines like the *Thalweg* do not apply to disputes between states of their own force.⁴⁰³ Rather, the Supreme

³⁹⁹ See, e.g., *New Jersey v. Delaware*, 291 U.S. 361, 364-78 (1934) (interpreting a deed of feoffment delivered to William Penn by the Duke of York on August 24, 1682).

⁴⁰⁰ 291 U.S. 361 (1934).

⁴⁰¹ *Id.* at 379.

⁴⁰² *Id.* For a very recent application of the *Thalweg* principle to resolve a dispute between states, see *Louisiana v. Mississippi*, 116 S. Ct. 290 (1995).

⁴⁰³ Although international law may have governed disputes between states "[w]hen independence was achieved," *New Jersey v. Delaware*, 291 U.S. at 378, international law has no application to disputes between constituent parts of a larger union. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 reporter's note 5 (1986) ("A state of the United States is not a 'state' under international law, since by its constitutional status it does not have capacity to conduct foreign relations." (citation omitted)). In ascertaining the location of an international border, by contrast, "the law of nations . . . remain in full force" where "[n]o

Court's application of such doctrines is best understood as an attempt to "achieve equality" between states.⁴⁰⁴ Traditional doctrines of international law implement the constitutional equality of the states because they are founded upon the "perfect equality and absolute independence of sovereigns."⁴⁰⁵ For example, the *Thalweg* ensures that nations (and states) divided by bays and rivers will have equal access to these vital "arteries of trade and travel."⁴⁰⁶ "If the dividing line were to be placed in the centre of the stream rather than the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other."⁴⁰⁷ Thus, it is not surprising that the Court employs doctrines like the *Thalweg* to resolve disputes between states, because such doctrines preserve and implement the constitutional equality of the states.⁴⁰⁸

Controversies between states concerning "the relative rights of contending States in respect of the use of streams flowing through them"⁴⁰⁹ raise distinct considerations. In cases of this nature, international law provides no ready solution.⁴¹⁰ Nonetheless, the

subsequent treaty has changed or in any shape regulated the general rights growing out of the law of nations on this subject." *The Fame*, 8 F. Cas. 984, 986 (C.C.D. Me. 1822) (No. 4634) (Story, J.).

⁴⁰⁴ *New Jersey v. Delaware*, 291 U.S. at 383.

⁴⁰⁵ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812); see also U.N. CHARTER art. 2, ¶ 1 ("The [United Nations] is based on the principle of the sovereign equality of all its Members."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (stating that under international law, a state has "sovereignty over its territory and general authority over its nationals," "status as a legal person," and "capacity to join with other states to make international law"); VATTEL, *supra* note 165, at 57-58.

⁴⁰⁶ *New Jersey v. Delaware*, 291 U.S. at 381.

⁴⁰⁷ *Id.* at 380.

⁴⁰⁸ In addition to the *Thalweg*, the Court applies the traditional international law doctrines of "accretion" and "avulsion" in order to ascertain the location of interstate boundaries, "where the boundaries . . . are, by prescription or treaty, found in running water." *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892). "Accretion" refers to the change in the banks of a river when it "changes its course gradually by alluvial formations," *id.* at 360, whereas "avulsion" refers to a "sudden and rapid change" in the course of a stream from any cause. *Id.* at 361. The traditional rule of the law of nations is that "[a]ccretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel," while "[a]vulsion has no effect on boundary, but leaves it in the centre of the old channel." *Id.*

⁴⁰⁹ *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931).

⁴¹⁰ Nor is state law to be given controlling weight. See *id.* (stating that "the laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies" between states).

Supreme Court is not without constitutional guidance. In keeping with the structural equality of the states, the Court resolves “such disputes . . . on the basis of equality of right.”⁴¹¹ This means that the Court “will determine what is an equitable apportionment of the use of such waters,” “having regard to the ‘equal level or plane on which all the States stand, in point of power and right, under our constitutional system.’”⁴¹²

The Supreme Court’s adoption of rules to resolve controversies between states “on the basis of equality of right” raises fewer constitutional concerns than does the Court’s adoption of federal common law rules according to its own standards. Doctrines borrowed from the law of nations provide significant constraints on the Court’s “lawmaking” functions in this context.⁴¹³ Moreover, even when such doctrines are unavailable and the Court must, as a matter of constitutional necessity, exercise “equitable discretion,” such discretion is necessarily constrained by important inferences from the constitutional structure—namely, the constitutional equality of the states.⁴¹⁴ For these reasons, the Supreme Court’s resolution of interstate disputes according to the constitutional equality of the states furthers, rather than impedes, the constitutional structure.

⁴¹¹ *Id.*

⁴¹² *Id.* at 670-71 (quoting *Wyoming v. Colorado*, 259 U.S. 419, 465, 470 (1922)); see also *New Jersey v. New York*, 283 U.S. 336, 343 (1931) (stating that “the effort is always to secure an equitable apportionment without quibbling over formulas”).

⁴¹³ *Cf. supra* notes 195-209 and accompanying text (discussing application of the law merchant under *Swift*).

⁴¹⁴ See *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); Monaghan, *supra* note 7, at 14 (“[T]he authority to create federal common law [governing interstate disputes] springs of necessity from the structure of the Constitution . . .”). The founders were well aware that the establishment of an effective means of resolving disputes between states was of paramount importance to the national peace and harmony. When the Constitution was adopted, “there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies.” *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838). The founders regarded territorial disputes as “one of the most fertile sources of hostility” among states and established the Supreme Court as an “umpire or common judge to interpose between the contending parties.” THE FEDERALIST No. 7, *supra* note 202, at 60-61. The founders’ concerns were not mere hyperbole. Even in this century, “armed conflicts” between states were only “narrowly averted.” *Oklahoma v. Texas*, 258 U.S. 574, 580 (1922) (stating that “the militia of Texas had been called to support the orders of its courts, and an effort was being made to have the militia of Oklahoma called for a like purpose”).

C. Cases of Admiralty and Maritime Jurisdiction

Perhaps the most extensive modern enclave of federal common law consists of rules governing "Cases of admiralty and maritime Jurisdiction."⁴¹⁵ Today, there is a well-established "tradition of federal common lawmaking in admiralty."⁴¹⁶ Under current doctrine, the federal courts' power to formulate and apply federal common law in such cases is said to be implicit in the *jurisdictional* grants set forth in Article III.⁴¹⁷ Except for matters governed by positive federal law, most of the cases adjudicated in the federal courts' admiralty and maritime jurisdiction are governed by federal judge-made law. Although federal admiralty courts apply state law on occasion, in the modern era such law is preempted to the extent that it "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."⁴¹⁸ That approach is difficult to square with the constitutional text and with *Erie's* holding (in the context of diversity) that mere jurisdiction to adjudicate a case under Article III does not confer upon the courts the "power to declare substantive rules of common law applicable in a State."⁴¹⁹

Nonetheless, at least some of the federal common law rules applied in admiralty and maritime cases can be reconceptualized under the proposed approach. In order to assess these rules precisely, it is useful to divide cases of admiralty and maritime

⁴¹⁵ U.S. CONST. art. III, § 2; see DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 140-41 (1970) ("The maritime law is distinguished from other such areas of the law by reason of the theory that it amounts to a federal corpus of law which is in no sense interstitial, but which is central and rather jealous of usurpation.")

⁴¹⁶ American Dredging Co. v. Miller, 114 S. Ct. 981, 989 (1994); see also Yamaha Motor Corp. v. Calhoun, 116 S. Ct. 619, 620 (1996) (characterizing "the general maritime law" as "a species of judge-made federal common law").

⁴¹⁷ See, e.g., HART & WECHSLER, *supra* note 4, at 883-84 ("Perhaps the most dramatic [instance of the assumption of law-making power by the federal courts] is the power to create federal admiralty law implied by Article III's grant of admiralty jurisdiction . . ."); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 122 (2d ed. 1990) ("It is well accepted . . . that the provisions of Article III, section 2 of the Constitution extending the federal judicial power to [admiralty and interstate cases] vest the federal judiciary with authority to develop its own substantive legal principles in cases falling within these areas."); Field, *supra* note 4, at 891 (noting that for admiralty cases and for interstate controversies, "the Court has found the directive that it create this body of federal common law in article III's grant of federal judicial power" over such cases).

⁴¹⁸ Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

⁴¹⁹ Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

jurisdiction into two historic categories—prize cases and instance cases. Although today we conceive of “the Constitution’s admiralty clause as a head of jurisdiction over private claims,”⁴²⁰ in 1789, cases of admiralty and maritime jurisdiction encompassed a much broader array of disputes. Admiralty was “divisible into two great branches, one embracing captures, and questions of prize, arising *jure belli*; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations.”⁴²¹ As Justice Johnson explained, “[i]n its ordinary jurisdiction, the admiralty takes cognizance of mere questions . . . arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects.”⁴²² Admiralty courts were

⁴²⁰ William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 154 (1993).

⁴²¹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 864 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833). In fact, according to a report prepared by then-Attorney-General Edmund Randolph at the request of the House of Representatives, “[c]ases of admiralty and maritime jurisdiction” encompassed an even broader array of disputes. These included the “condemn[ation of] all lawful prizes in time of war,” prosecutions under the “criminal sea law,” “offenses on water against the revenue laws and claims for specific satisfaction on the body of a vessel, as for mariners’ wages, &c.” See H.R. REP. 1st Cong., 3d Sess. (Dec. 31, 1790), reprinted in 1 AMERICAN STATE PAPERS class 10, at 21, 22 (W. Lowrie & W. Franklin eds., 1834) [hereinafter *Randolph’s Report*]. Only the last category corresponds to modern conceptions of private admiralty litigation. My focus in the text will be on the first and last of these categories.

Randolph’s conception of admiralty and maritime cases is consistent with the original draft of the Virginia Plan that he presented to the Constitutional Convention in 1787. The Virginia Plan proposed, in pertinent part, to extend the federal judicial power to “all piracies & felonies on the high seas, captures from an enemy; [and] cases . . . which respect the collection of the National revenue.” James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND, *supra* note 61, at 22. The Convention was initially unable to agree upon a specific delineation of federal jurisdiction and referred the matter to the Committee of Detail. See Committee of Detail, Proceedings of the Convention (June 19-July 23, 1787), in 2 FARRAND, *supra* note 61, at 132-33. The Committee “opted for a general admiralty clause and rejected the drafting strategy of breaking admiralty jurisdiction into subcategories.” Casto, *supra* note 420, at 135. Randolph’s Report indicates that the effect of the Committee’s approach was to expand federal admiralty jurisdiction beyond the three categories of cases set forth in the Virginia Plan to encompass “claims for specific satisfaction on the body of a vessel, as for mariners’ wages, &c.” as well. *Randolph’s Report*, *supra*, at 22.

⁴²² *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 282 (1808). For further discussion of the principles and practices in prize causes, written by Justice Story, see *Note-On the Practice in Prize Causes* (1816), 14 U.S. (1 Wheat.) 494; *Additional Note on the Principles and Practice in Prize Causes* (1817), 15 U.S. (2 Wheat.) app. at 1. Justice Story’s authorship of the notes is documented in G. EDWARD WHITE, THE MARSHALL COURT

denominated "prize courts" when hearing questions of the latter sort and "instance courts" when hearing claims of the former description.⁴²³

This Article considers prize and instance cases separately below. Properly understood, the rules of decision applied in prize cases do not constitute "federal judge-made law." Rather, because rules governing prize cases generally satisfy the criteria proposed in Part II, they are consistent with the constitutional structure. Recasting the rules of decision that apply to private maritime claims is more difficult. Although some of these rules may satisfy the proposed criteria, many such rules remain constitutionally problematic because they govern matters within the traditional legislative competence of the states.

1. Prize Cases

Historically, prize cases were arguably the most important cases within the federal courts' admiralty and maritime jurisdiction because they had the greatest potential to affect the public peace. Under the law of nations, when two powers were at war, each had the right to make prizes of the ships, goods, and effects of the other acquired by capture at sea.⁴²⁴ As a means of augmenting their military forces, countries encouraged privateers to capture enemy vessels by permitting them to "obtain title to the seized property, ship, and cargo, through judicial condemnation carried out by an admiralty court."⁴²⁵ Thus, prize courts played an essential role in encouraging such captures. Facilitating captures was not the only function of prize courts. Equally important was the prize courts' power "to regulate the adventurers and to remedy their abuses."⁴²⁶

AND CULTURAL CHANGE, 1815-1835, at 453-54 (1988).

⁴²³ See *Rose v. Himely*, 8 U.S. (4 Cranch) at 282-83.

⁴²⁴ See FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS* 388 app. at 471 (2d ed. New York, John S. Voorhies 1863).

⁴²⁵ *Casto*, *supra* note 420, at 124; see also *id.* ("An effective system of prize courts encouraged privateering by providing an efficient and lawful procedure for converting captures into economic gain.")

⁴²⁶ *Id.* at 125. As Justice Johnson explained in *Rose v. Himely*:

[A]s every civilized nation pretends to the character of justice and moderation, and to have an interest in preserving the peace of the world, they constitute courts with powers to inquire into the correctness of captures made under colour of their own authority, and to give redress to those who have been unmeritedly attacked or injured. These are denominated prize courts, and the primary object of their institution, is to inquire whether a

Because “a nation was responsible for the actions of its licensed adventurers, [and because] the adventurers were not part of the formal naval establishment and not subject to naval discipline and chains of command,”⁴²⁷ it was essential to the public peace and the amicable relations of nations that prize courts adhere closely to the law of nations in performing their functions.⁴²⁸ As Lord Mansfield explained:

By the law of nations, and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for the trial of prize. Every country sues in these Courts of the others, which are all governed by one and the same law, equally known to each.⁴²⁹

Under the law of nations, the general rule was that “cognizance . . . of all questions of prize, and their incidents, belongs exclusively to the courts of the country, to which the captors belong.”⁴³⁰ “If justice be there denied, the nation itself becomes responsible to the parties aggrieved,” and the nation to which the aggrieved parties belong “may vindicate their rights, either by a peaceful appeal to negotiation, or by a resort to arms.”⁴³¹

taking as prize, is sanctioned by the authority of their sovereign, or the unauthorised act of an individual.

8 U.S. (4 Cranch) at 282-83.

⁴²⁷ *Casto*, *supra* note 420, at 124.

⁴²⁸ *See* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816) (“[T]he admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested . . .”).

⁴²⁹ *Lindo v. Rodney*, *reprinted in* *LeCaux v. Eden*, 99 Eng. Rep. 375, 385 n.1, 388 (K.B. 1781).

⁴³⁰ *STORY*, *supra* note 421, § 865. The law of nations recognized an exception to exclusive jurisdiction in the captor's courts where a neutral nation's “sovereign or territorial rights [we]re violated.” *Id.*; *see also* *The Brig Alerta v. Moran*, 13 U.S. (9 Cranch) 359, 365 (1815) (noting the exception based on a country's neutral status).

⁴³¹ *STORY*, *supra* note 421, § 865. The general rule that “all questions of prize . . . belong[] exclusively to the courts of the country, to which the captors belong,” *id.*, is closely related to the act of state doctrine in that both doctrines derived from “the equality of nations” under the law of nations. *See* *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 283 (1808) (Johnson, J., dissenting) (stating that “the propriety of . . . [a seizure which a prize court has declared to be the act of its sovereign] may correctly become the subject of executive or diplomatic discussion; but the equality of nations forbids that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the jurisdiction of the courts of another”); *supra* notes 258-71 and accompanying text.

In view of the foregoing, federal jurisdiction over prize cases was necessary to enable the United States to carry out its obligations under the law of nations,⁴³² and thus was "a necessary appendage to the power of war, and negotiation with foreign nations."⁴³³ Without such jurisdiction, the United States "could neither restore property upon an illegal capture; nor in many cases afford any adequate redress for the wrong; nor punish the aggressor."⁴³⁴ Leaving such matters to state courts was problematic. Even if state courts generally performed these duties faithfully, "the peace of the whole nation might be put at hazard at any time by the misconduct of one of its members."⁴³⁵

For these reasons, Article III extended the federal judicial power to "all Cases of admiralty and maritime Jurisdiction," which encompasses "condemn[ations of] all lawful prizes in time of war."⁴³⁶ Congress implemented this grant by giving the federal courts *exclusive* jurisdiction over prize cases.⁴³⁷ This allocation deprived the state courts of any opportunity to affect foreign relations through the adjudication of prize cases.

⁴³² "The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognised by all civilized and commercial states throughout Europe and America." Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.).

⁴³³ STORY, *supra* note 421, § 866.

⁴³⁴ *Id.*

⁴³⁵ *Id.*; see also *Randolph's Report*, *supra* note 421, at 22 (stating that concurrent jurisdiction "might either involve the confederacy in war, contrary to its will, or subject it to a grievous reparation of some injury"); James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 Farrand, *supra* note 61, at 19 (recounting Edmund Randolph's assertion that one of the principal defects of the Articles of Confederation was "that particular states might by their conduct provoke war without controul"); cf. *La Amistad de Rues*, 18 U.S. (5 Wheat.) 385, 390-91 (1820) (stating that failure of "neutral prize tribunals" to exercise their jurisdiction according to the law of nations would create "irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties").

⁴³⁶ *Randolph's Report*, *supra* note 421, at 22; see also *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794) ("[E]very District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court . . ."); *Jennings v. Carson*, 13 F. Cas. 540, 542 (D. Pa. 1792) (No. 7281) (stating that prize authority "is inherent in a court of admiralty; and not lost, but torpid, like other authorities of the court, when there are no occasions for its exercise"); STORY, *supra* note 421, § 863 ("The next clause [of Article III] extends the [federal] judicial power 'to all cases of admiralty and maritime jurisdiction.'").

⁴³⁷ The Judiciary Act's "saving to suitors" clause did not disturb the district courts' "exclusive original cognizance" of prize cases. The "savings" clause did not apply because "the common law" was not "competent to give" "a common law remedy" in prize cases. See *infra* notes 516-30 and accompanying text.

The significance of the proper disposition of prize cases to the peace of the Union places Hamilton's famous remarks in *The Federalist* in context:

The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace.⁴³⁸

"If Hamilton had in mind ordinary private litigation, his conclusory statement is suspect."⁴³⁹ Frequently, such litigation does not even implicate the rights of citizens from different states, let alone affect the rights of foreigners. Thus, it is difficult to see how modern admiralty litigation could ever be thought to threaten "the public peace." If, on the other hand, Hamilton had in mind prize cases when he wrote this passage, then his assessment is quite understandable.⁴⁴⁰

Although federal courts possessed exclusive *jurisdiction* over prize cases, these courts faced an important choice-of-law question at the outset of every case—what is the source of law to govern the case? In the late eighteenth and early nineteenth centuries, the Supreme Court's answer was clear. "The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."⁴⁴¹

Because "[p]rize litigation involving privateers—the epitome of eighteenth century admiralty jurisdiction—had lapsed into desuetude

⁴³⁸ THE FEDERALIST No. 80, *supra* note 201, at 478. Even George Mason, "one of the best known 'idolizers of state authority,'" admitted in the Virginia ratifying convention that the federal courts "ought to have judicial cognizance in all cases affecting ambassadors, foreign ministers and consuls, as well as in cases of maritime jurisdiction." Casto, *supra* note 420, at 137 (quoting 3 ELLIOT'S DEBATES, *supra* note 101, at 523).

⁴³⁹ Casto, *supra* note 420, at 137.

⁴⁴⁰ *Federalist No. 80* confirms that prize cases were foremost in Hamilton's mind. In defending Article III's inclusion of "Cases of admiralty and maritime Jurisdiction," Hamilton remarked that "[t]he most important part of them are, by the present Confederation, submitted to federal jurisdiction." THE FEDERALIST No. 80, *supra* note 201, at 478. The Articles of Confederation, in turn, gave the national judiciary jurisdiction over "the trial of piracies and felonies committed on the high seas, and . . . appeals in *all cases of captures*." ARTICLES OF CONFEDERATION art. 9, § 1 (U.S. 1778) (emphasis added). The Articles of Confederation made no mention of admiralty jurisdiction over private civil claims, which were left to adjudication by state courts.

⁴⁴¹ *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815).

by the end of the nineteenth century,⁴⁴² the Supreme Court never had any occasion to consider whether *Erie* would require federal courts to apply state law in prize cases.⁴⁴³ Nonetheless, it is clear that the Supreme Court did not have rules governing prize cases in mind when it decided *Erie*.⁴⁴⁴ That is not because such rules constituted "federal judge-made law." Rather, as explained below, inferences from the constitutional structure required both federal and state courts to apply these rules in the absence of contrary direction by the political branches.

The first criterion necessary to reconceptualize federal common law is satisfied in this context because the rules applicable in prize cases governed matters beyond the legislative competence of the states. As discussed above, proper resolution of prize cases was "a necessary appendage to the power of war, and negotiation with foreign nations"⁴⁴⁵—power committed exclusively to the federal government.⁴⁴⁶ Were the states free to establish rules of decision in prize cases, and the federal courts bound to apply them, the states would possess substantial control over the conduct of foreign relations.

The rules of decision applicable in prize cases also satisfy the second criterion. In the absence of positive federal law, adherence to traditional rules drawn from the law of nations in adjudicating prize cases was necessary to preserve the exclusive authority of the political branches over foreign affairs.⁴⁴⁷ As Hamilton recognized, prize cases "so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace."⁴⁴⁸ Under these circumstances, the decision whether to depart from the law of

⁴⁴² Casto, *supra* note 420, at 151-52.

⁴⁴³ Although "[t]he United States did not use privateers after the War of 1812," *id.* at 152, a few prize cases involving captures by the regular Navy continued to be litigated during the late nineteenth and early twentieth centuries. *See id.* at 152 n.180; *see also* *The Paquete Habana*, 175 U.S. 677 (1900); *The Prize Cases*, 67 U.S. 635 (1862); *United States v. The Europa*, 80 F. Supp. 12 (S.D.N.Y. 1948); *Ling v. 1689 Tons of Coal Lying Aboard S.S. Wilhelmina*, 78 F. Supp. 57 (W.D. Wash. 1942); *Arnold W. Knauth, Prize Law Reconsidered*, 46 COLUM. L. REV. 69, 78-79 (1946) (identifying 11 prize cases arising during World Wars I and II).

⁴⁴⁴ *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.").

⁴⁴⁵ STORY, *supra* note 421, § 866, at 615.

⁴⁴⁶ *See supra* notes 237-52 and accompanying text.

⁴⁴⁷ *See Sabbatino*, 376 U.S. at 427-28; *supra* notes 268-71 and accompanying text.

⁴⁴⁸ THE FEDERALIST No. 80, *supra* note 201, at 478.

nations in prize cases is "a question[] of policy [rather] than of law"⁴⁴⁹ that must be left to the political branches under the structure of government established by the Constitution.⁴⁵⁰

The Supreme Court's decision in *The Paquete Habana*⁴⁵¹ illustrates these points. The case involved the United States's attempt while at war with Spain to condemn "two [Spanish] fishing vessels and their cargoes as prize of war."⁴⁵² The Court relied on a "rule of international law . . . that coast fishing vessels . . . are exempt from capture"⁴⁵³ "to declare and adjudge that the capture was unlawful, and without probable cause."⁴⁵⁴ The Court, however, did not adequately explain why international law provided the governing rule of decision. In a well-known portion of its opinion, the Court simply declared:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act of judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.⁴⁵⁵

Although courts and commentators have read this passage to mean that international law is a form of *federal* law,⁴⁵⁶ application of the criteria proposed in this Article suggests an alternative interpretation.

⁴⁴⁹ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812).

⁴⁵⁰ For similar reasons, even if state courts had possessed concurrent jurisdiction to adjudicate prize cases, they would have been required to apply rules derived from the law of nations (rather than state law) in order to avoid encroaching upon exclusive federal authority over foreign affairs. See *supra* notes 237-52 and accompanying text.

⁴⁵¹ 175 U.S. 677 (1900).

⁴⁵² *Id.* at 678.

⁴⁵³ *Id.* at 708.

⁴⁵⁴ *Id.* at 714. According to the Court, "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." *Id.* at 686.

⁴⁵⁵ *Id.* at 700.

⁴⁵⁶ See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295.

Whether foreign fishing vessels are subject to capture as prizes of war is surely a matter beyond the legislative competence of the states, and thus state law has no application to cases like *The Paquete Habana*. Similarly, "the structure of our government"⁴⁵⁷ requires courts to apply the rule that the law of nations supplies "in the absence of any treaty or other public act of their own government in relation to the matter."⁴⁵⁸ Whether to depart from a rule of this kind is a question for the political branches rather than the courts because the decision has obvious implications for foreign affairs. As the Court recognized in an earlier case, "[t]he rule which we apply to the [vessels] of our enemy, will be applied by him to the [vessels] of our citizens."⁴⁵⁹ In other words, departure from the law of nations in this context could "lead to retaliation upon our own" fishing vessels,⁴⁶⁰ and escalate hostilities between the warring parties. Under the constitutional scheme—which assigns exclusive power over foreign affairs to the political branches—such consequences should be brought about, if at all, by the conduct of the political branches rather than by the decisions of federal or state courts.⁴⁶¹ Accordingly, the international law rules applied in cases like *The Paquete Habana* do not constitute federal common law. Rather, federal courts apply such rules in order to implement the exclusive power of the political branches to conduct foreign relations.

⁴⁵⁷ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 123 (1814).

⁴⁵⁸ *The Paquete Habana*, 175 U.S. at 708; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964) (stating that courts must adhere to the act of state doctrine in its traditional formulation because it reflects "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs").

⁴⁵⁹ *Brown*, 12 U.S. (8 Cranch) at 128-29. The question in *Brown* was very similar to the question in *The Paquete Habana*. *Brown* considered whether the executive may confiscate "enemy property[] in our country" "[w]hen war breaks out." *Id.* at 128. The Court acknowledged "[t]hat war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found," *id.* at 122 (emphasis added), but held that until the "will [of the sovereign] shall be expressed, no power of condemnation can exist in the court." *Id.* at 123. In reaching this conclusion, the Court relied expressly on implications "from the structure of our government." *Id.* Because the declaration of war did not specifically authorize confiscation of enemy property, the Court concluded "that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war." *Id.* at 129; cf. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

⁴⁶⁰ *United States v. Ortega*, 27 F. Cas. 359, 360 (C.C.E.D. Pa. 1825) (No. 15,971) (applying law of nations to foreign ambassadors), *aff'd*, 24 U.S. (11 Wheat.) 467 (1826).

⁴⁶¹ Cf. *Brown*, 12 U.S. (8 Cranch) at 129 (stating that decisions of this kind are "proper for the consideration of the legislature, not of the executive or judiciary").

2. Private Maritime Claims

The other “great branch” of admiralty jurisdiction consisted of private maritime claims or, as Justice Johnson described them in 1808, “mere questions of *meum* and *tuum* arising between individuals.”⁴⁶² In the modern era, such questions have come to dominate the federal courts’ admiralty and maritime jurisdiction to the virtual exclusion of all others.⁴⁶³ Yet, as discussed below, the application of federal common law in these cases is frequently more difficult to justify.

The following discussion of private maritime claims consists of three parts. First, this section reviews the nineteenth-century expansion of the federal courts’ admiralty and maritime jurisdiction. The scope of admiralty and maritime jurisdiction is significant because, under *Southern Pacific Co. v. Jensen*,⁴⁶⁴ such jurisdiction generally implies federal common lawmaking power as well. Second, this section briefly examines the historical purposes behind admiralty jurisdiction over private maritime claims. It concludes that these purposes do not suffice to distinguish federal common lawmaking in private maritime cases from federal common lawmaking in diversity cases. Third, this section examines the extent to which federal common law rules governing private maritime claims can be reconceptualized to avoid constitutional difficulties under the approach proposed in Part II.

a. *The Scope of Jurisdiction over Private Maritime Claims*

In 1789, the English admiralty courts’ jurisdiction over private claims was “confined to contracts and things exclusively made and done upon the high seas, and to be executed upon the high seas.”⁴⁶⁵ Two nineteenth-century developments greatly expanded the federal courts’ jurisdiction over private maritime claims. First, the Supreme Court abandoned the narrow common law conception

⁴⁶² *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 282 (1808) (Johnson, J., dissenting).

⁴⁶³ For example, the multivolume treatise *Benedict on Admiralty* devotes only one chapter (out of 191) to “prize causes.” See 2 *BENEDICT ON ADMIRALTY* ch. 11 (Steven F. Friedell ed., 6th ed. 1994); see also David J. Bederman, *The Feigned Demise of Prize*, 9 *EMORY INT’L L. REV.* 31, 37 (1995) (book review) (“The evidence is, indeed, quite strong that prize law has passed from the scene, at least in the United States.”); Casto, *supra* note 420, at 120 (claiming that prize law is “irrelevant to twentieth century admiralty practice”).

⁴⁶⁴ 244 U.S. 205 (1917).

⁴⁶⁵ *De Lovio v. Boit*, 7 F. Cas. 418, 426 (C.C.D. Mass. 1815) (No. 3776).

of admiralty and maritime jurisdiction in favor of Justice Story's broad reading of such jurisdiction to encompass "all maritime contracts, torts, and injuries."⁴⁶⁶ Second, the Court abandoned the traditional tidewater doctrine, which limited the exercise of admiralty and maritime jurisdiction to matters arising on the high seas or waters within the ebb and flow of the tide.⁴⁶⁷

The modern expansion of admiralty jurisdiction began with Justice Story's circuit court opinion in *De Lovio v. Boit*,⁴⁶⁸ in which he declared that "whatever may in England be the binding authority of the common law decisions upon this subject, in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles."⁴⁶⁹ Discarding "the narrow and perplexed doctrines of the common law," Justice Story "pronounce[d], that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries."⁴⁷⁰ "The latter branch is necessarily bounded by locality,"⁴⁷¹ encompassing occurrences "as well in ports within the ebb and flow of the tide, as upon the high seas."⁴⁷² The former branch "extends over all contracts, (whereso-

⁴⁶⁶ *Id.* at 444; see *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 24-29 (1870) (rejecting the narrow view of admiralty jurisdiction in favor of Justice Story's approach).

⁴⁶⁷ See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851).

⁴⁶⁸ 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

⁴⁶⁹ *Id.* at 441. The English common law held that the admiralty

has no jurisdiction over torts, offences or injuries, done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are, in some measure, to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for payment of money.

Id. at 426.

⁴⁷⁰ *Id.* at 444 (quoting § 9 of the Judiciary Act of 1789). The precise question before the court was whether a policy of insurance was a maritime contract such that a dispute arising thereunder was properly within the admiralty and maritime jurisdiction of the federal courts. Needless to say, the court held that it was.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 420. In a subsequent case, Justice Story further pronounced that a tort claim falls within the admiralty and maritime jurisdiction when "the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage during the whole voyage." *Plummer v. Webb*, 19 F. Cas. 891, 893 (C.C.D. Me. 1827) (No. 11,233).

ever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea."⁴⁷³

In *Insurance Co. v. Dunham*,⁴⁷⁴ the Supreme Court embraced Justice Story's "enlarged and liberal" construction of the admiralty and maritime jurisdiction.⁴⁷⁵ Although acknowledging the restrictive common law view, the Court agreed with the "more enlarged view of the subject" espoused in *De Lovio*.⁴⁷⁶ According to the Court, Justice Story's "learned and exhaustive opinion . . . has never been answered, and will always stand as a monument of his great erudition."⁴⁷⁷

The second major development that expanded the admiralty jurisdiction was the Supreme Court's decision to abandon the tidewater doctrine. On this occasion, Justice Story favored the more restrictive approach. In *The Steamboat Thomas Jefferson*,⁴⁷⁸ Justice Story held on behalf of the Court that the federal courts could not exercise admiralty and maritime jurisdiction over suits arising on inland waterways beyond the "ebb and flow of the tide." Justice Story explained,

In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit, which it was not at liberty to transcend.⁴⁷⁹

⁴⁷³ *De Lovio*, 7 F. Cas. at 444. In 1827, Justice Johnson—a well-known opponent of Justice Story's efforts to expand the admiralty jurisdiction—stated that he thought "it high time to check this silent and stealing progress of the admiralty, in acquiring jurisdiction to which it has no pretensions." *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 614 (1827).

⁴⁷⁴ 78 U.S. (11 Wall.) 1 (1870).

⁴⁷⁵ *De Lovio*, 7 F. Cas. at 441.

⁴⁷⁶ *Dunham*, 78 U.S. (11 Wall.) at 24, 25.

⁴⁷⁷ *Id.* at 35.

⁴⁷⁸ 23 U.S. (10 Wheat.) 428 (1825).

⁴⁷⁹ *Id.* at 429. It has been suggested that Story's adherence to the tidewater doctrine was inconsistent with his broad view of admiralty jurisdiction. See Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1217 (1954) ("The [*Thomas Jefferson*] case stands virtually alone, a curious landmark of admiralty abnegation in a judicial career marked otherwise by determined support of a broadened scope for the American maritime courts."). Even Justice Story's opinion in *De Lovio*, however, acknowledged limitations tied to "the ebb and flow of the tide." See *De Lovio*, 7 F. Cas. at 419, 420, 430, 440, 443. Moreover, Justice Story's embrace of the tidewater doctrine was apparently well considered and long held. See *The Steamboat Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175, 183 (1837) (denying jurisdiction because the *Orleans* was not "substantially

The Court's decision was consistent with English precedent.⁴⁸⁰

The tidewater doctrine, however, was short lived. In *The Propeller Genesee Chief v. Fitzhugh*,⁴⁸¹ the Supreme Court overruled *The Thomas Jefferson* and held that all "public navigable water, including lakes and rivers in which there is no tide, . . . are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."⁴⁸² The Court reasoned that although the tidewater limitation was appropriate when the Constitution was adopted, the subsequent expansion of the United States coupled with "the discovery of steamboats" justified an expanded conception of the admiralty jurisdiction.⁴⁸³ The impact of the Court's decision was enormous. Commerce and navigation on the inland waterways were already of "great importance"⁴⁸⁴ and were rapidly expanding. The effect of *The Genesee Chief* was to permit federal courts to exercise admiralty and maritime jurisdiction over all maritime torts and contracts relating to all navigable waterways within the United States, even those wholly within the territory of the states.⁴⁸⁵

Together, *Dunham* and *The Genesee Chief* worked a vast expansion of the federal courts' admiralty and maritime jurisdiction. That jurisdiction now encompassed numerous cases that were previously within the exclusive jurisdiction of the state courts. For example,

engaged" in navigation on tidewaters); *Thomas v. Lane*, 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902) ("The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.").

⁴⁸⁰ As Blackstone explained:

[T]he courts maritime, or admiralty courts . . . have jurisdiction and power to try and determine all maritime causes, or such injuries, which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, and therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county.

3 BLACKSTONE, *supra* note 74, at *106 (footnote omitted).

⁴⁸¹ 53 U.S. (12 How.) 443 (1851).

⁴⁸² *Id.* at 457.

⁴⁸³ *See id.* at 455.

⁴⁸⁴ *Id.* at 456.

⁴⁸⁵ *See* ROBERTSON, *supra* note 415, at 115 ("[S]ubsequent decisions gradually established *The Genesee Chief* as the basis for the exercise of federal admiralty jurisdiction over all waters, salt or fresh, tidal or not, navigable in fact in interstate or foreign commerce.").

admiralty jurisdiction extended to all maritime torts occurring not only on the high seas and the tidewaters, but also on all navigable waters, wherever located.⁴⁸⁶ Admiralty jurisdiction also encompassed all maritime contracts regardless of where they were made, and regardless of whether they related to transactions beyond the high seas and the tidewaters.⁴⁸⁷ The scope of federal admiralty jurisdiction "was an issue of genuine importance because, under *De Lovio*, parties of nondiverse citizenship could bring into the federal admiralty forum claims that would otherwise have been confined to state forums because of lack of diversity."⁴⁸⁸

Although the federal courts might exercise questionable *jurisdiction* over a number of cases that otherwise would be left to the state courts, the Supreme Court's decisions expanding admiralty jurisdiction raised only limited federalism concerns. At the time, federal courts acknowledged that the mere existence of jurisdiction in such cases did not dictate the source of law to be applied. For example, as Justice Story explained in an early circuit case, once the admiralty's jurisdiction "rightfully attaches on the subject matter, it will exercise it conformably with the law of nations, or the *lex loci contractus*, as the case may require."⁴⁸⁹ As Justice Story remarked

⁴⁸⁶ See *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 25 (1870). In 1948, Congress further expanded the scope of admiralty and maritime jurisdiction by extending it to "include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." Extension of Admiralty Jurisdiction Act, Pub. L. No. 80-695, 62 Stat. 496 (1948) (codified at 46 U.S.C. app. § 740 (1988)). Perhaps influenced by Seventh Amendment concerns, the Supreme Court has read the statute narrowly to confer jurisdiction "only if 'the wrong' had 'a significant connection with traditional maritime activity.'" *Grubart v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1048 (1995) (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)).

⁴⁸⁷ *Dunham*, 78 U.S. at 26.

⁴⁸⁸ Fletcher, *supra* note 160, at 1552. Although the state courts retained some degree of concurrent jurisdiction over these matters under the "saving to suitors" clause, such jurisdiction was limited to suits seeking *in personam* relief under the Court's restrictive construction of the clause. See *infra* notes 516-19 and accompanying text.

⁴⁸⁹ *The Jerusalem*, 13 F. Cas. 559, 563 (C.C.D. Mass. 1814) (No. 7293). For example, although admiralty jurisdiction as interpreted in *De Lovio* encompassed "all contracts (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea," 7 F. Cas. at 444, the substantive law to be applied to such contracts remained "the law of the place where they are made, or to be executed." *The Jerusalem*, 13 F. Cas. at 562; see also *Hammond v. Essex Fire & Marine Ins. Co.*, 11 F. Cas. 387, 389 (C.C.D. Mass. 1826) (No. 6001) ("The cases cited at the bar fully support [the American] doctrine; and what is more material, it has been recognized by the supreme court of Massachusetts, to which state these parties belong.").

in an analogous context, it is difficult to "perceive the hardship of compelling a party to perform his engagements according to the construction, which the courts of his own [state] would put upon them."⁴⁹⁰

Moreover, in the early to mid-nineteenth century, the distinction between general and local law made little difference because in most cases "American courts resorted to [general maritime] law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign."⁴⁹¹ In addition, although "the law generated in the various state and federal courts was fairly uniform,"⁴⁹² state courts remained free to exercise independent judgment in ascertaining and applying the general law maritime in cases coming before them.⁴⁹³

The federalism concerns associated with expansive admiralty jurisdiction are primarily attributable to the Supreme Court's controversial decision in *Southern Pacific Co. v. Jensen*.⁴⁹⁴ There, the Court held that "in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."⁴⁹⁵ State law is preempted to the extent that it "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 rela-

⁴⁹⁰ *The Jerusalem*, 13 F. Cas. at 562. In the original quote, the bracketed word is "country."

⁴⁹¹ Fletcher, *supra* note 160, at 1517. In the early part of the nineteenth century, "the state courts considered themselves, other state courts, and the federal courts to be engaged in precisely the same enterprise: deciding cases under, and developing a system of, general common law." *Id.* at 1575; *cf.* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) (stating that on questions "of general commercial law, . . . the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial law to govern the case"); *supra* notes 184-88 and accompanying text (discussing *Swift*). Like the law merchant, the general maritime law was derived from the law of nations. "The maritime law," however, "was an even more comprehensive and eclectic general law than the law merchant." Fletcher, *supra* note 160, at 1517. For example, "in almost all civilized countries, [maritime contracts were] in general substantially governed by the same rules." *The Jerusalem*, 13 F. Cas. at 562.

⁴⁹² Fletcher, *supra* note 160, at 1569.

⁴⁹³ "[S]tate courts were under no legal compulsion to follow the decisions of the United States Supreme Court," *id.* at 1574, but deviations were nonetheless rare, *see id.* at 1515.

⁴⁹⁴ 244 U.S. 205 (1917).

⁴⁹⁵ *Id.* at 215.

tions.”⁴⁹⁶ In other words, under *Jensen*, jurisdiction over admiralty and maritime cases confers upon federal courts authority not merely to adjudicate such cases, but to impose its own conceptions of uniform maritime law as a matter of federal law.⁴⁹⁷

b. *The Historical Purpose of Jurisdiction over Private Maritime Claims*

The Supreme Court’s modern “tradition of federal common lawmaking in admiralty”⁴⁹⁸ is difficult to reconcile with *Erie*.⁴⁹⁹ Like *Swift*, *Jensen* permits *federal courts* to disregard rules of decision adopted by state courts in favor of so-called “general” law, a practice that *Erie* held to invade rights “reserved by the Constitution to the several States.”⁵⁰⁰ Indeed, *Jensen* appears to raise even greater federalism concerns than *Swift* because it also generally requires *state courts* to follow general common law rules adopted by federal courts, notwithstanding contrary state law. The general common law at issue in *Swift*, by contrast, applied only in federal courts.⁵⁰¹ As Justice Pitney observed, “the effect will be to deprive the several States of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.”⁵⁰²

The combined effect of *Jensen* and *Erie* is that “the grant of jurisdiction to the federal courts in ‘Cases of admiralty and maritime Jurisdiction’ gives the federal courts power to evolve and apply a national substantive law, [while] the grant of jurisdiction over ‘Controversies . . . between Citizens of different States’ does

⁴⁹⁶ *Id.* at 216.

⁴⁹⁷ The Court continues to adhere to *Jensen*’s determination that Article III’s jurisdictional grant authorizes federal common lawmaking in admiralty and maritime cases. See *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95-96 (1981) (“We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.”).

⁴⁹⁸ *American Dredging Co. v. Miller*, 114 S. Ct. 981, 989 (1994).

⁴⁹⁹ *Jensen* was decided 20 years before *Erie*, but the Supreme Court does not appear to have subsequently made any serious attempt to reconcile the former with the latter.

⁵⁰⁰ *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938).

⁵⁰¹ See *supra* note 107 and accompanying text.

⁵⁰² *Jensen*, 244 U.S. at 253 (Pitney, J., dissenting). Justice Pitney’s dissent characterized *Jensen* as “novel and far-reaching,” *id.* at 225, stressing that it had never previously “been held that the jurisdictional grant required state courts to conform their decisions to those of the United States courts,” *id.* at 248.

not."⁵⁰³ The constitutional basis for this dichotomy is not obvious. According to Professor Currie:

The answer lies, to the extent that there is an answer, in the historical purposes that have been attributed to the two jurisdictional grants. Although in the present day the interests appear largely indistinguishable in both classes of cases, a uniform law was apparently one reason for the establishment of the admiralty jurisdiction in 1789, while the diversity jurisdiction is generally regarded as intended only to insure unbiased protection against the provincialism of state courts in the administration of their own laws in cases involving citizens of other states.⁵⁰⁴

Professor Currie's skepticism is well-founded. Although these historical purposes have indeed been "attributed to the two jurisdictional grants," neither is entirely accurate.⁵⁰⁵

"[P]rotection against the provincialism of state courts in the administration of their own laws"⁵⁰⁶ does not appear to have been the founders' exclusive, or even primary, motivation in giving the federal courts jurisdiction over suits between citizens of different states. The founders anticipated (correctly) that many suits brought within the diversity jurisdiction would involve matters of a commercial nature.⁵⁰⁷ At the time, these matters were governed, not by

⁵⁰³ David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158, 162-63. For example, if two boats piloted by Michigan residents collide on Lake Erie, then federal courts have admiralty jurisdiction and general maritime law governs the matter to the exclusion of state law. If, however, these same vessels collide while being transported on the shore, then federal courts probably lack jurisdiction and "the law to be applied . . . is the law of the state." *Erie*, 304 U.S. at 78.

⁵⁰⁴ Currie, *supra* note 503, at 163 (footnotes omitted).

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ According to Professor Frank:

The real key to the diversity clause lies in the optimism of the founders [The members of the Convention] anticipated manufacture and trade within the United States on an unknown but vast scale. One of the principal objects of the Convention was to open a path for that expansion. . . . If the Founding Fathers could anticipate the industrial and commercial revolution, already beginning, they could anticipate some of the obstacles to the success of the concomitant business enterprise. The diversity clauses were based on that dual anticipation more largely than on experience.

John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 27 (1948). The founders appear to have correctly anticipated the type of litigation that would be brought in federal court, at least during the nation's early history. "At the beginning of the period [1790-1815], the principal economic groups involved in litigation, quantitatively at least, were the shipping industry, the holders of bills and notes, and those who dealt in land." *Id.* at 17. "Tort cases in diversity

the states' "own laws," but by the law merchant, which (like the law maritime) was thought to be neither federal nor state law.⁵⁰⁸ Thus, at the time, uniformity appears to have been considered as important in commercial cases as it was in private maritime cases.⁵⁰⁹

Similarly, although the need for "a uniform law" was certainly "one reason for the establishment of the admiralty jurisdiction in 1789,"⁵¹⁰ the founders did not consider all admiralty and maritime cases to be equal in this regard. The founders regarded prize cases and felonies committed on the high seas as "[t]he most important part" of the federal courts' admiralty and maritime jurisdiction.⁵¹¹ Neither the Virginia Plan nor its primary rival, the New Jersey Plan, originally made any provision for federal jurisdiction over private maritime claims.⁵¹² Rather, both plans would have limited jurisdiction to "all cases of captures from an enemy, . . . all cases of piracies [and] felonies on the high seas, . . . [and] the collection of the federal Revenue."⁵¹³ Private maritime claims appear to have

were almost nonexistent . . ." *Id.* at 18; *see also* 3 ELLIOT'S DEBATES, *supra* note 101, at 583 (Madison) (arguing in favor of diversity jurisdiction, in part, to counteract the prejudices of local courts that have "prevented many wealthy gentlemen from trading or residing among us").

⁵⁰⁸ *See* Thompson v. The Catharina, 23 F. Cas. 1028, 1030 n.7 (D. Pa. 1795) (No. 13,949) (noting with respect to the law of England that "[h]er law merchant, and that part of it relating to assurances particularly, as well as maritime law, . . . are founded on usages and established customs, as well [as] of her own, as of all countries possessing respectable codes or principles of maritime law"); *supra* notes 167-73 and accompanying text (discussing the role of the law merchant in early American history as a system of commercial customs to which most civilized nations adhered).

⁵⁰⁹ *See* Thurston v. Koch, 4 U.S. (4 Dall.) 348, 352 (1800) ("To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a national, uniform and generally received law-merchant. The custom or practice of one state, differing, perhaps, from that of another, must yield to general and established principles."); *supra* notes 174-78 and accompanying text (describing the political and economic benefits of adhering to a uniform law merchant).

⁵¹⁰ Currie, *supra* note 503, at 163.

⁵¹¹ THE FEDERALIST No. 80, *supra* note 201, at 478; *see also supra* note 440.

⁵¹² *See* James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 Farrand, *supra* note 61, at 22 [hereinafter Madison, Virginia Plan]; James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 Farrand, *supra* note 61, at 244 [hereinafter Madison, New Jersey Plan]. Only the Pinckney Plan, which appears to have been presented but never discussed, would have authorized Congress to create federal admiralty courts "for hearing and determining' all 'maritime Causes.'" Pinckney Plan, in 3 Farrand, *supra* note 61, at 608.

⁵¹³ Madison, New Jersey Plan, at 244. The Virginia Plan was essentially similar. It would have encompassed "all piracies & felonies on the high seas," "captures from an enemy," and "cases . . . which respect the collection of the National revenue." Madison, Virginia Plan, at 22.

been included in Article III only because the Committee of Detail "opted for a general admiralty clause and rejected the drafting strategy of breaking admiralty jurisdiction into subcategories."⁵¹⁴

The founders' broad grant of "admiralty and maritime Jurisdiction" does not establish that the historical purpose of the grant was to establish "a uniform law" to govern all cases contemplated by such jurisdiction. To the contrary, the Judiciary Act of 1789 reveals that the founders took steps to ensure the development of "a uniform law" to govern cases involving questions of prize, enforcement of criminal sea laws, and collection of federal revenue, but took no similar action to ensure uniformity in the context of private maritime claims. Specifically, as discussed below, the Act conferred exclusive jurisdiction upon the federal courts to adjudicate cases of the former description, but permitted federal and state courts to exercise concurrent jurisdiction over private maritime claims under the famous "saving to suitors" clause.⁵¹⁵

Section 9 of the Judiciary Act of 1789 gave the federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade . . . ; *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.*"⁵¹⁶ The provision appears to grant the federal courts exclusive jurisdiction over all civil causes of admiralty and maritime jurisdiction, subject only to the operation of the "saving to suitors" clause.⁵¹⁷ The difficulty, of course, has been to decipher the meaning of the "savings" clause. In *The Moses Taylor*,⁵¹⁸ the Supreme Court adopted the modern interpretation of the clause under which federal admiralty courts exercise exclusive jurisdiction over civil admiralty proceedings *in rem*, while state courts retain concurrent jurisdiction over cases brought *in personam*. This procedural dichotomy rests on a seemingly straightforward interpretation of the "savings" clause: "It is not a remedy in the common-law courts

⁵¹⁴ Casto, *supra* note 420, at 135.

⁵¹⁵ This dichotomy reflects the founders' belief that it was not essential to the national interest that private maritime claims be "appropriated to the admiralty." *Randolph's Report*, *supra* note 421, at 22.

⁵¹⁶ Ch. 20, 1 Stat. 73, 77 (emphasis added).

⁵¹⁷ In a separate portion of the Act, Congress gave the lower federal courts exclusive "cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas . . ." § 9, 1 Stat. at 76-77. The famous "saving to suitors" clause did not apply to these cases.

⁵¹⁸ 71 U.S. (1 Wall.) 411 (1866).

which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law.⁵¹⁹

Professor Casto has persuasively argued, however, that although the Court's "procedural distinction fits the language of the Act,"⁵²⁰ it does not appear "to have occurred to any member of the Founding Generation".⁵²¹

Jacob's [Law Dictionary] . . . defined Remedy as "the *Action* or means given by law, for the Recovery of a Right." Following this eighteenth century definition, concurrent admiralty jurisdiction under the Act could extend to all disputes in which the common law is competent to give a cause of action.

In other words, the *Jacob's* definition suggests that concurrent jurisdiction could be keyed to the legislative jurisdiction of the common law courts rather than those courts' coincidental use of *in personam* process.⁵²²

The treatment of *in personam* cases within the admiralty's "extraordinary or prize jurisdiction"⁵²³ strongly supports Professor Casto's interpretation.⁵²⁴ It was well established in 1789 that "[i]n cases of prize . . . the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations."⁵²⁵ Even if a suit involving a question of prize were brought *in personam*, the "courts of common law [were] bound to abstain from any decision of questions of this sort."⁵²⁶

Properly understood, the Judiciary Act maintained this traditional division. The Act gave the federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," which indisputably encompassed prize cases.⁵²⁷ The "sav-

⁵¹⁹ *Id.* at 431.

⁵²⁰ Casto, *supra* note 420, at 141.

⁵²¹ *Id.* at 143.

⁵²² *Id.* at 146 (citing G. JACOB, A NEW LAW DICTIONARY (6th ed. 1750)). According to Professor Casto, Oliver Ellsworth may have been influenced by *Jacob's Law Dictionary* in drafting the Judiciary Act because this volume "was one of the primary legal texts in his legal education." *Id.* (citing WILLIAM G. BROWN, THE LIFE OF OLIVER ELLSWORTH 22 (Da Capo Press 1970) (1905)).

⁵²³ *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 282 (1808) (Johnson, J., dissenting).

⁵²⁴ See Casto, *supra* note 420, at 143-45.

⁵²⁵ 3 BLACKSTONE, *supra* note 74, at *108.

⁵²⁶ *Story*, *supra* note 421, § 865; see also *Maisonnaire v. Keating*, 16 F. Cas. 513, 519 (C.C.D. Mass. 1815) (No. 8978) ("[I]f the decision of prize or no prize be involved, it exclusively belongs to the admiralty.")

⁵²⁷ Prize cases were regarded as "civil causes of admiralty and maritime jurisdiction" and, as such, fell within the federal courts' "exclusive original

ings" clause was inapplicable to cases within the admiralty's "extraordinary or prize jurisdiction,"⁵²⁸ not because such cases were invariably brought *in rem*,⁵²⁹ but because "the common law" simply was not "competent to give" "a common law remedy"—that is, a cause of action—in prize cases.⁵³⁰

Under this interpretation, private civil claims within the admiralty's "ordinary jurisdiction"⁵³¹ presented a very different case. Although such claims fell within the federal courts' "exclusive original cognizance of all causes of admiralty and maritime jurisdiction," they were subjected to concurrent state court jurisdiction by virtue of the "savings" clause. As Justice Story acknowledged, "by the usage and decisions of ages," the common law courts possessed "concurrent jurisdiction over all causes, except of prize, within the cognizance of the admiralty."⁵³² In other words, in all such cases, "the common law [was] competent to give" a common law remedy.⁵³³ This meant that suitors were free to file

cognizance" under the Act. *Jennings v. Carson*, 13 F. Cas. 540, 542-43 (D. Pa. 1792) (No. 7281).

⁵²⁸ *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 282 (1808) (Johnson, J., dissenting).

⁵²⁹ The question of "prize or no prize" could readily arise in an *in personam* action as well. For example, in cases of captures by belligerents, "no action for damages could be maintained at common law, even if the capture had been tortious; for it was a taking as prize. Admitting that trespass will lie, at common law, for a maritime tort on the high seas . . . , it is otherwise, if the supposed trespass be a seizure as prize." *Keating*, 16 F. Cas. at 519.

⁵³⁰ See *Casto*, *supra* note 420, at 143-46.

⁵³¹ *Rose v. Himely*, 8 U.S. (4 Cranch) at 282.

⁵³² *De Lovio v. Boit*, 7 F. Cas. 418, 426 (C.C.D. Mass. 1815) (No. 3776). As Lord Mansfield explained: "A thing being done upon the high sea, [does not] exclude the jurisdiction of the Courts of Common Law. For, seizing, stopping, or taking, a ship, upon the high sea, *not as prize*, an action will lie; but for taking, *as prize*, no action will lie. The nature of the question excludes, not the locality." *Lindo v. Rodney*, *reprinted in* *LeCaux v. Eden*, 99 Eng. Rep. 375, 385 n.1, 386 (K.B. 1781) (emphasis added).

⁵³³ *De Lovio*, 7 F. Cas. at 426. The "saving to suitors" clause appears to have been inapplicable not only to prize cases, but to revenue cases as well, because the common law did not possess jurisdiction over such cases. In England, revenue cases appear to have been brought in the court of exchequer in its capacity as a court of equity. See 3 BLACKSTONE, *supra* note 74, at *43-44. In the colonies, actions "to enforce imperial revenue laws concerning smuggling and illicit trading" were brought in the vice-admiralty courts. *Casto*, *supra* note 420, at 125. The colonists resented the lack of "a common law remedy" in such cases because it deprived them of a jury trial. *Cf.* *Frank*, *supra* note 507, at 6-7 ("Experience in the colonies proved that juries would not convict their fellow colonials in trade cases, and [eventually] the admiralty courts were reorganized to utilize their non-jury procedures."). Even after the states declared their independence, however, state admiralty courts continued "the common course of proceeding against a ship for breach of revenue laws." *Casto*, *supra* note 420, at 126-27 (internal quotations omitted).

private maritime claims in the common law courts of any state that afforded them an appropriate cause of action.⁵³⁴ Thus, the traditional distinction between prize cases and private maritime claims strongly suggests that Congress “was motivated by substantive rather than procedural distinctions when [it adopted] the Judiciary Act’s admiralty clause with its ‘saving to suitors’ clause.”⁵³⁵

Given the Act’s dichotomy, the “historical purpose” of admiralty jurisdiction does not appear to have been the establishment of “a uniform law” to govern private maritime claims. As in diversity cases, federal and state courts exercising concurrent jurisdiction over private maritime claims jointly administered the general law applicable to the case.⁵³⁶ Although each expressed respect for the other’s interpretation of such law, both considered themselves free to exercise independent judgment.⁵³⁷ Thus, there was no assurance of uniformity in either context. Under these circumstances, there is little reason to believe that uniformity played a greater role in the founders’ establishment of jurisdiction over private maritime claims than it did in the establishment of diversity jurisdiction.

In the end, there appears to be little historical basis for distinguishing *Jensen* from *Erie*. At least one member of the Supreme Court has recently recognized the apparent inconsistency between these cases. Writing separately in *American Dredging Co. v. Miller*,⁵³⁸ Justice Stevens declared that “*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation . . . without any firm grounding in constitutional text or principle.”⁵³⁹ As discussed below, Justice Stevens’s assessment has much force, especially as applied to the federal courts’ imposition of general maritime rules that govern matters within the legislative competence of the states.

⁵³⁴ Suitors were also free to file an action on the “law” side of the federal courts, provided that they could establish an independent basis for subject matter jurisdiction, such as diversity of citizenship. See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 379 (1918) (asserting that, barring jurisdictional problems, “the [claim] must be the same in every court, maritime or common law”).

⁵³⁵ *Casto*, *supra* note 420, at 145.

⁵³⁶ See *Fletcher*, *supra* note 160, at 1521 (observing that throughout the first half of the nineteenth century “there had always been, and still remained, a substantial core of uniform law that was administered by the federal and state courts as a general American common law”).

⁵³⁷ See *id.* at 1515, 1574.

⁵³⁸ 114 S. Ct. 981 (1994).

⁵³⁹ *Id.* at 991 (Stevens, J., concurring in part and concurring in the judgment).

c. *Reconceptualizing Federal Common Law Rules Governing Private Maritime Claims*

It may be possible to reconceptualize at least a portion of the federal common law rules applied to private maritime claims using the criteria set forth in Part II. It is necessary at the outset to distinguish rules that govern matters within the legislative competence of the states from those that govern matters beyond such competence. The legislative competence of the states remains largely territorial. With important exceptions, states generally possess legislative competence over matters that occur within their borders and lack authority over events that take place outside their territory.⁵⁴⁰ In the admiralty context, this means that states generally possess authority over matters that take place within their territorial waters,⁵⁴¹ and generally lack competence over events that occur on the high seas.⁵⁴²

The exceptions to the states' general legislative competence over matters that occur within their territory stem from the constitutional division of authority between the federal government and the states. Thus, in areas over which the Constitution grants the federal government exclusive power—such as the conduct of foreign

⁵⁴⁰ Cf. *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (holding that due process precludes Texas from “abrogat[ing] the rights of parties beyond its borders [in Mexico] having no relation to anything done or to be done within them”). We are not here concerned with the distinct due process considerations that govern domestic (as opposed to international) choice of law. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (discussing the “permissible constitutional limits on choice of substantive law”); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-13 (1981) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact creating state interests . . .”).

⁵⁴¹ The Supreme Court has recognized various exceptions to the territorial sovereignty of the states when the matter in question directly implicates the conduct of foreign relations. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432-34 (1968) (invalidating an Oregon probate statute requiring inquiry “into the type of governments that obtain in particular foreign nations” as “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress”); cf. *Bergman v. De Sieyes*, 170 F.2d 360, 363 (2d Cir. 1948) (extending diplomatic immunity from service of process to foreign persons in transit to their place of diplomatic service, despite the countervailing interest of allowing a state’s “citizens the opportunity to sue upon their claims in their home state”).

⁵⁴² The Supreme Court recognizes an exception to this principle that permits states to regulate the conduct of its own citizens even when such conduct occurs outside the territorial waters of the state. See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (“[W]e see no reason why the State of Florida may not . . . govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.”).

affairs—the application of state law could impair this authority. In these circumstances, state law is arguably preempted.

Before turning to consider the potential constitutional preemption of state authority, this section first reviews the areas over which the states appear to retain constitutional authority. Even with respect to bays and harbors within the ebb and flow of the tide, states retain general legislative competence. *United States v. Bevans*⁵⁴³ illustrates the point. *Bevans* arose under section 8 of the Crimes Act of 1790, which defined piracy to include murder committed “upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state.”⁵⁴⁴ *Bevans* was indicted for committing murder on board “the United States ship of war Independence” while the ship was “lying at anchor, in the main channel of Boston harbour[.]”⁵⁴⁵ The question before the Court was whether the statute encompassed this offense.

The United States argued that the Constitution’s extension of the judicial power to all cases of admiralty and maritime jurisdiction excluded Massachusetts from exercising jurisdiction over the offense. Chief Justice Marshall framed the inquiry as follows: “Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?”⁵⁴⁶ The Court’s answer anticipated *Erie*’s embrace of judicial federalism in important respects, and thus warrants extended quotation:

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions

⁵⁴³ 16 U.S. (3 Wheat.) 336 (1818).

⁵⁴⁴ Ch. 9, § 8, 1 Stat. 112, 113 (emphasis added).

⁵⁴⁵ *Bevans*, 16 U.S. (3 Wheat.) at 337-38.

⁵⁴⁶ *Id.* at 388. The Court made clear at the outset that, under the statute, “[i]t is not the offence committed, but the bay in which it is committed, which must be out of the jurisdiction of the state.” *Id.* at 387-88. The Court also assumed that the offense “committed [was] a case of admiralty and maritime jurisdiction” within the meaning of Article III. *Id.* at 387. This assumption appears to have been well founded. The murder occurred on a ship “lying at anchor in the main channel of Boston harbours in waters of a sufficient depth at all times of tide for ships of the largest class and burden, and to which there is at all times a free and unobstructed passage to the open sea or ocean.” *Id.* at 338. The admiralty’s jurisdiction over crimes was based on locality rather than subject matter. See STORY, *supra* note 421, § 871; 4 BLACKSTONE, *supra* note 74, at *265.

of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.

It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts.⁵⁴⁷

Accordingly, the Court concluded that "the bay in which this murder was committed, is not out of the jurisdiction of a state," and that *Bevans's* offense could not be punished under the Act.⁵⁴⁸

The location of events within a state's territory is a necessary but not a sufficient condition to establish state legislative competence over the events in question. Even with respect to conduct that takes place within its territory, a state may or may not possess legislative competence, depending upon the nature of the transaction at issue and its effect on matters committed to exclusive federal control. For example, as *Bevans* observed, "if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts?"⁵⁴⁹ "As the powers of the respective governments now stand," this question "must be answered in the affirmative"⁵⁵⁰ because the state's regulation of such events does not unduly interfere with the exercise of authority committed by the Con-

⁵⁴⁷ *Bevans*, 16 U.S. (3 Wheat.) at 388-89.

⁵⁴⁸ *Id.* at 389.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

stitution to the federal government—such as the foreign affairs power.⁵⁵¹

Conversely, the states arguably lack legislative competence over events that occur within their territory if regulation would interfere with the conduct of foreign relations.⁵⁵² To take a stark example posed by Professor Hill, suppose a state attempted to seize “a Russian nuclear submarine” under “a state statute provid[ing] that the property of a foreign government found within the jurisdiction, not excluding naval vessels, shall be subject to execution and sale under local process, in satisfaction of local judgments returned against foreign governments.”⁵⁵³ Professor Hill is surely correct in concluding that actions of this kind “affect our relations . . . so intimately and sensitively that they must be deemed to be within the exclusive competence of the federal government.”⁵⁵⁴

Although each case must be evaluated in light of its peculiar facts and circumstances, the constitutional structure suggests that states generally lack legislative competence to prescribe binding rules of decision in situations in which federal courts would interpret a federal statute narrowly to avoid violations of international law.⁵⁵⁵ *Benz v. Compania Naviera Hidalgo, S.A.*⁵⁵⁶ provides a real-life example. In that case, the Supreme Court construed the Labor Management Relations Act narrowly not to apply to a dispute between a foreign ship and a foreign crew that arose while the ship was in Portland harbor for repairs.⁵⁵⁷ The Court’s rationale was

⁵⁵¹ Under *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 268 (1972), and its progeny, however, the Court upholds admiralty jurisdiction (and thus federal common lawmaking authority) over all torts that have the potential to disrupt maritime commerce and navigation. See, e.g., *Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (holding that federal admiralty court has jurisdiction over tort claims arising when a fire, caused by a defective washer/dryer aboard a pleasure boat docked at a marina, burned the boat, other boats docked nearby, and the marina).

⁵⁵² See, e.g., *Japan Line v. County of Los Angeles*, 441 U.S. 434, 453 (1979) (holding that California lacks legislative competence to tax the instrumentalities of foreign commerce found within its territory because a state, “by its unilateral act, cannot be permitted to place . . . impediments before this Nation’s conduct of its foreign relations and its foreign trade”).

⁵⁵³ Hill, *supra* note 7, at 1047.

⁵⁵⁴ *Id.* at 1048; cf. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 117 (1812) (rejecting a federal admiralty court’s attempt to libel a French warship), discussed *supra* notes 283-308 and accompanying text.

⁵⁵⁵ See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

⁵⁵⁶ 353 U.S. 138 (1957).

⁵⁵⁷ See *id.* at 146-47.

based on the relative institutional competence of the judicial and the political branches in the field of foreign relations:

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.⁵⁵⁸

Generally speaking, under the constitutional structure, states have no greater warrant than federal courts to “run interference” in the “delicate field of international relations.”

For example, the constitutional structure counsels strongly against the application of Oregon law to a dispute like the one in the *Benz* case, even if the case arose in state court. There is little reason to suppose that the application of state law rather than federal law would render “the possibilities of international discord” less “evident,” or “retaliative action” less “certain.”⁵⁵⁹ To the contrary, the founders were well aware that “[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members.”⁵⁶⁰ Under these circumstances, the states appear to lack legislative competence over the transaction in question for much the same reason that the federal courts must apply foreign law in the absence of clear positive federal law to the contrary. In matters so intimately related to foreign affairs, the constitutional structure suggests that the political branches of the federal government—rather than the states or the judiciary—should make the “the important policy decision” to depart from international custom.⁵⁶¹

Thus, in cases like *Benz*, “courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality,”⁵⁶² not

⁵⁵⁸ *Id.* at 147.

⁵⁵⁹ *Id.*

⁵⁶⁰ THE FEDERALIST No. 80, *supra* note 201, at 476; *see also* *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) (“[A]ny contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.”); *cf.* *Japan Line v. County of Los Angeles*, 441 U.S. 434, 450 (1979) (“If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer.”).

⁵⁶¹ *Benz*, 353 U.S. at 147.

⁵⁶² *Lauritzen*, 345 U.S. at 581. Such law “has the force of law, not from

because such law constitutes federal common law, but because departure from such law would adversely affect foreign relations. "International or maritime law in such matters as this does not seek uniformity [Rather,] it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own."⁵⁶³ In other words, unless the political branches clearly establish a federal rule of decision to govern the case, courts should apply principles of international law and comity that either supply a rule of decision or call for the application of the local or municipal law of the country to which the foreign ship and crew belong.⁵⁶⁴

In the modern era, rules derived from traditional principles of the law maritime might be characterized as "federal judge-made law." As discussed above, however, this characterization is unnecessary and, in fact, misleading. Rules of this nature apply in both federal and state court, not because they constitute federal common law, but because they sometimes govern matters beyond the legislative competence of the states and implement the Constitution's allocation of powers over foreign relations.

In other cases, however, the Supreme Court's application of "federal common law" to resolve private maritime claims cannot be

extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." *Id.* at 581-82.

⁵⁶³ *Id.* at 582.

⁵⁶⁴ For example, in *Thompson v. The Catharina*, 23 F. Cas. 1028 (D. Pa. 1795) (No. 13,949), a "case of a foreign ship, which came before the court on a claim for wages by her seamen," the court was confronted with the question, "What laws or rules shall direct or govern the decisions of maritime courts here, in points on which we have no regulations established by our own national legislature?" *Id.* at 1028. The court answered as follows:

There are, in most nations concerned in commerce, municipal and local laws relative to contracts with mariners, and other maritime covenants and agreements; though the great leading principles, or outlines, are in all nearly the same. On this account among others, I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen, are concerned. I have in general, left them to settle their differences before their own tribunals. . . . But where the voyage of a foreign ship ended here, or was broken up, and no treaty or compact designated the mode of proceeding, I have permitted suits to be prosecuted. In such cases, I have determined according to the laws of the country to which the ship belonged, if there existed any peculiar variance or difference from those generally prevailing.

Id.

so easily reconciled with federalism and separation of powers concerns because neither of the criteria proposed in this Article is satisfied. Under the expanded scope of admiralty and maritime jurisdiction recognized in *Dunham* and *The Genessee Chief*, a substantial proportion of the cases governed by federal common law concern matters within the traditional legislative competence of the states. Whatever the precise scope of such competence, it seems safe to say that the states generally possess authority over transactions that involve United States citizens and that take place within their territory.⁵⁶⁵ Thus, *Jensen's* command that federal and state courts apply general maritime law to such transactions appears to contradict the principles of judicial federalism established in *Erie*.⁵⁶⁶ Congress undoubtedly has authority to establish rules of decision to govern most, if not all, maritime transactions relating to navigable waters within the United States.⁵⁶⁷ Until it does so, however, the judiciary's imposition of "general maritime law" under *Jensen* arguably intrudes upon the constitutional authority of Congress and the states no less than the federal courts' application of "general commercial law" under *Swift*. To paraphrase Justice Stevens, *Jensen* appears to be just as untrustworthy a guide in an admiralty case today as *Swift v. Tyson* would be in a diversity case.⁵⁶⁸

⁵⁶⁵ It is not obvious why the fact that state law governing such transactions affects "maritime commerce" should have any greater constitutional significance in cases of admiralty and maritime jurisdiction than does the fact that state products liability law affects "interstate commerce" in cases brought within the federal courts' diversity jurisdiction. In either case, the states appear to possess legislative competence unless preempted by positive federal law, or perhaps, the negative implication of the dormant commerce clause. *Cf. supra* note 53 (discussing the dormant Commerce Clause).

⁵⁶⁶ *See supra* notes 54-69 and accompanying text. Perhaps for this reason, the Supreme Court has resisted requests to establish "a solitary federal scheme" to govern private maritime claims. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 621 (1996) (upholding "the application of state statutes to deaths within territorial waters").

⁵⁶⁷ *See Perez v. United States*, 402 U.S. 146, 151-52 (1971) (upholding a federal statute criminalizing loan-sharking because even if such activity "be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942))); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (stating that "our investigation is at an end" "where we find that the [congressional] legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce"). *But see United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority because "possession of a gun in a local school zone is in no sense an economic activity that might . . . substantially affect any sort of interstate commerce").

⁵⁶⁸ *See American Dredging Co. v. Miller*, 114 S. Ct. 981, 990 (1994) (Stevens, J.,

D. *Cases Affecting the Rights and Obligations of the United States*

This section offers some tentative thoughts concerning the final enclave of “federal common law” identified by the Supreme Court—rules governing cases that involve “the rights and obligations of the United States.”⁵⁶⁹ In particular, this section briefly examines several of the Court’s leading decisions in light of the criteria proposed. Although, application of the proposed approach does not resolve all of the constitutional difficulties associated with these cases, it provides a useful analytical framework for assessing these decisions. As discussed below, the federal courts’ displacement of state law generally does not raise significant federalism concerns because the states arguably lack legislative competence to prescribe binding rules of decision in this context. The federal courts’ adoption of federal common law rules, however, does raise separation of powers concerns to the extent that rules of this kind are difficult to derive from the Constitution, even using “the method of inference from the structures and relationships created by the constitution.”⁵⁷⁰

1. Adoption of Federal Common Law Rules Favoring the United States

The first set of cases involves attempts by the United States, as plaintiff, to use federal common law as a sword—that is, to impose liability on private parties even though neither state law nor positive federal law authorizes such liability. Prominent examples include *Clearfield Trust Co. v. United States*,⁵⁷¹ and, most recently, *O’Melveny & Myers v. FDIC*.⁵⁷² The federal common law rules sought by the

concurring in part and concurring in the judgment) (“In my view, *Jenson* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* would be in a case under the Due Process Clause.” (citation omitted)).

⁵⁶⁹ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). This field is intrinsically complex because each case requires a careful assessment of competing federal and state interests. The purpose of this section is not to provide a comprehensive analysis of the problems inherent in the field, but merely to demonstrate that the approach proposed in this article may provide a useful starting point for future analysis.

⁵⁷⁰ BLACK, *supra* note 19, at 7.

⁵⁷¹ 318 U.S. 363, 366 (1943) (adopting a federal common law rule to govern the “rights and duties of the United States on commercial paper which it issues”).

⁵⁷² 114 S. Ct. 2048, 2052, 2056 (1994) (rejecting the FDIC’s request for “judicial creation of a federal rule of decision” to determine whether the knowledge of

United States in these cases do not satisfy the proposed criteria. Although it is unclear whether the states possess legislative competence over the matters at issue, the "federal common law" rules advocated by the United States do not appear to have been necessary to implement any particular aspect of the constitutional scheme. Thus, at a minimum, adoption of federal common law in cases like these would raise separation of powers concerns.

a. *Application of the First Criterion*

Whether these cases satisfy the first criterion is unclear. In *Clearfield Trust*, for example, the United States sought reimbursement from Clearfield Trust (on the basis of Clearfield's express guaranty of prior endorsements) for the amount of a check that the government had issued and paid, but that had been fraudulently cashed.⁵⁷³ Clearfield defended on the ground that the United States unreasonably delayed in giving it notice of the forgery and that the government was therefore barred from recovery under Pennsylvania law.⁵⁷⁴ The Supreme Court held that the "rule of *Erie R. Co. v. Tompkins* does not apply to this action,"⁵⁷⁵ and that "federal rather than local law" governs both "[t]he rights and duties of the United States on commercial paper which it issues."⁵⁷⁶

The Court found that state law was inapplicable to the transactions in question, reasoning essentially that federal law occupied the field:

When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.⁵⁷⁷

corporate officers acting against the corporation's interest "will be imputed to the FDIC when it sues as receiver of the corporation"). Although the *O'Melveny* Court initially observed that "the FDIC is not the United States," *id.* at 2053, the Court chose not to rest its decision on this ground and proceeded to evaluate the FDIC's arguments in favor of a federal common law rule.

⁵⁷³ See *Clearfield Trust Co.*, 318 U.S. at 364-65.

⁵⁷⁴ See *id.* at 366.

⁵⁷⁵ *Id.* (citation omitted).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* (citations omitted). The Court reached a similar conclusion regarding the

If the Court is correct that “the Constitution and statutes of the United States” preempt state authority in this context,⁵⁷⁸ then this finding satisfies the first criterion and alleviates judicial federalism concerns.⁵⁷⁹

More recently, however, in *O’Melveny & Myers v. FDIC*,⁵⁸⁰ the Supreme Court appeared to employ a stricter approach to “federal preemption” of state authority. On this occasion, the Court made no suggestion that federal law occupied the field. Rather, the Court asserted that displacement of state law is “limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’”⁵⁸¹ The Court found no such

absence of state legislative competence in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947). In this case, the United States sued Standard Oil after a soldier was hit by a truck owned and operated by Standard Oil. The United States sought to establish liability under a novel federal common law cause of action for negligent interference with the government-soldier relationship and to recover the costs of the soldier’s hospitalization and wages during his disability. Although the Court ultimately refused to recognize a federal common law cause of action for separation of powers reasons, the Court agreed with the United States that “the creation or negation of such a liability is not a matter to be determined by state law,” *id.* at 305, because “the Federal Government has the exclusive power to establish and define the [government-soldier] relationship by virtue of its military and other powers, . . . [and] has power in execution of the same functions to protect the relation once formed from harms inflicted by others,” *id.* at 306 (footnote omitted).

⁵⁷⁸ Although the validity of the Court’s determination turns largely upon questions of constitutional and statutory construction beyond the scope of this Article, *see supra* note 7, “[t]he rights and duties of the United States on commercial paper which it issues,” *Clearfield Trust*, 318 U.S. at 366, arguably preempt state law as a matter of intergovernmental immunity. The problem of defining the rights and duties of the United States under these circumstances “is not dissimilar to that of determining the amenability of a federal instrumentality to state taxation. The broad basis on which the latter issue was dealt with in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425-36 (1819), lends support to the conception of a constitutional preemption in the entire area under discussion.” Hill, *supra* note 7, at 1040 n.103 (discussing the analogous “problem of defining the defenses of a federal official sued for defamation”); *cf.* *Johnson v. Maryland*, 254 U.S. 51, 55 (1920) (relying on *McCulloch* to reverse the conviction of a postal employee for driving a truck without a state license). Of course, the precise scope of displacement of state law is not always clear, and the Court appears to have adopted a much stricter approach to federal preemption in subsequent cases. *See infra* notes 580-81 and accompanying text.

⁵⁷⁹ *Cf.* THE FEDERALIST No. 32, *supra* note 249, at 198 (stating that the Constitution confers exclusive federal power and alienates state sovereignty “where it grant[s] an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*”); THE FEDERALIST No. 82, *supra* note 1, at 492 (observing that “where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible,” such authority is “exclusively delegated to the federal head”).

⁵⁸⁰ 114 S. Ct. 2048 (1994), discussed *infra* notes 594-602 and accompanying text.

⁵⁸¹ *Id.* at 2055 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68

conflict to exist in this case because there was "not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity."⁵⁸² Accordingly, the Court concluded that federal courts should apply state law.

Significantly, the Supreme Court left open the question "whether the basis for [application of state law] is California's own sovereign power or federal adoption of California's disposition."⁵⁸³ Although the Court regarded the question to be "of only theoretical interest," the distinction is crucial under the first criterion. If state law applies of its own force, then the principles of judicial federalism recognized in *Erie* are relevant to cases like this. If not, then displacement of state law raises few, if any, federalism concerns.⁵⁸⁴ Resolution of this complex preempt-

(1966)).

⁵⁸² *Id.* The Court stressed that "[t]he rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred." *Id.*; cf. *infra* notes 611-21 and accompanying text (discussing potential preemption of state law at issue in *Boyle v. United Technologies, Inc.*, 487 U.S. 500 (1988)).

⁵⁸³ *O'Melveny*, 114 S. Ct. at 2053-54.

⁵⁸⁴ *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), provides an apparent example of constitutional preemption of state authority. In that case, the United States had acquired title to two parcels of land in Louisiana, one by purchase in 1937 and the other by judgment of condemnation in 1939. *See id.* at 582. The documents granting title to the United States reserved various mineral rights to Little Lake Misere for an initial period of 10 years and then for so long as the company continued to conduct mining activities at the site. *See id.* at 582-83. The parties stipulated that the company conducted no mining activities after the initial period expired. "Thus, under the terms of the instruments, fee title in the United States ripened as of 1947 and 1949, respectively . . ." *Id.* at 583. Nonetheless, the company continued to claim the mineral rights associated with the property, *see id.* at 584, and the United States brought suit in federal court to quiet title. *See id.* at 582 & n.1. The company defended on the basis of a 1940 Louisiana statute that purported to render "imprescriptible" certain mineral rights reserved "[w]hen land is acquired by . . . the United States." *Id.* at 584 (quoting the Louisiana Act 315 of 1940).

Although the Supreme Court unanimously agreed that the Louisiana statute "has no application to the mineral reservations agreed to by the United States," *id.* at 604, the Court split as to the precise rationale. The majority opinion considered the possibility of "formulating an independent federal 'common law' rule." *Id.* Justice Rehnquist, however, thought that "the central question presented by this case is whether Louisiana has the constitutional power to make Act 315 applicable to this transaction, and not whether a judicially created rule of decision, labeled federal common law, should displace state law." *Id.* at 606-07 (Rehnquist, J., concurring in the judgment). Justice Rehnquist concluded that Louisiana lacks such power because "[t]he doctrine of intergovernmental immunity . . . requires at least that the United States be immune from discriminatory treatment by a State which in some manner

tion question, however, is beyond the scope of this Article, and, in any event, is unnecessary because the application of federal common law in these cases does not appear to satisfy the second criterion.

b. *Application of the Second Criterion*

The question under the second criterion is whether application of a “federal common law” rule is necessary to implement some feature of the constitutional structure. The answer in this context appears to be no, because the rules advocated by the United States serve only to further a particular policy choice rather than any fixed aspect of the constitutional scheme. *Clearfield Trust* is again illustrative. After concluding that “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law,”⁵⁸⁵ the Court stated that 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.”⁵⁸⁶ Application of such federal judge-made law in this context raises substantial separation of powers concerns.⁵⁸⁷ Certainly, the precise rule fashioned by the Court in this case—that the United States’s failure to give prompt notice is a valid defense only if the defendant can show damage from the delay—is difficult to derive from the constitutional structure.

interferes with the execution of federal laws.” *Id.* at 608.

⁵⁸⁵ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

⁵⁸⁶ *Id.* at 367. In performing this function, the Court looked to the general law merchant “developed for about a century under the regime of *Swift v. Tyson* . . . as a convenient source of reference for fashioning federal rules applicable to these federal questions,” *id.*, and adopted the rule that failure to give prompt notice is a defense only if the defendant can establish that it was damaged by the delay, *see id.* at 369.

⁵⁸⁷ *See supra* notes 108-18 and accompanying text. Alternatively, *Clearfield Trust* might be thought to involve the application of a state law cause of action, combined with the preemption of a state law defense. The difficulty with this characterization, however, is that it assumes that the cause of action and the defense are severable under state law. *See O’Melveny & Myers*, 114 S. Ct. at 2056 (Stevens, J., concurring) (“Because state law provides the basis for respondent’s claim, that law also governs both the elements of the cause of action and its defenses.”). Because state courts must give effect to both claims and defenses, application of the former without the latter would appear to be inconsistent with the intent of the relevant sovereign. *Cf. Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987) (“The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress.”). If the state cause of action was not severable from the defense, then the resulting cause of action was necessarily federal in nature.

Rather, whether the rights and duties of the United States with respect to its commercial paper are "subject to the vagaries of the laws of the several states"⁵⁸⁸ or governed by "a uniform rule"⁵⁸⁹ is essentially a question of policy. It may be that application of state law "would subject the rights and duties of the United States to exceptional uncertainty,"⁵⁹⁰ but the desirability of a uniform rule is hardly "plain."⁵⁹¹ Firms may be reluctant to accept commercial paper issued by the United States if they know that the parties' rights and duties are subject to revision after the fact by the federal courts "according to their own standards."⁵⁹² Whatever the merits of the competing policy considerations, the constitutional separation of powers at least suggests that judgments of this kind should be left to Congress rather than the courts.⁵⁹³

The Supreme Court was much more sensitive to separation of powers concerns in *O'Melveny & Myers v. FDIC*.⁵⁹⁴ There, the Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver of a federally insured savings and loan (S&L), brought suit

⁵⁸⁸ *Clearfield Trust*, 318 U.S. at 367.

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*; see also Monaghan, *supra* note 7, at 13 n.70 ("Why . . . is it necessary for the negotiable paper of the United States to be governed by a uniform law . . . when General Motors and IBM are remitted to the laws of the several states?").

⁵⁹² *Clearfield Trust*, 318 U.S. at 367; cf. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 61 (1977) (Brennan, J., dissenting) (suggesting that vigorous application of the Contracts Clause is unnecessary because the states' need for "credibility in the credit market" will prevent them from blithely repudiating their financial obligations); *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926) ("The United States does business on business terms.").

⁵⁹³ Cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 313 (1947) (declining the opportunity to create a federal common law cause of action permitting the United States to recover for negligent interference with the government-soldier relationship). The *Standard Oil* Court declined "the tendered opportunity" to establish a federal common law rule in light of the constitutional separation of powers. *Id.* at 314. The Court considered the issue to rest upon "a question of federal fiscal policy," whose "conversion into law is a proper subject for congressional action, not for any creative power of ours." *Id.*; see also *id.* ("Congress, not this Court or the other federal courts, is the custodian of the national purse.").

This is not to say that state law necessarily applies of its own force in cases like *Clearfield Trust*. As discussed, state power to govern the transactions in question may be ousted by constitutional preemption. Nonetheless, federal courts frequently apply state law in the "absence of an applicable Act of Congress," *Clearfield Trust*, 318 U.S. at 367, because they are uncomfortable making the policy judgments required to fashion federal rules of decision. Cf. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) (stating that when Congress fails to put "a limit upon the time for enforcing a right which it created," federal courts generally borrow state statutes of limitation).

⁵⁹⁴ 114 S. Ct. 2048 (1994).

in federal court against O'Melveny & Myers, a law firm that had represented the S&L in connection with two real estate transactions. The FDIC's complaint alleged professional negligence and breach of fiduciary duty, "causes of action created by California law."⁵⁹⁵ The firm defended, inter alia, on the ground "that knowledge of the conduct of [the S&L's] controlling officers must be imputed to the S&L, and hence to [the FDIC], which, as receiver, stood in the shoes of the S&L."⁵⁹⁶ The principal question before the Supreme Court was whether federal common law or state law determines whether the knowledge of corporate officers acting against the corporation's interest "will be imputed to the FDIC when it sues as receiver of the corporation."⁵⁹⁷

The Supreme Court unanimously rejected "judicial creation of a federal rule of decision."⁵⁹⁸ The Court's analysis proceeded in two steps that roughly correspond to the criteria proposed in this Article. First, as previously discussed, the Court found insufficient evidence of "federal preemption" to preclude the application of state law in the context of this case.⁵⁹⁹ Second, the Court held that the absence of "a genuinely identifiable (as opposed to judicially constructed) federal policy"⁶⁰⁰ precluded the adoption of a "federal common law" rule. The Court's refusal to engage in judicial lawmaking rested on the constitutional separation of powers:

What sort of tort liability to impose on lawyers and accountants in general, and on lawyers and accountants who provide services to federally insured financial institutions in particular, "involves a host of considerations that must be weighed and appraised"—including, for example, the creation of incentives for careful work, provision of fair treatment to third parties, assurance of adequate recovery by the federal deposit insurance fund, and enablement of reasonably priced services. Within the federal system, at least, we have decided that that function of weighing and appraising "is more appropriately for those who write the laws, rather than for those who interpret them."⁶⁰¹

⁵⁹⁵ *Id.* at 2052.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.* at 2056.

⁵⁹⁹ *See id.* at 2053; *supra* notes 580-82 and accompanying text.

⁶⁰⁰ *O'Melveny & Myers*, 114 S. Ct. at 2055.

⁶⁰¹ *Id.* at 2055-56 (citations omitted) (quoting *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 98 n.41 (1981) (quoting *United States v. Gilman*, 347 U.S. 507, 512-13 (1954))); *cf. supra* notes 108-20 and accompanying text (discussing

Accordingly, the constitutional structure not only fails to require, but also affirmatively forecloses, adoption of a "federal common law" cause of action in cases of this kind.

The Supreme Court's unanimous decision in *O'Melveny & Myers* may signal heightened sensitivity to the constitutional concerns raised by federal common law. The Court characterized "cases in which the creation of a federal rule of decision is warranted" as "extraordinary."⁶⁰² Given its decision in *O'Melveny & Myers*, the Court seems prepared to impose a "federal common law" rule only when state power over the matter in question is clearly lacking *and* when adoption of a "federal common law" rule does not require federal courts to engage in the "weighing and appraising" of competing policy considerations more appropriately left to the legislative and executive branches.

2. Preemption of State Law Rules Disfavoring the United States

This section addresses attempts by the United States—or, more precisely, its surrogates—to use "federal common law" rules as a shield to prevent the application of state law rules that adversely affect the interests of the United States. As discussed below, these rules may be easier to reconceptualize under the proposed approach than those discussed in the previous section. To the extent that the rules under consideration simply involve preemption of state law rather than affirmative judicial lawmaking, such rules are easier to reconcile with the constitutional structure.

*Boyle v. United Technologies Corp.*⁶⁰³ provides an example. In that case, a marine was killed when his helicopter crashed into the ocean and he was unable to escape.⁶⁰⁴ The marine's father filed a state law wrongful death action against the manufacturer of the helicopter, alleging, inter alia, that the manufacturer had defectively

the disparity between the lawmaking powers of federal and state courts). Justice Stevens's concurrence in *O'Melveny & Myers*, joined by Justices Blackmun, O'Connor, and Souter, placed even greater emphasis on the "important difference between federal courts and state courts." *Id.* at 2056 (Stevens, J., concurring). Justice Stevens stressed that federal courts "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* (quoting *Northwest Airlines*, 451 U.S. at 95).

⁶⁰² *O'Melveny & Myers*, 144 S. Ct. at 2056.

⁶⁰³ 487 U.S. 500 (1988).

⁶⁰⁴ *See id.* at 502.

designed the helicopter because "the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure)."⁶⁰⁵ The jury returned a verdict against the manufacturer, but the court of appeals held that the manufacturer could not be held liable for the alleged design defect because it satisfied the "military contractor defense," a federal defense recognized by the court of appeals the same day in another case.⁶⁰⁶ The Supreme Court described the defense as follows:

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.⁶⁰⁷

The question before the Court in *Boyle* was the validity of this defense.

A closely divided Supreme Court adopted the Fourth Circuit's formulation of the "military contractor defense" in its entirety as a matter of "federal common law."⁶⁰⁸ The majority reasoned that "the liability of independent contractors performing work for the Federal Government . . . is an area of uniquely federal interest,"⁶⁰⁹ and that such areas "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.'"⁶¹⁰ As discussed below, the federal contractor defense appears to satisfy the criteria proposed in this Article and thus does not in fact constitute "federal judge-made law."

The requirements of the federal contractor defense recognized in *Boyle* arguably serve to define the scope of federal preemption of state tort law as applied to federal military contractors acting within the scope of their contractual duties. These requirements arguably satisfy the first criterion because the design of military equipment appears to be a matter committed to exclusive federal control, and

⁶⁰⁵ *Id.* at 503.

⁶⁰⁶ See *Tozer v. LTV Corp.*, 792 F.2d 403, 414-15 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

⁶⁰⁷ *Boyle*, 487 U.S. at 512.

⁶⁰⁸ See *id.* at 514 (5-4 decision).

⁶⁰⁹ *Id.* at 505 n.1.

⁶¹⁰ *Id.* at 504.

thus beyond the legislative competence of the states. The Constitution grants Congress plenary power to establish and equip the army and navy,⁶¹¹ while generally prohibiting the states from “keep[ing] Troops, or Ships of War . . . , or engag[ing] in War.”⁶¹² As the Court noted in *Boyle*, “the selection of the appropriate design for military equipment to be used by our Armed Forces”⁶¹³ rests upon delicate policy considerations. “It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.”⁶¹⁴ Given the constitutional allocation of power with respect to national defense, the task of balancing these considerations should be performed by federal, rather than state, officials.⁶¹⁵

That *Boyle* involved a suit against a military contractor rather than one against the United States or its employees does not affect the constitutional preemption of state authority in this context. In exercising its power to equip the armed forces, the United States may proceed either by directing federal employees to design and manufacture military equipment or by contracting with private firms to do so. When the United States chooses the former course, it is well established that the constitutional structure immunizes federal

⁶¹¹ The Constitution gives Congress power “[t]o raise and support Armies,” U.S. CONST. art. I, § 8, cl. 12, and “[t]o provide and maintain a Navy,” *id.* cl. 13, and makes the President “Commander in Chief of the Army and Navy of the United States,” *id.* art. II, § 2, cl. 1.

⁶¹² *Id.* art. I, § 10, cl. 3. The Constitution provides that “No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” *Id.* It is worth noting in this context that the Constitution recognizes a distinction between the army and navy, on the one hand, and the militia, on the other. Whereas Congress appears to have plenary authority over the army and navy, Congress’s power over the militia is qualified. The Constitution gives Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress” *Id.* § 8, cl. 16. The Constitution reserves no similar authority to the states over the army and navy.

⁶¹³ *Boyle*, 487 U.S. at 511.

⁶¹⁴ *Id.*

⁶¹⁵ *See id.* (asserting that “the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law”); *cf. id.* at 512 (stating that state law “must be displaced” because “state law which holds Government contractors liable for design defects in military equipment . . . present[s] a ‘significant conflict’ with federal policy”).

officials acting within the scope of their authority from state tort liability.⁶¹⁶ The traditional justification for such immunity is that it is necessary to protect federal officials from unwarranted state interference while they are carrying out legitimate federal functions.⁶¹⁷

When the United States pursues the alternative course of contracting out the manufacture of military equipment according to federal specifications, the same concern for state interference with federal functions arguably implies an analogous immunity for federal contractors.⁶¹⁸ In *Boyle*, for example, “the state-imposed duty of care that is the asserted basis of the contractor’s liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) [was] precisely contrary to the duty imposed by [the specifications contained in] the Government contract.”⁶¹⁹ The imposition of such conflicting duties under state law would necessarily impede the accomplish-

⁶¹⁶ As Chief Justice Marshall explained in an early case examining the scope of immunity enjoyed by federal officials:

It is no unusual thing for an act of congress to imply, without expressing, . . . [an] exemption from State control It has never been doubted that all who are employed in [institutions which are public in their nature] are protected while in the line of duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 865-866 (1824). Such implied immunity for federal officials is distinct from the sovereign immunity retained by the United States under the “discretionary function” exception to the Federal Tort Claims Act. 28 U.S.C. § 2680(a) (1994); see *Boyle*, 487 U.S. at 511-12 (discussing the “discretionary function” exception). Because such immunity is arguably implied by the constitutional structure, it does not appear to constitute “federal judge-made law.” But see Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 310 (1992) (stating that the “use of federal common law has enabled courts to find broad immunities from suits—especially suits for damages—although no enacted language suggests any such immunities”).

⁶¹⁷ See, e.g., *Butz v. Economou*, 438 U.S. 478, 489 (1978) (“The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law.”).

⁶¹⁸ Consider Chief Justice Marshall’s early observations on this point in *Osborn*:

Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.

22 U.S. (9 Wheat.) at 867.

⁶¹⁹ 487 U.S. at 509.

ment of legitimate federal functions, whether carried out by federal officials or by independent contractors.⁶²⁰ In both cases, the constitutional structure suggests that the states lack authority to interfere with the means chosen by the United States to accomplish legitimate federal ends, either directly (through regulatory imperatives) or indirectly (through the imposition of tort liability on the manufacturer).⁶²¹

The requirements of the military contractor defense appear merely to define and implement the constitutional preemption of state authority in this context. Historically, "a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law."⁶²² A limitation of this kind is necessary to ensure that federal immunity is no broader than necessary to accomplish legitimate federal objectives. The first two requirements of the military contractor defense adopted in *Boyle* arguably perform a similar function.

The first requirement—that "the United States [have] approved reasonably precise specifications"⁶²³—ensures that the contractor's action is, in fact, necessary to further the United States's exercise of exclusive federal authority. State regulation of military equipment sold "off the rack" does not pose as great a threat to federal functions.⁶²⁴ Although such regulation may incidentally affect the cost, or perhaps even the design, of the equipment in question, the

⁶²⁰ The suggestion that the imposition of state tort liability would merely raise the price that contractors must charge the government does not adequately distinguish contractors from employees. The imposition of state tort liability on federal officials might similarly raise the cost of their services to the government, but the constitutional structure nonetheless implies immunity in their favor. *Cf. id.* at 507 ("The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.").

⁶²¹ *Cf. International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 209 (1991) (suggesting that Title VII may preempt state tort liability that "punish[es] employers for complying with Title VII's clear command" (emphasis omitted)); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959) (stating that a federal statute prohibiting broadcasters from censoring speeches by political candidates precludes states from imposing liability on broadcasters for libel).

⁶²² *Butz v. Economou*, 438 U.S. 478, 490 (1978); *see also id.* at 489-90 ("A federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts.").

⁶²³ *Boyle*, 487 U.S. at 512.

⁶²⁴ *See id.* at 509 ("If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches that open outward, it is impossible to say that the Government has a significant interest in that particular feature.").

constitutional scheme appears to leave the states substantially free to undertake regulation of this kind.⁶²⁵ The second requirement—that “the equipment [have] conformed to [reasonably precise] specifications [approved by the United States]”⁶²⁶—is analogous to the limitation inherent in the immunity for federal officials, and ensures that the contractor acted within the scope of its engagement. Broader immunity is unnecessary to further, and indeed might frustrate, the federal objectives reflected in the specifications.

Although a closer case, the third requirement—that the supplier have “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”⁶²⁷—also appears necessary to implement the constitutional preemption of state authority in this sphere. When the first two requirements of the military contractor defense have been met and a contractor has disclosed all relevant dangers, the imposition of state tort liability on federal contractors for performing their contracts would interfere with the accomplishment of federal functions. Indeed, the imposition of liability on federal contractors under these circumstances appears to threaten federal functions to the same extent as imposition of liability on federal officials who act in good faith.⁶²⁸ In both cases, implications from the constitutional structure appear to preclude the application of state law.

On the other hand, when a supplier fails to disclose relevant dangers to the United States, it is far less clear that the application of state tort law to the supplier would significantly interfere with the performance of federal functions.⁶²⁹ In general, the Supreme

⁶²⁵ As Justice Holmes emphasized in reversing the conviction of a postal employee for driving a truck without a state license, “an employee of the United States does not secure a general immunity from state law while acting in the course of his employment.” *Johnson v. Maryland*, 254 U.S. 51, 56 (1920). To the contrary, it “very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets.” *Id.*

⁶²⁶ *Boyle*, 487 U.S. at 512.

⁶²⁷ *Id.*

⁶²⁸ See *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98-99 (1845) (holding that the Postmaster General would not be liable in damages for mistakenly exercising the discretion of his office if he “acted from a sense of public duty and without malice”); cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that qualified or “good faith” immunity generally shields “government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

⁶²⁹ Similarly, the imposition of liability for civil damages on federal officials whose

Court's "cases have followed a 'functional' approach to immunity law," extending protection "no further than its justification would warrant."⁶³⁰ In the case of contractors who fail to disclose relevant dangers, the application of state law does not appear to threaten federal interests. To the contrary, the imposition of liability in such cases would encourage full disclosure of the dangers associated with the military equipment under consideration, and thus could actually facilitate rather than impede the exercise of federal power. Full knowledge of the dangers inherent in the equipment would enable federal officials to make a more accurate assessment of the costs and benefits associated with various design alternatives, and thus to exercise federal power more effectively.

Viewed from this perspective, the military contractor defense appears to satisfy the proposed criteria. The first criterion is satisfied because the various elements of the defense themselves supply the means of determining when a military contractor's actions fall within the legislative competence of the states. To be sure, a federal court's failure to apply state law when the requirements of the defense are not met would raise judicial federalism concerns. On the other hand, when these requirements are satisfied, the states simply lack constitutional authority to regulate the contractor's actions. Thus, by hypothesis, the federal courts' recognition of immunity based on the military contractor defense cannot be said to invade the autonomy and independence of the states.

Similarly, the defense appears to satisfy the second criterion. Restricting federal immunity to contractors who satisfy the various requirements of the defense does not constitute improper judicial lawmaking. Rather, these requirements appear necessary to implement an essential feature of the constitutional scheme—namely, the division of authority between the federal government and the states over military procurement matters. As discussed above, federal courts do not apply the federal contractor defense in order to implement their vision of sound federal policy. Rather, they employ the defense to protect federal functions from unwarranted state interference. Thus, the federal contractor defense is not, in fact, "federal judge-made law," but serves merely to define

actions are objectively unreasonable does not entail "excessive disruption of government." *Harlow*, 457 U.S. at 818.

⁶³⁰ *Id.* at 810-11.

and implement the constitutional preemption of state authority in this context.

From this perspective, there is little substance to Justice Brennan's charge that the Supreme Court "unabashedly stepped into the breach to legislate a rule" of decision in *Boyle*.⁶³¹ It is true, as the dissent stressed, that "Congress has not decided to supersede state law,"⁶³² despite "a sustained campaign by Government contractors" in favor of such legislation.⁶³³ But this fact does not preclude the Court from recognizing and implementing the constitutional preemption of state authority in this context. For example, had Congress unsuccessfully attempted to adopt the act of state doctrine as a matter of positive federal law prior to the Supreme Court's decision in *Sabbatino*, few would argue that the Court would have been required to apply state law to the controversy.⁶³⁴ To the contrary, the constitutional structure would have rendered application of state law improper.⁶³⁵ In the end, the dissenting Justices appear simply to have overlooked the possibility of constitutional preemption in *Boyle*.

CONCLUSION

Current conceptions of federal common law are problematic because they raise federalism and separation of powers concerns. Reconceptualizing federal common law rules using the criteria proposed in this Article alleviates these concerns. Many of these rules can be justified in terms of the constitutional structure because they govern matters beyond the legislative competence of the states and implement various aspects of the constitutional scheme. Recognizing the structural foundations of various rules currently thought to be "federal judge-made law" suggests that many of these rules have been essentially mischaracterized. Recasting federal common law rules by reference to the constitutional

⁶³¹ *Boyle*, 487 U.S. at 515-16 (Brennan, J., dissenting).

⁶³² *Id.* at 518.

⁶³³ *Id.* at 515.

⁶³⁴ This is true, moreover, even though an act of state case may be "simply a suit between two private parties." *Id.* at 519.

⁶³⁵ See *supra* note 273 and accompanying text. Of course, Congress remains free to adopt positive federal law to govern controversies of this kind—as it did following *Sabbatino*, see *supra* note 279 and accompanying text—or even to incorporate state law by reference. Until Congress takes such steps, however, federal courts need not apply state law to matters beyond the legislative competence of the states simply because Congress has not acted.

structure places them on a firmer constitutional footing and dispels the suggestion that judicial application of such rules either usurps the constitutional authority of the states or invades the province of the political branches.