

PREEMPTION AND FEDERAL COMMON LAW

*Ernest A. Young**

INTRODUCTION

Brad Clark warned me about becoming a federal courts professor. When I was a young attorney in private practice in Washington, D.C., and thinking about applying for law teaching positions, Brad—then just a friend of a friend—was kind enough to advise me about how to “package” my candidacy to appeal to law schools. “Federal courts and constitutional law are the kiss of death,” he said, urging me to pick subjects in greater demand. I failed to heed his warning, but found out in short order why he had given it. When I interviewed with Jack Goldsmith, then representing the University of Chicago, the first thing Jack said to me was, “I think federal courts is a dead field.” I did not get the job.

The truth is that the careful doctrinal work that characterizes the federal courts field is not much in favor these days in “cutting edge” circles of legal academia. I have presented papers at faculty colloquia urging continued attention to the insights of the legal process school, only to be looked at as if I had two heads. Over a decade ago, many of the federal courts field’s leading lights gathered for a symposium at Vanderbilt University to consider (very earnestly) Jack Goldsmith’s question—that is, whether the federal courts field is somehow “dead.”¹ Some of the best evidence for the field’s continued vitality,

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* Professor of Law, Duke Law School. This Essay is part of a Symposium focusing on Bradford R. Clark’s seminal article, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) [hereinafter Clark, *Separation of Powers*]. As such, this Essay is an opportunity not only to examine Brad’s ideas but also to thank him for his friendship and guidance over the years. I am also grateful to the many University of Texas law students whose probing questions brought to light many of the issues in this Essay, to Curt Bradley for comments on the manuscript, to Will Peterson for helpful research assistance, and to Allegra Young for all the rest.

1 See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 956 (1994) (offering “a qualified defense against the charge that Federal

however, can be found in the work of my friend Brad Clark. That work demonstrates that careful doctrinal scholarship can be both theoretically sophisticated and practically relevant. Perhaps the most sincere compliment I can pay him is that, in my own academic career, I have chosen to try and follow his example rather than his advice.

This Essay plays out some of the doctrinal implications of Brad's work—not only the seminal *Separation of Powers as a Safeguard of Federalism* article that forms the focus of this Symposium,² but also Brad's earlier work on federal common law.³ Despite the holding of *Erie Railroad Co. v. Tompkins*⁴ that “[t]here is no federal general common law,”⁵ it is well accepted that the federal courts retain common law-making powers in particular areas.⁶ Perhaps the most well-known and well-developed such area involves the rights and obligations of the United States government itself, which the Court held to be a legitimate subject for federal common law in *Clearfield Trust Co. v. United States*.⁷ Brad's work on federal common law found this line of cases troubling but suggested that at least some of the decisions could be justified as instances of constitutional preemption of state authority in areas of strong federal interests.⁸

My purpose here is to spin out three doctrinal puzzles arising out of the *Clearfield* line of cases. The first two arise out of the fact that, while federal courts often make federal common law rules in cases concerning the rights and obligations of the United States, they also

Courts is an intellectually benighted backwater”); Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1054 (1994) (concluding that the field “is overflowing with possibilities,” but only “once we agree not to see the world with the vision provided only by the official fathers”); see also Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 1003–05 (1994) (sounding pretty depressed about the whole thing). Professor Fallon's contribution suggested that the field is ripe for “oedipal rebellion,” Fallon, *supra*, at 955, but I for one have never seen the point of such a response. I like my parents.

2 See Clark, *Separation of Powers*, *supra* note *.

3 See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996) [hereinafter Clark, *Federal Common Law*].

4 304 U.S. 64 (1938).

5 *Id.* at 78.

6 See generally Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (describing and endorsing this development early on).

7 318 U.S. 363, 366 (1943).

8 See Clark, *Federal Common Law*, *supra* note 3, at 1361–75; see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1031 (1967) (identifying “areas that are federalized by force of the Constitution itself”).

sometimes apply state law. The decision whether to do so involves a balancing test articulated most clearly in *United States v. Kimbell Foods, Inc.*,⁹ which generally turns on the degree of conflict between federal interests and the state rule that would otherwise apply.¹⁰ The first puzzle involves whether, once a federal court articulates a federal common law rule because it finds that a particular state rule conflicts with federal interests, that federal rule governs all future cases raising the same issue, notwithstanding that the otherwise applicable state rules might be different and less antagonistic to federal interests. In other words, is *Kimbell Foods* an analysis courts apply once per issue, or over and over again? I call this puzzle the “repeat application problem.”

The second puzzle, which I call the “use of state law problem,” involves what happens when a court chooses to apply *state* law under *Clearfield* and *Kimbell Foods*. Different courts have used different terminology to describe this phenomenon: sometimes courts say they “adopt” state law as the federal rule of decision; sometimes they purport to apply state law “of its own force.”¹¹ In one leading opinion, Justice Scalia suggested that the distinction may make no practical difference.¹² I want to argue that the choice *does* make a difference, however, and that we must therefore try to pin down what happens when a court chooses to use state law under these circumstances.

My answers to these first two puzzles are fundamentally informed by Brad’s suggestion that federal common lawmaking in the *Clearfield* line must be justified in terms of constitutional preemption.¹³ While I am skeptical of the view that the Constitution carves out “enclaves” of such preemption, I do think that federal common lawmaking can sometimes be justified as incidental to the more general law of preemption. On this view, federal common lawmaking depends on a conflict between state law and federal policy. Insisting on such a conflict would likely yield a considerably more limited role for judicial legislation.

These conclusions lead to a third puzzle, which has to do with the scope of *Clearfield’s* application: does the two-step power and discretion analysis, including *Kimbell Foods’* gloss on the discretion stage, apply outside the context of cases involving the rights and obligations of the United States? Although admiralty cases, for example, some-

9 440 U.S. 715 (1979).

10 *See id.* at 728–29.

11 *See, e.g.,* Atherton v. FDIC, 519 U.S. 213, 217–26 (1997).

12 *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 n.3 (1988).

13 *See Clark, Federal Common Law, supra* note 3, at 1251–52.

times apply a similar analysis, the Court has never acknowledged *Clearfield* as a test of general application. Once we view the power to make federal common law as stemming from a conflict between state law and federal interests, however, it becomes clear that some form of *Clearfield* must govern all instances of preemptive federal common lawmaking.

The argument proceeds in five parts. Part I lays out the *Clearfield* line and its central, two-part test for federal common lawmaking. Parts II and III then address the “repeat application” and “use of state law” puzzles, respectively. Part IV draws some conclusions about the preemptive basis for federal common lawmaking, and Part V argues that those conclusions should govern federal common lawmaking whenever it occurs.

I. THE *CLEARFIELD* LINE AND THE *KIMBELL FOODS* TEST

Federal common law comes in a number of different forms.¹⁴ Sometimes Congress expressly delegates common lawmaking authority to federal courts: Rule 501 of the Federal Rules of Evidence, for example, provides that evidentiary privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”¹⁵ Sometimes the delegation is implicit: the very general provisions of the Sherman Act are often read as an implied delegation of authority to the judiciary to develop a federal common law of antitrust,¹⁶ for instance, and federal courts have treated the grant of admiralty jurisdiction as creating a wide-ranging common law jurisdiction.¹⁷ It is just

14 See generally RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 693–98 (5th ed. 2003) [hereinafter HART & WECHSLER] (discussing interpretive theories of federal common law); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7–12 (1985) (suggesting that general constitutional and statutory principles combine to create the standard by which to assess the validity of the federal common law).

15 FED. R. EVID. 501. The rule goes on to *forbid* federal common lawmaking, however, “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law provides the rule of decision.” *Id.*

16 See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.”).

17 See Act of June 25, 1948, ch. 646, § 1333, 62 Stat. 869, 931 (codified as amended at 28 U.S.C. § 1333 (2000)); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (“[I]n the absence of some controlling statute the general maritime law as accepted

a step beyond this idea of explicit or implicit delegation to say that when Congress leaves gaps in federal statutes—when it fails to specify a measure of damages for new federal claims, for example¹⁸—it means for the courts to fill in those gaps through federal common lawmaking. Justice Jackson famously defended this sort of interstitial lawmaking by contending that “[w]ere we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes”¹⁹

In other areas, federal common lawmaking seems to derive simply from the presence of strong federal interests.²⁰ This is the explanation often given for federal common lawmaking in foreign affairs cases.²¹ It may also be a better way to understand federal common lawmaking in admiralty—that is, common law authority flows not from the jurisdictional grant but from strong federal interests in uni-

by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.”). See generally David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995) (surveying the field). I argue in Part V that this treatment is incorrect. See *infra* notes 158–82 and accompanying text.

18 See, e.g., *Carey v. Piphus*, 435 U.S. 247, 264–67 (1978) (fashioning a federal common law rule to govern the measure of damages in an action under 42 U.S.C. § 1983 for deprivation of procedural due process rights). These remedial gaps are often filled, however, by looking to state law. See, e.g., *Robertson v. Wegmann*, 436 U.S. 584, 590–93 (1978) (looking to state law to determine the survival of a § 1983 action). See generally HART & WECHSLER, *supra* note 14, at 758–66 (discussing the statutory gap-filling genre of federal common law).

19 *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring). Justice Jackson went on to claim that this authority “is apparent from the terms of the Constitution itself,” *id.*, but one searches those terms in vain for any explicit grant of lawmaking authority to courts.

20 See Merrill, *supra* note 14, at 36–39 (discussing “preemptive lawmaking”).

21 See, e.g., *id.* at 55 n.238. The leading example of the federal common law of foreign relations is *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which fashioned a federal common law “act of state” doctrine, limiting judicial review of claims that foreign governments have breached international law, see *id.* at 427–37. While *Sabbatino* is often read as recognizing a very broad lawmaking power in foreign affairs cases, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 139 (2d ed. 1996) (reading *Sabbatino* as recognizing “an independent power for the federal courts to make [foreign affairs] law on their own authority”), I argue in Part V that it is better cited for the considerably more modest proposition that courts may fashion choice of law rules that restrict their own exercise of judicial review, much like rules of prudential standing, in deference to the political branches, see *infra* notes 193–98 and accompanying text; see also Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 440–45 (2002) [hereinafter Young, *Customary International Law*].

form rules to govern maritime commerce.²² In these cases, Congress may be wholly absent, leaving the courts to fashion common law rules in response to relatively amorphous interests rather than simply to fill in the gaps in a statutory scheme.

The *Clearfield* line fits squarely within this tradition of “preemptive lawmaking” based on the need to protect strong federal interests. *Clearfield* itself involved a misplaced check for \$24.20 issued to one Clair Barner by the Works Progress Administration (WPA).²³ An unknown person obtained the check and cashed it at J.C. Penney’s, which then endorsed it over to the Clearfield Trust Co. Clearfield obtained payment from the WPA. Barner, who had never received the check, informed the WPA that he had not been paid; he later executed an affidavit alleging that the endorsement on the check was a forgery. The United States ultimately filed suit against Clearfield for reimbursement. Under Pennsylvania law, the United States would not have been able to recover because it had unreasonably delayed in giving notice to Clearfield.²⁴ The Supreme Court ruled, however, that “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . In 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.”²⁵

Although Justice Douglas’ opinion for the Court pointed to a federal statute conferring authority to issue the check,²⁶ that statute said nothing about authorizing the federal courts to fashion a federal rule of decision in cases arising out of the authorized transaction. Everything the federal government does is authorized by some species of positive law (or at least one hopes it is), but that does not mean that all disputes involving the federal government are governed by federal common law.²⁷ It seems clear that the primary ground for fashioning a federal common law rule on the delay question was the general federal interest in uniformity:

22 See, e.g., Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide* (pt. 2), 28 J. MAR. L. & COM. 555, 556 (1997).

23 *Clearfield Trust Co. v. United States*, 318 U.S. 363, 364 (1943).

24 See *id.* at 366–67.

25 *Id.*

26 See *id.* at 366 (citing the Federal Emergency Relief Act of 1935, which authorized the WPA project upon which Barner was employed).

27 The presumption under the Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.), for example, is that tort disputes arising out of federal officers’ conduct will be governed by *state law*, see 28 U.S.C. § 1364(b)(1) (2000), notwithstanding that the officers in question exercise authority under federal statutes, see *id.* § 2674.

The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.²⁸

Interestingly, the Court determined the content of the federal common law rule by looking to the “federal law merchant, developed . . . under the regime of *Swift v. Tyson*.”²⁹ The Court ultimately adopted a federal rule requiring the person accepting commercial paper with a forged signature—*Clearfield* here—to prove some sort of injury resulting from the drawee’s delay in giving notice.³⁰

Clearfield fashioned a new federal rule without drawing on local sources, but it also acknowledged that “[i]n our choice of the applicable federal rule we have occasionally selected state law.”³¹ Subsequent cases have generally applied a two-part test to determine whether to create federal common law:

[F]irst, a court should ask whether the issue before it is properly subject to the exercise of federal power; if it is, the court should go on to determine whether, in light of the competing state and federal interests involved, it is wise as a matter of policy to adopt a federal substantive rule to govern the issue.³²

The Hart and Wechsler authors describe these two steps as addressing “competence” and “discretion,” respectively.³³

Since *Clearfield*, the competence question for cases involving the rights and obligations of the United States has been taken as settled.³⁴ However, the Court has frequently held that state law should govern

28 *Clearfield*, 318 U.S. at 367.

29 *Id.* (citing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)). For an account of the *Swift* regime, see generally 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, 1516–38 (1984).

30 *Clearfield*, 318 U.S. at 369–70.

31 *Id.* at 367; see also *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”).

32 Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 886 (1986); see also Friendly, *supra* note 6, at 410 (extracting these two steps from *Clearfield*).

33 HART & WECHSLER, *supra* note 14, at 700.

34 See *id.* at 700–02.

as a matter of discretion.³⁵ The canonical formulation of this discretion inquiry emerged in *Kimbell Foods*:

Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.³⁶

The Court stressed that it would “reject generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs.”³⁷ Subsequent cases have emphasized that “‘a significant conflict between some federal policy or interest and the use of state law’ . . . is normally a ‘precondition’” for fashioning a rule of federal common law.³⁸

This basic analytical framework for federal common lawmaking in the *Clearfield* line sets the backdrop for the two puzzles that I wish to consider in this Essay.

II. THE REPEAT APPLICATION PROBLEM

Use of state law in cases like *Kimbell Foods* reflects a basic aspect of our federalism, that the “Congress legislates against a background of existing state law,”³⁹ and that federal law retains its “incomplete and interstitial nature” even in the midst of a national regulatory scheme.⁴⁰ The repeat application problem arises from the case-specific nature of the *Kimbell Foods* balancing test. Both the degree of conflict between state law and federal interests and the extent of reliance interests predicated upon state law will turn importantly on the character of the particular state rule at issue. Some state rules will

35 See, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83–86 (1994); *United States v. Yazell*, 382 U.S. 341, 352–57 (1966).

36 *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979). Erwin Chemerinsky has summarized the test as one in which “the Court balances the need for federal uniformity and for special rules to protect federal interests against the disruption that will come from creating new legal rules.” ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 6.2.1, at 371 (5th ed. 2007).

37 *Kimbell Foods*, 440 U.S. at 730.

38 *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *O'Melveny & Myers*, 512 U.S. at 87; *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

39 Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 811 (1957).

40 Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525–39 (1954). Indeed, Professor Hart believed that “[i]t is in this sphere” that the interstitialness of federal law “is most conspicuously revealed.” *Id.* at 525.

interfere with federal interests and inspire reliance to a greater extent than others. The question, then, is the extent to which a court's decision that federal common law should be made should bind future courts considering cases involving a different state's rule.

Consider, for example, the basic issue in *Kimbell Foods* itself. The two consolidated cases before the Court both involved the priority of security interests held by the United States as against competing liens held by private parties.⁴¹ In neither case did the federal statutes creating the federal security interests establish rules of priority. The Court determined, under *Clearfield*, that "the priority of liens stemming from federal lending programs must be determined with reference to federal law."⁴² The Court was "unpersuaded," however, "that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors."⁴³ Central to this determination was the Court's finding that "the state commercial codes 'furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s].'"⁴⁴

How much weight should we put on the Court's seemingly boilerplate reference to "the circumstances presented here"? The cases consolidated in *Kimbell Foods* arose in Texas and Georgia,⁴⁵ and both states seem to have had fairly standard commercial law rules governing the priority of liens. Suppose that the case had instead arisen in a hypothetical version of South Carolina, where—still angry about that whole Civil War episode—state law provides that liens held by the federal government always take *last* priority.⁴⁶ The point, naturally, is that *that* state law would surely be displaced under the *Kimbell Foods* balance; it would interfere with federal interests in a fairly dramatic way. So if the *Kimbell Foods* issue comes up first in South Carolina, it would result in the formulation of a distinctively federal common law rule rather than the use of state law.

Now suppose that the same issue arises in Texas or Georgia, both of which have standard state commercial law rules that, according to the Court, raise no significant conflict with federal interests. We know that if the issue were one of first impression, the Court would be content to employ state law—that, after all, is what actually happened in

41 *Kimbell Foods*, 440 U.S. at 718.

42 *See id.* at 726.

43 *Id.* at 729.

44 *Id.* (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 309 (1947)).

45 *See id.* at 718, 723.

46 Of course, any resemblance between this hypothetical and the actual law of South Carolina would be purely coincidental and, frankly, quite surprising.

Kimbell Foods. But what is the import of the South Carolina case (assuming that it had been affirmed on appeal to the Supreme Court)? One plausible approach would be to say that the discretion question is no longer open, having been answered in the South Carolina case. There is now a federal rule on the subject of the relative priority of federal government liens, and that rule must now be applied to all cases raising that issue. On this view, *Kimbell Foods* is a one-shot test.⁴⁷

The alternative view would be that the *Kimbell Foods* inquiry should be rerun every time a different state rule is potentially applicable. The fact that South Carolina's rule conflicted with federal interests does not mean that Texas' and/or Georgia's does, so what would be the justification for displacing those more moderate state law rules? Recent decisions, after all, have emphasized that actual conflict between a state rule and federal interests is a "precondition" for federal common lawmaking.⁴⁸ As Paul Carrington has observed in another context, the power to make federal common law stems from a court's obligation to decide particular cases; the courts could not, for example, codify general rules of federal common law for application in future cases not yet before them.⁴⁹ A federal common law "rule" is simply a shorthand way of saying that particular conflicts between state law and federal interests should be resolved in a particular way; it is not a prospective legal norm with force that is independent of the circumstances that gave rise to it.⁵⁰

47 I put to one side the complications that would arise had the first case not been affirmed by the Supreme Court. For example, if the Fourth Circuit has recognized a federal common law rule governing a particular issue, can that rule be said to "exist" at all in the Fifth or Eleventh Circuits, which have not yet considered the issue? My tentative answer is that this wrinkle should not matter, because the Fifth Circuit's inquiry as to whether the Fourth Circuit's case was rightly decided would be a different decision than a *de novo* application of *Kimbell Foods* to the Texas rule.

48 See *Atherton v. FDIC*, 519 U.S. 213, 218 (1997).

49 See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 980-81 (1996) (addressing Congress' ability to delegate rulemaking authority over offer-of-settlement rules to the federal courts). It is true, of course, that a court's creation of a federal common law rule has precedential force in a subsequent case. But that is not to say that the rule itself has prospective force—the precedent simply binds a future court, *if confronted with a similar conflict* between state law and federal interests, to apply a similar federal common law rule. The prior precedent would be readily distinguishable if no such conflict existed in the subsequent case, even if that case fell within the formal ambit of the federal common law rule announced in the prior decision.

50 See *id.* at 980 ("To decide an existing dispute framed by contending parties is an activity for which the independence of the judiciary is a very useful qualification; moreover, the public necessity of the decision affords moral legitimacy to the act. On

Moreover, the proposition that *Kimbell Foods* should be a one-shot test is probably not sustainable if we reverse the chronological order of my two cases. If the South Carolina case arises second, does that mean that the Court must ignore the blatant conflict between the United-States-is-last state priority rule and federal interests, simply because a prior decision found no conflict between those federal interests and a more reasonable state rule?⁵¹ Just as a federal common law rule should have no persistent existence beyond the scope of the conflict that gave it birth, so too the potential for conflict in future cases preserves the potential for federal common lawmaking, even though no such conflict has yet necessitated the displacement of state law.⁵²

To say that some circumstances will require rerunning the *Kimbell Foods* test does not mean, however, that such a state-by-state inquiry will always be necessary. I suggest that all depends upon the nature of the conflict between state law and federal interests. In *Clearfield Trust* itself, the conflict did not seem to arise from the nature of the particular state rule that was potentially applicable in that case. Justice Douglas plainly did not *agree* with the state rule that injury could be presumed from delay,⁵³ but he offered no reason to think that such a rule would systematically undermine federal interests. Rather, the justification for a federal rule of decision rested—however implausi-

the other hand, to prescribe standards of conduct by which future disputes will be judged is an activity for which the independence of the judiciary from politics is a disqualification wherever a republican form of government abides.”).

51 In *De Sylva v. Ballentine*, 351 U.S. 570 (1956), for example, the Court looked to state law to determine whether “children,” as used in the renewal provisions of the Copyright Act, would include an illegitimate child. The Court noted that “[t]his does not mean that a state would be entitled to use the word ‘children’ in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deem state law controlling.” *Id.* at 581.

52 Paul Mishkin anticipated the possibility that even where state law might be generally adopted on an issue, it would be possible to reject the rule of a particular state whose doctrine on the specific issue was not entirely consistent with federal objectives, though this might mean that state law was incorporated as to forty-six out of the forty-eight states but not the remaining two.

Mishkin, *supra* note 39, at 806. He noted, for example, that “as to measure of damages for wrongful death under the Federal Tort Claims Act, local law is adopted in all the states except Alabama and Massachusetts.” *Id.* at 806 n.33 (citation omitted) (citing *Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128 (1956)).

53 See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 370 (1943).

bly⁵⁴—on the United States' need for a single rule to govern all of its myriad transactions in multiple jurisdictions. Where the conflict between state law and federal interests is *generic* in this way, there is no need to run the *Kimbell Foods* balance over and over; it will always come out the same.

There is, believe it or not, a somewhat deeper theoretical point underlying all this doctrine-crunching. I want to suggest that my intuition about how the repeat application hypotheticals should play out actually rests on the federal courts' lack of constitutional power to simply create federal rules of law that have the same persistent, across-the-board quality of a federal statute. Rather, the courts' power to apply a federal rule of decision stems solely from the circumstances arising when they find that a particular *state* rule of decision is preempted by federal interests. Before I explore this point further, however, I want to consider the second puzzle.

III. THE USE OF STATE LAW PROBLEM

What does it mean to apply state law in a case that falls within the federal courts' common lawmaking competence? *Clearfield* used the curious formulation that "[i]n our choice of the applicable federal rule we have occasionally selected state law."⁵⁵ In *Boyle v. United Technologies Corp.*,⁵⁶ Justice Scalia contrasted this way of thinking—under which “the area in which a uniquely federal interest exists [is] entirely governed by federal law, with federal law deigning to ‘borro[w]’ or ‘incorporat[e]’ or ‘adopt’ state law except where a significant conflict with federal policy exists”—with the view that, absent a conflict, state law simply applies of its own force.⁵⁷ He opined, however, that the distinction made little difference:

We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state

54 The United States, after all, is hardly the only entity that must write checks to its employees in at least fifty different jurisdictions. The McDonald's Corporation, for example, seems to muddle through selling Big Macs and paying its employees in fifty-one United States jurisdictions despite not having the benefit of its own set of commercial paper rules. See Mishkin, *supra* note 39, at 830 (expressing some skepticism of the uniformity argument in *Clearfield*).

55 *Clearfield*, 318 U.S. at 367.

56 487 U.S. 500 (1988).

57 *Id.* at 507 n.3 (citations omitted) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–30 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973)).

law ever makes a practical difference, it at least does not do so in the present case.⁵⁸

In the more recent *Semtek* case,⁵⁹ however, Justice Scalia embraced the “adoption” language that he eschewed in *Boyle*. After stating that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity,” he nonetheless stated that such a case provided a “classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.”⁶⁰

I want to suggest here that the distinction between “adopting” a state rule as the federal rule of decision and applying the state rule of its own force does make a difference. A state rule “adopted” into federal law—whether or not the court actually uses the “adoption” terminology—becomes a federal rule; a state rule applied of its own force remains a creature of state law. This has at least three potentially vital implications. First, if the state rule remains a creature of state law, then in any dispute over the content of that rule, the federal courts will be obliged to follow the interpretation of that rule articulated by the state’s highest court.⁶¹ Second, and relatedly, if the state rule is adopted into federal law, then a dispute about the content or application of that rule can be appealed to the United States Supreme Court.⁶² Third, if the state rule does *not* apply of its own force, then a court choosing to adopt a state rule of decision can, at least in principle, adopt *any* state’s rule—not necessarily the rule of the state in which the court sits.⁶³

58 *Id.*; see also *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (Scalia, J.) (“The issue . . . is whether the California rule of decision is to be applied . . . , and if it is applied it is of only theoretical interest whether the basis for that application is California’s own sovereign power or federal adoption of California’s disposition.”).

59 *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

60 *Id.* at 508.

61 See, e.g., *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (reading “the rule of *Erie*” to require that “state law as announced by the highest court of the State is to be followed”).

62 See 28 U.S.C. § 1257 (2000) (limiting appeals to the United States Supreme Court from the state courts to those involving a question of federal law). Appeals to the United States Supreme Court from the federal circuit courts are not so limited, see *id.* § 1254, but because the United States Supreme Court cannot definitively settle questions of state law, see U.S. CONST. art. III, § 2, cl. 1, it does not usually consider such questions certworthy.

63 Or, more precisely, not simply the state rule that the choice of law rules of the state in which the court sits would prescribe. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941) (holding that a federal court sitting in diversity must apply the choice of law rules of the state in which it sits).

We can better understand these implications by playing out some variations on the facts of *Boyle*. The original case was a tort action brought by the father of a Marine helicopter copilot killed when the helicopter crashed during a training exercise. Because the military actors involved would enjoy strong immunity defenses, the plaintiff instead sued the private contractor who made the helicopter under Virginia tort law for defective repair and defective design. Jurisdiction in the federal district court rested on diversity of citizenship.⁶⁴ Although the defective repair claim failed under state law, the court of appeals held the defective *design* claim barred by a federal common law defense conferring broad immunity on military contractors. Justice Scalia's opinion for the Supreme Court agreed with the court of appeals, holding that

[I]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.⁶⁵

The majority found the case to be within federal common lawmaking competence, notwithstanding that it did not involve the rights and obligations of the United States *per se*, because any liability assessed against the contractor would be passed through to the United States government as part of the cost of the contract.⁶⁶ And it found a "significant conflict" between the application of state law and federal interests in government procurement by drawing an analogy to the "discretionary function" exception to liability⁶⁷ under the Federal Tort Claims Act (FTCA).⁶⁸ Although neither the FTCA nor its discretionary function exception applied to private contractors directly, the Court determined that imposing liability on military contractors for following specifications produced by government officials would have

64 See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 502–03 (1988).

65 *Id.* at 512.

66 See *id.* at 506–07.

67 See *id.* at 507–11.

68 See Federal Tort Claims Act, ch. 753, § 421, 60 Stat. 842, 845 (1946) (codified as amended at 28 U.S.C. § 2680(a) (2000 & Supp. V 2005)) (excepting from the United States' general consent to suit in tort cases "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").

the effect of constraining the discretionary functions of officials charged with formulating those specifications.⁶⁹

Boyle itself did not implicate the use of state law problem because the Court chose to fashion a new federal rule at the discretion stage. But consider another case (case number one) arising in a hypothetical North Carolina, in which state tort law already provides that a government contractor can be liable for negligent design only if it failed to follow government specifications. Under *Boyle's* extension of the *Clearfield* line to cases involving not only the rights and obligations of the United States but also the rights and obligations of government vendors, the case would fall within federal common lawmaking competence.⁷⁰ But under *Kimbell Foods*, the federal court would most likely find no conflict between the North Carolina rule and federal interests at the discretion stage. The court would thus either (a) "adopt" the North Carolina contractor defense as the federal rule of decision, or (b) allow the North Carolina rule to apply of its own force.⁷¹

The distinction between (a) and (b) makes a difference in a second hypothetical case arising on the heels of the first. A second products liability suit is brought against a government contractor in North Carolina state court. State courts have the same obligation to apply (or even to formulate) federal common law rules that federal courts do,⁷² but the state court follows the prior federal decision and applies North Carolina's rule. Imagine, however, that there is a dispute about the proper content and/or application of the North Carolina contractor defense, and one of the parties wishes to appeal that dispute to the United States Supreme Court. Do the Federal Supremes have jurisdiction? They do if case number one took option (a) and "adopted" the North Carolina defense; that defense is now part and parcel of federal law, and its proper interpretation and application present federal questions that are within the United States Supreme Court's jurisdiction. But if case number one is read to have pursued option (b), applying state law of its own force, then the last word on the applica-

69 See *Boyle*, 487 U.S. at 511–12.

70 I do not wish to concede that this extension of *Clearfield* was correct, but it is beside the point of this Essay.

71 See Mishkin, *supra* note 39, at 803 ("[T]he considerations which lead to selection of local law in one context may vary greatly from those operative in other circumstances; in any given situation, the extent of incorporation and the techniques for ascertaining what local law is must be determined by the particular considerations which established the advisability of adopting that law.")

72 See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102–03 (1962) (holding that federal common law governs suits falling within the scope of section 301 of the Labor Management Relations Act of 1947 even when those suits are brought in state court).

tion and content of that law is the North Carolina Supreme Court, and the United States Supreme Court would lack jurisdiction to hear any appeal.⁷³

Now consider case number three arising in a hypothetical Louisiana, which, like Virginia in *Boyle* itself, provides no defense at all for military contractors. Again, the case is within federal common law-making competence, but *Boyle* strongly suggests that the federal court should apply a federal rule of decision as a matter of discretion; Louisiana's failure to provide any defense for contractors, after all, conflicts sharply with the federal policies identified in *Boyle*. But what should the federal law defense be? If case number one "adopted" the North Carolina contractor defense as a matter of federal law (option (a)), then shouldn't the court in case number three be applying a federal rule with the same content as the North Carolina defense? If, on the other hand, case number one took option (b) and applied North Carolina's rule of its own force, then there would be no particular reason to apply that specific contractor defense in case number three. The federal court in Louisiana would be free to formulate its own federal law defense or possibly even adopt the rule of some other state entirely.

As with the repeat application problem, I suspect that there is no mandatory or uniformly correct way to resolve the choice between adoption of state law and applying state law of its own force. As with the repeat application problem, the answer will depend in significant part on the strength of the general federal interest in uniformity. If the potentially applicable state rule is consistent with federal interests, but there is a strong interest in simply having a uniform rule, then the court should *adopt* state law as the rule of decision and apply that particular state-originated rule in all future cases, regardless of the jurisdiction in which those cases arise. If, on the other hand, the *Kimbell Foods* analysis reveals little general interest in uniformity but strong reliance interests in adhering to the otherwise applicable state rule, then the court should apply state law of its own force. In this scenario, the interest in intrastate uniformity—that is, in having the same law apply to transactions that do and do not involve the United States—is paramount, and each jurisdiction should be able to apply its own state rule unless a particular rule engenders a significant conflict with federal interests. Whichever approach is chosen in a particular case, it is

73 Cf. *Murdock v. City of Memphis*, 87 U.S. 590, 635–38 (1875) (holding that the Supreme Court cannot ordinarily review questions of state law on appeal from the state courts).

important that the court considering the federal common law question explicitly address the specific way in which it is using state law.

This analysis suggests, by the way, a problem with Justice Scalia's holding in *Semtek* that federal law "adopt[ed], as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."⁷⁴ *Semtek* involved the res judicata rules governing judgments issued by federal courts sitting in diversity.⁷⁵ Perhaps there is some general uniformity interest in treating all federal court judgments the same way for preclusion purposes, and if so, one could possibly justify "adopting" a federal common law rule of decision. The content of such a rule, as I have suggested, might mirror a particular state's preclusion rules. But if there is a sufficient federal uniformity interest to prevent state law from applying of its own force, then that interest would surely be compromised by simply "adopting," in each instance, whichever state preclusion rules "would be applied by state courts in the State in which the federal diversity court sits."⁷⁶ Justice Scalia's willingness to allow the preclusive effect of federal diversity judgment to vary across jurisdictions suggests, instead, that state law should apply *of its own force*.

I would go further and say that state law should presumptively apply of its own force, unless it can be shown that the federal interest in having a uniform rule is sufficiently strong to *preempt* state rules of decision. Only in the latter case should federal courts have the power to adopt state law as a federal rule of decision, thereby divesting the state courts of control over the content and application of the state rule. This position stems from the more fundamental point that the authority to fashion a federal common law rule of decision—whether or not it draws on state law for its content—must stem from the preemptive effect of federal interests. I turn to this more general point in the next Part.

IV. THE PREEMPTIVE ORIGINS OF FEDERAL COMMON LAW

Federal common law is problematic. The *prima facie* case against it is textual: the Supremacy Clause, after all, mentions only "[t]his Constitution," "Laws of the United States which shall be made in Pursuance thereof," and "Treaties" as "the supreme Law of the Land."⁷⁷ While common law rules might be "Laws," they are not made "in Pursuance" of the legislative process laid out in Article I, and nothing in

74 *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

75 *See id.* at 500.

76 *Id.* at 508.

77 U.S. CONST. art. VI, cl. 2.

Article III explicitly grants lawmaking authority to courts.⁷⁸ This textual gap is not surprising, given the founding generation's general ambivalence toward the English common law,⁷⁹ their rejection of common law *criminal* powers for the federal courts,⁸⁰ and their concern that a common law jurisdiction for those courts would unduly expand federal authority at the expense of the states.⁸¹ Hence, although federal courts in the nineteenth century exercised a broad common law jurisdiction in admiralty and diversity cases—the leading example being *Swift v. Tyson*,⁸² which applied the general “law merchant” to a diversity case⁸³—they did not treat that law as “federal” for purposes of jurisdiction or supremacy.⁸⁴ The relevant history thus dovetails with constitutional text in supporting *Erie*'s pronouncement that “[t]here is no federal general common law.”⁸⁵

Moreover, as Brad Clark pointed out in the article forming the focus of this Symposium, “federal common law raises both federalism and separation-of-powers concerns because it appears to permit courts

78 See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 823 (1997) (“[G]eneral common law was not part of the ‘Laws of the United States’ within the meaning of Articles III and VI of the Constitution”); Stewart Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231, 1275 (1985) (“[T]he supremacy clause of the Constitution . . . was not designed to apply to common-law cases”).

79 See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 137–42 (1996) (Souter, J., dissenting) (discussing founding era debates about reception of the English common law).

80 See *United States v. Hudson (Hudson & Goodwin)*, 11 U.S. (7 Cranch) 32, 34 (1812) (rejecting the notion of federal common law crimes); see also *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416 (1816) (confirming the holding in *Hudson & Goodwin*); HART & WECHSLER, *supra* note 14, at 686–89.

81 James Madison warned, for example, that according broad common law powers to the federal courts “would overwhelm the residuary sovereignty of the States, and by one constructive operation new model the whole political fabric of the country.” James Madison, Report on the Resolutions, in 6 THE WRITINGS OF JAMES MADISON 341, 381 (Gaillard Hunt ed., 1906); see also Stewart Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003, 1111 (1985) (“Federal common law was to Republicans a symbol of a consolidated national government, the achievement of which seemed the evident goal of scheming Federalists.”).

82 41 U.S. (16 Pet.) 1 (1842).

83 See *id.* at 18–20.

84 See *Fletcher*, *supra* note 29, at 1517–25 (describing the operation of general law under *Swift*); see also TONY FREYER, HARMONY AND DISSONANCE 17–100 (1981) (same).

85 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (“Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.”).

to adopt federal rules of decision outside the procedures established by the Constitution to govern federal lawmaking.”⁸⁶ In particular, federal common lawmaking evades both the political safeguards of federalism (the representation of the states in Congress)⁸⁷ and the *procedural* safeguards of federalism (the simple difficulty of navigating the federal legislative process).⁸⁸ This is why *Erie* was the most important federalism case of the twentieth century: it forced federal law to be made by the representatives of the states through a procedure that virtually guarantees that federal lawmaking on any given subject will be sporadic and limited.⁸⁹ As Professor Clark has concluded, “*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*.”⁹⁰

This understanding of *Erie* has been questioned—most notably, in the present Symposium, by Peter Strauss.⁹¹ Professor Strauss reads *Erie* as a case about the reach of Congress’ enumerated powers—that is, the lower court’s refusal to follow state law in *Erie* was unconstitutional because Congress would have lacked authority to enact a statute covering the same circumstances.⁹² To say this is to deny *Erie* any separation of powers component: the limits on federal common lawmaking are no greater than those on federal lawmaking generally.⁹³

86 Clark, *Separation of Powers*, *supra* note *, at 1452.

87 See, e.g., 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, 547–52 (1954).

88 See Clark, *Separation of Powers*, *supra* note *, at 1339–42.

89 See Mishkin, *supra* note 39, at 800 n.12 (“Although it might seem that vis-a-vis the states it would make no difference which agency of the central government exercised the power to declare supervening law, this ignores the political structure which gives the states per se very significant power in the Congress—to a degree hardly paralleled in the judicial structure.” (citing Wechsler, *supra* note 87)).

90 Clark, *Federal Common Law*, *supra* note 3, at 1262 n.69.

91 See Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1571–73 (2008); see also R. Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1009992> (arguing that *Erie* had little to do with constitutional federalism or separation of powers). I can address Professor Green’s argument, which purports to demonstrate that such interpreters as Henry Friendly, Paul Mishkin, John Hart Ely, and Charles Alan Wright were all deluded about *Erie*’s significance, see Green, *supra* (manuscript at 2–3, 22 n.96), only in passing here.

92 See Strauss, *supra* note 91, at 1571–73.

93 See Green, *supra* note 91 (manuscript at 23–30). But see *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 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 law to govern those areas until Congress acts.”).

Professor Clark and I are not the first scholars to read *Erie* as a case about separation of powers as well as federalism.⁹⁴ It seems unlikely that the rule of decision in *Erie* was outside federal legislative competence, even under the pre-1937 case law. Professor Strauss concedes that the Erie Railroad Company was an interstate carrier and therefore subject to federal regulation, but he insists that the question in *Erie* was the authority to articulate a more general rule.⁹⁵ Fair enough, but the Court had already held in the *Shreveport Rate Cases* that federal authorities could reach intrastate activities of railroads where necessary to facilitate federal regulation of interstate transport.⁹⁶ It would hardly have been a stretch to uphold federal safety regulation of railroads generally. More generally, of course, *Erie* was decided in 1938—in the morning after the revolution of 1937—by a Justice with a broad view of national legislative authority. It is implausible that Justice Brandeis viewed the question as outside Congress' reach.⁹⁷ When Justice Brandeis wrote that “Congress has no power to declare substantive rules of common law applicable in a State,”⁹⁸ the critical reference was to “rules of *common law*.” I read this to mean that, even where Congress could regulate legislatively, it may not simply empower the federal courts to make rules in common law fashion,

94 For the widespread view that *Erie* was, in fact, firmly grounded in separation of powers concerns about judicial lawmaking, see, for example, Merrill, *supra* note 14, at 15–19; Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1689 (2004). For Professor Clark's treatment, see Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1478–93 (1997); Clark, *Federal Common Law*, *supra* note 3, at 1256–64; Clark, *Separation of Powers*, *supra* note *, at 1412–19.

95 See Strauss, *supra* note 91, at 1571.

96 See *Houston, E. & W. Tex. Ry. Co. v. United States (The Shreveport Rate Cases)*, 234 U.S. 342, 351–52 (1914).

97 It is also hard to square Professor Strauss' reading of *Erie* with the constitutional text. Article I, Section 8 grants powers to Congress. If, as Strauss seems to think, Article III's judicial power includes lawmaking authority, it is hard to see why that authority would be limited by Article I. The President's lawmaking authority via treaty, for example, has not been similarly construed to be limited by Congress' enumerated powers in Article I. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920). And, in fact, federal courts have often viewed their own lawmaking powers as distinct from those of Congress. For example, for much of our history federal courts conceived of their lawmaking authority in maritime cases as *not* resting on the Article I powers of Congress; quite the reverse, Congress' powers were thought to piggyback on the courts' maritime authority. See, e.g., *Pan. R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

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

outside the constraints of the Article I, Section 7 lawmaking process.⁹⁹ As Professor Clark argues so forcefully, the “reserved powers” of the states are not defined by a priori spheres or enclaves; they are defined, rather, by federal inaction. Article I, Section 7—along with the additional vetogates built into the process by house rules and restrictive statutes¹⁰⁰—creates a great deal of legislative inertia, which in turn tends to preserve at least some meaningful areas of state autonomy.¹⁰¹ The greatest threats to state autonomy arise, not surprisingly, out of the exceptions to Professor Clark’s principle—lawmaking by executive agencies and courts, neither of which are accountable to the states and each of which may produce law considerably more easily than Congress.¹⁰²

Erie’s rejection of “federal *general* common law,” however, has not been interpreted to foreclose federal judicial lawmaking in areas of particular federal interest.¹⁰³ To the extent that such judicial lawmaking can be justified, it must be through either delegation by Congress or through “constitutional preemption of state law that unduly impairs federal functions.”¹⁰⁴ Only the second rationale is available to justify the *Clearfield* line’s assertion of federal common lawmaking

99 Cf. *INS v. Chadha*, 462 U.S. 919, 946 (1983) (insisting that the lawmaking procedures in Article I “are integral parts of the constitutional design for the separation of powers”).

100 See generally William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008) (describing additional vetogates created by congressional rules); Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1498–1504 (2008) (describing the operation and effect of the Unfunded Mandates Reform Act).

101 This is not to deny Carlos Vázquez’s point that inertia also protects established federal regulation from repeal. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1604–05 (2008). Whether or not inertia protects state autonomy on balance depends on one’s starting baseline and assumptions about the most likely direction of federal legislative action. It strikes me as a reasonable assumption that federal legislators will generally act to increase rather than decrease the scope of federal authority. See Garrett, *supra* note 100, at 1513–15. But see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 935 (2005). Professor Levinson is right that Congress may often act to decrease its responsibility, see *id.* at 935–36, but in the present context it seems more likely to do so by delegating to federal agencies, over which it maintains some control, than by devolving authority to the states.

102 For more extensive discussions of preemption by executive agencies and courts from this perspective, see Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. (forthcoming 2008); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 333–41 (1999) [hereinafter Young, *Preemption at Sea*].

103 See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); Friendly, *supra* note 6, at 405–21.

104 Clark, *Separation of Powers*, *supra* note *, at 1453.

authority over the rights and obligations of the United States. It is thus worth looking more closely at the rationale for preemptive common lawmaking. As described by Tom Merrill:

Preemptive lawmaking may be invoked when a court, although it can discern no specific intention on the part of the enacting body with respect to the question before it, finds that the adoption of state law as the rule of decision would unduly frustrate or undermine a federal policy as to which there *is* a specific intention on the part of the enacting body. In effect, the court finds that some federal policy specifically intended by an enacting body “preempts” the application of state law to some collateral or subsidiary point about which the enacting body has been silent.¹⁰⁵

It is important to note, however, that often the connection to any “intent” by a real “enacting body” is tenuous indeed. In *Boyle*, for example, Congress had considered legislative proposals for a government contractor defense and rejected them.¹⁰⁶ Likewise, in *Clearfield* itself, the federal statutes invoked by Justice Douglas had nothing to do with the issue before the Court.¹⁰⁷

Even worse, the federal interest in uniformity in cases like *Clearfield* is attributable to Congress only in some extremely attenuated and abstract way. The preemption going on in these cases is really *dormant* preemption analogous to that under the Commerce Clause. And dormant preemption is extremely problematic from the perspective of contemporary federalism doctrine. After all, scholars and judges routinely invoke the “political safeguards” argument as a reason not to intervene to protect state autonomy,¹⁰⁸ but surely Congress is even better able to act to protect its own authority than are the states.¹⁰⁹ It is ironic—if not entirely surprising—that the nationalist mantra of judicial restraint evaporates when we turn to dormant preemption and federal common lawmaking.¹¹⁰

105 Merrill, *supra* note 14, at 36.

106 See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 515 & n.1 (1988) (Brennan, J., dissenting).

107 See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

108 See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–84 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278 (2000); Wechsler, *supra* note 87, at 545.

109 See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 132 (2004) (“If we are attempting to enhance the effectiveness of political and inertial impediments to federal lawmaking, then dormant rules . . . ought to be anathema.”).

110 Compare, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 (1996) (Souter, J.) (invalidating a state law under the dormant Commerce Clause), with *United States v. Morrison*, 529 U.S. 598, 649–50 (2000) (Souter, J., dissenting) (arguing that the

The conception of federal “enclaves” created by preemptive federal interests is problematic for a second reason as well. By attempting to distinguish between areas of uniquely federal and state authority,¹¹¹ the Court replicates the mistakes of nineteenth-century “dual federalism.”¹¹² That system proved unsustainable because, in many if not most cases, it was possible to categorize the government action in question as falling within either the state or federal sphere.¹¹³ The same is true of current enclaves of federal common lawmaking authority. Admiralty cases, for example, often implicate traditional state interests in providing tort remedies or regulating water pollution;¹¹⁴ likewise, recent foreign affairs cases have implicated traditional state concerns about state government procurement, insurance regulation, and criminal justice.¹¹⁵

Court should not enforce federalism constraints, including the Commerce Clause, because the Constitution “remits them to politics”).

111 See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988) (arguing that, because federal common law is made in fields of “unique federal concern,” “[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates ‘in a field which the States have traditionally occupied’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

112 See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (describing the collapse of the Court’s effort to define exclusive spheres of federal and state authority); Alpheus Thomas Mason, *The Role of the Court*, in *FEDERALISM* 8, 24–25 (Valerie Earle ed., 1968) (observing that “dual federalism” contemplates “two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States [which] confront each other as equals across a precise constitutional line, defining their respective jurisdictions”). It is important to distinguish “dual federalism” from “dual sovereignty,” which often connotes simply the separate and independent existence of the states as autonomous governments. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 143–44 (2001) [hereinafter Young, *Dual Federalism*].

113 See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2232 (1998) (“[W]ithout written guideposts on the content of the enclaves in the face of changing economies and functions of government, the substantive enclave theory is unworkable.”); Young, *Dual Federalism*, *supra* note 112, at 146–50.

114 See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 202 (1996); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 328 (1973). See generally Young, *Preemption at Sea*, *supra* note 102, at 329–33 (identifying a wide range of traditional state interests in maritime cases).

115 See, e.g., *Medellin v. Dretke*, 544 U.S. 660, 661–62 (2005) (criminal justice); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003) (insurance); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (state government procurement). See generally Young, *Dual Federalism*, *supra* note 112, at 177–85 (arguing that “foreign affairs” cannot be maintained as a sphere of uniquely federal interest).

The *Clearfield* line itself seems to be predicated on some notion of intergovernmental immunity, as if state law were somehow *incapable* of regulating a federal government contract. Indeed, it is commonplace to speak of federal contracts as an area of *constitutional* preemption.¹¹⁶ But why would that be true? There is no general exemption of federal officers, entities, and rights from generally applicable state laws. Federal officers, when they drive, must ordinarily observe posted state speed limits, and their salaries are subject to state taxes as long as those taxes are nondiscriminatory.¹¹⁷ License agreements involving federal patents, which surely impact federal intellectual property policy more directly than the commercial paper rules in *Clearfield* impacted the operations of the Works Progress Administration, are nonetheless governed by state law.¹¹⁸ Prior to *Clearfield*, state law appears to have extended to federal contracts in the absence of a contrary federal statute.¹¹⁹

To be sure, Congress retains the power to preempt state law governing federal officers, entities, and rights, and sometimes it does so. And particular state laws must yield, under ordinary principles of conflict preemption, if they impair federal governmental rights or functions.¹²⁰ But it is quite another thing to say that the states simply lack legislative competence to govern such matters, or to empower the federal courts to make rules of common law that oust state contract prin-

116 See, e.g., Clark, *Federal Common Law*, *supra* note 3, at 1361 (stating that “the states arguably lack legislative competence to prescribe binding rules of decision in this context”); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507, 509–12 (2006) (speaking of the *Clearfield* area as one in which “the structure of our federal system is thought to keep state law from applying of its own force”).

117 See *Jefferson County v. Acker*, 527 U.S. 423, 436–37 (1999) (taxes); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 486–87 (1939) (same); see also *Johnson v. Maryland*, 254 U.S. 51, 56 (1920) (“Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment.”).

118 See, e.g., *Lear, Inc. v. Adkins*, 395 U.S. 653, 661–62 (1969) (recognizing that the interpretation of a licensing agreement was “solely a matter of state law”); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 284 F.3d 1323, 1327 (Fed. Cir. 2002) (“[T]he interpretation of contracts for rights under patents is generally governed by state law.”).

119 See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 127 (4th ed. 1998) (stating that in the nineteenth century, “except where federal statutes explicitly displaced state law, the law governing the rights and duties of the United States in proprietary transactions was the same state law that would govern the rights and duties of a private party to the same transaction.”).

120 See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

ciples. *McCulloch v. Maryland*¹²¹ remains a landmark case on the scope of Congress' legislative power, but its suggestion that the states simply cannot tax or regulate federal entities has not held up nearly so well.¹²² Although some notions of intergovernmental immunities survive, they are hardly a poster child for orderly and predictable constitutional doctrine.¹²³

I thus disagree with Professor Clark's proposed test for federal common lawmaking authority, which sought to confine federal common law to areas in which the states lack legislative competence.¹²⁴ I am skeptical, for reasons just outlined, whether such areas can be inferred a priori from the Constitution in the absence of a specific federal legislative prohibition.¹²⁵ The states lack legislative competence where Congress has acted, consistent with Article I, Section 7, and that action has preemptive effect. In a world of concurrent legislative authority, the boundaries of state and federal authority will be defined largely by the terms of federal statutes rather than disembodied federal interests.¹²⁶

Even if we accept the notion of dormant preemption, however, preemptive lawmaking would remain problematic. Professor Merrill explains that, in such cases:

[R]ather than simply ignoring state law, as would be done in an ordinary preemption case, the court goes on to fashion a federal rule of decision to effectuate the enacting body's intent. Preemptive lawmaking can thus be regarded as a form of textual interpretation When a court engages in preemptive lawmaking, it still

121 17 U.S. (4 Wheat.) 316 (1819).

122 See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-33, at 1223 (3d ed. 2000) ("[I]mmunity from 'interference' obviously cannot include 'a general immunity from state law,' including nondiscriminatory taxes of every description, for all federal agents or instrumentalities acting within the scope of their agency or carrying on their functions as federal instruments. Given the interstitial character of federal law, any contrary principle, at least in the matter of regulation even if not in the matter of taxation, would require Congress to undertake the overwhelming burden of having to provide a comprehensive body of rules to govern *all* of the rights and obligations of all those who act on its behalf, including 'the mode of turning at the corners of streets.'" (quoting *Johnson*, 254 U.S. at 56)).

123 See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 (1985); TRIBE, *supra* note 122, § 6-34, at 1237 (noting the doctrinal difficulties that have plagued the Court's intergovernmental immunity doctrine).

124 See Clark, *Federal Common Law*, *supra* note 3, at 1251-52.

125 The Constitution does specifically forbid the States from certain forms of activity, such as creating titles of nobility. See U.S. CONST. art. I, § 10.

126 See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 429-35 (2007) (arguing that statutory boundaries largely define the limits of state and national authority under current law).

may be said to be carrying out the original intentions of the enacting body—not, however, by directly applying the specific intentions of the draftsmen, but by asking what collateral or subsidiary rules are necessary in order to effectuate or to avoid frustrating the specific intentions of the draftsmen.¹²⁷

Again, I would question whether the practical gap between any nonfictional intent associated with an actual enactment and the federal common law rules fashioned in many preemptive lawmaking cases is not unacceptably wide.

More fundamentally, however, one of the limits on federal preemption is ordinarily the fact that such preemption, unaccompanied by affirmative legislation, creates a legal gap that may itself have undesirable consequences.¹²⁸ We would ordinarily expect the decisionmaker to weigh the costs of accepting the state rule against the drawbacks of the gap resulting from preempting that rule—an analysis that might often favor the preservation of state law as the lesser of two evils. To let a preemptive decisionmaker who is *not* Congress fill in the resulting gap by legislating outside constitutional lawmaking processes is to eliminate a structural disincentive to preemptive federal action.

All this is to say that preemptive lawmaking is itself a tenuous justification for judicial authority to displace state rules with federal common law. My central point in the present Essay, however, is that preemption is the only justification there *is* for federal common law in cases like *Clearfield* and *Boyle*, and the scope and implications of such lawmaking should be confined according to the preemptive rationale. This has several implications.

First, the traditional two-part test under *Clearfield* should be restructured along the lines of cases that claim an actual and significant conflict between state law and federal policy as a precondition of federal common lawmaking.¹²⁹ We currently take the stage one “competence” inquiry to ask only whether the case falls into an enclave where federal courts have traditionally exercised common law authority.¹³⁰ But these “enclaves” are themselves judicial constructs—not enumerated power grants like the powers of Congress in Article I.¹³¹

127 Merrill, *supra* note 14, at 36 (footnote omitted).

128 See, e.g., Susan Bartlett Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 U.C. DAVIS L. REV. 113, 117 (1985).

129 See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994).

130 See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–06 (1988); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

131 See, e.g., U.S. CONST. art. I, § 8.

The power to make federal common law comes, if it exists at all, from the existence of a conflict between state law and some preexisting federal policy, and the resulting imperative that state law must give way under the Supremacy Clause.¹³² “Competence” to make federal common law thus turns on the evaluation of such conflicts that presently takes place at stage two under *Kimbell Foods*.

The second point, already developed with respect to the two puzzles above, is that federal common law in preemption cases is not really a lawmaking power at all. How could it be, in the absence of a delegation of such authority from Congress?¹³³ Rather, the only valid power exercised in the *Clearfield* line of cases is simply a power to fill in the gap created by a finding that state law is preempted in a particular case. It thus seems a mistake to treat the federal rule thus fashioned as a persistent feature of federal law to be applied in future cases, regardless of the presence or absence of a conflict with state law. Likewise, there is no power to routinely “federalize” state law rules, unless the conflict with federal interests is itself a persistent one, most likely created by an ongoing federal need for a uniform rule.

V. THE SCOPE OF *CLEARFIELD*

The general principles developed in the preceding Part may afford some purchase on yet another enduring puzzle about federal common law: does *Clearfield's* analysis, which applies state law in the absence of a conflict with federal norms, apply only in the particular realm of the United States government's proprietary interests, or does it extend to federal common lawmaking more generally? Does *Clearfield* apply, for instance, in admiralty and foreign relations cases, or to situations in which courts fill in “gaps” in federal statutes? If

132 See, e.g., Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770–73 (1994) (arguing that the supremacy of federal law does not itself displace state lawmaking authority).

133 At least some Justices, moreover, continue to insist that actual legislative power cannot be delegated at all—at least to administrative agencies. Compare *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . .” (alteration in original)), with *id.* at 488 (Stevens, J., concurring in part and in the judgment) (“Despite the fact that there is language in our opinions that supports the Court’s articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’” (footnote omitted)). If legislative power cannot be delegated to agencies, it is hard to see why the answer would be different for courts.

federal common lawmaking is based on the preemptive effect of federal law, as I have argued, then it should apply across the board.

I have already suggested, following Tom Merrill, that federal common lawmaking may rest on theories of either congressional delegation or the preemptive effect of federal interests.¹³⁴ In this Part, I want to push a little harder on each of these rationales. Take delegation first. The theory draws its power from an analogy to delegations to federal administrative agencies, but on reflection this analogy turns out to be quite strained.¹³⁵ Such delegations are almost always explicit. The Communications Act of 1934, for example, confers upon the Federal Communications Commission (FCC) broad authority to determine what the “public convenience, interest, or necessity requires”¹³⁶ in the communications field, including the authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out [the communications laws in Title 47 of the U.S. Code].”¹³⁷ While there are examples of explicit delegations to courts,¹³⁸ these are few and far between.¹³⁹ Generally, delegations to courts are implicit at best—notwithstanding the fact that, in the administrative law context, canons of statutory construction require clear statements of Congress’ intent to support broad delegations,¹⁴⁰ and notwithstanding the considerable risk of self-dealing attendant upon a finding *by* a court of implicit delegation *to* a court.

Moreover, the structural factors that support delegations to administrative agencies are largely absent for courts. Administrative

134 See *supra* notes 14–22 and accompanying text; see also *Tex. Indus.*, 451 U.S. at 640 (stating that instances of valid federal common lawmaking fall “into essentially two categories: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law” (citations omitted) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964))).

135 See generally Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. (forthcoming 2008) (manuscript at 28–51), available at <http://ssrn.com/abstract=1104823> (questioning this analogy).

136 47 U.S.C. § 303 (2000).

137 *Id.* § 303(r); see also *id.* § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”).

138 See *supra* note 15 and accompanying text (discussing Rule 501 of the Federal Rules of Evidence).

139 See Merrill, *supra* note 14, at 42 (“Express delegation of lawmaking authority to federal courts is rare.”).

140 See, e.g., *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion); *Nat’l Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 341–43 (1974).

agencies are said to be democratically accountable by way of their subordination to an elected President;¹⁴¹ they are accountable to Congress through oversight hearings, budgetary dependence, and Senate confirmation of agency officials;¹⁴² internal agency procedures like notice-and-comment rulemaking may afford broad opportunities for public participation (including state governments threatened by federal preemption);¹⁴³ and judicial review for conformity to the agency's statutory mandate provides a final check.¹⁴⁴ These structural safeguards are integral to the constitutional compromise that has at least papered over the inconsistency of broad agency delegations with Article I's vesting of the legislative power in Congress.¹⁴⁵ None of these safeguards can be invoked to support the exercise of delegated law-making authority by courts.¹⁴⁶

141 See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001).

142 See, e.g., Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253-63 (1987) (arguing that legislators exercise control through the design of procedures to be followed by the agency in implementing legislation). See generally Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that under the "fire-alarm oversight" model, Congress has not neglected its oversight responsibilities).

143 See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. (forthcoming 2008) (manuscript at 7, 28-31), available at http://papers.ssrn.com/abstract_id=1101141. I part company with Professors Galle and Seidenfeld when they say that the opportunities for states to participate in agency proceedings is sufficient to offset fears about agency preemption, compare *id.* (manuscript at 19-67, 114-17), with Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress* 57 DUKE L.J. (forthcoming 2008) (manuscript at 21-37, on file with author), but it seems likely that agency proceedings afford states greater input than judicial proceedings to which states may well not be a party.

144 See Act of Sept. 6, 1966, Pub. L. No. 89-554, § 702, 80 Stat. 378, 392 (codified as amended at 5 U.S.C. § 702 (2000)) (providing a right to judicial review of agency action).

145 See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990) ("Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued."); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469-91 (2003) (developing a series of models based on executive control, participation in agency processes, agency expertise, and agency conformity to statutory commands, that have been used to legitimate agency action).

146 Not even judicial review. The crucial thing about judicial review of agency action under the Administrative Procedure Act (APA) is that it is conducted by an institution other than the one that is exercising delegated power. See 5 U.S.C. § 702

I thus disagree with Tom Merrill's suggestion that, when Congress expressly delegates lawmaking authority to federal courts, "the only question that arises is whether the enacting body has framed the area in which the delegation has taken place with enough specificity to notify the states and electorally accountable bodies about the sorts of issues as to which lawmaking authority has been transferred to federal courts."¹⁴⁷ That consideration is surely important, but modern administrative law critically relies on *ex post* mechanisms—checks on the exercise of delegated authority that operate *after* the initial grant—to legitimate delegation of lawmaking authority outside of Congress. To be sure, the problem is even worse if the *ex ante* delegation is overbroad and/or implicit. But without continuing controls that emphasize the role of the States' representatives in Congress—e.g., congressional oversight and review by a third institutional party for conformity to the original statutory mandate—delegation of lawmaking authority to courts is awfully hard to justify by analogy to administrative agencies. And no other ground of justification has been proffered.

The federalism dimension of these problems is less acute for some of the broader and more prominent areas of federal common lawmaking that are typically justified on delegation grounds, such as antitrust law. That is because federal antitrust law generally does not preempt state competition law.¹⁴⁸ I want to focus here on a narrower

(2000). Moreover, much APA review is for agency conformity with the APA's procedural requirements, *see id.* § 704, but no similar procedural specifications discipline the exercise of federal common lawmaking power.

147 Merrill, *supra* note 14, at 42. Professor Merrill does acknowledge, in a footnote, that "executive-branch lawmaking is less in tension with the norms of federalism and electoral accountability than is judicial lawmaking," and he suggests that "the requirement that the area of delegation be circumscribed with reasonable specificity [should] be *more* restrictive than the test applied in assessing the constitutionality of delegations to the executive branch." *Id.* at 41 n.182. But the difficulties attendant upon enforcing any principle of nondelegation in the administrative context are likely to plague efforts to tighten the test for judicial delegations, and it is far from clear that even a somewhat tighter *ex ante* test can compensate for the lack of *ex post* controls on the exercise of delegated authority.

148 *See, e.g.*, PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, ANTITRUST ANALYSIS ¶ 164, at 90 (6th ed. 2004) (noting that "[i]t is generally assumed that federal antitrust laws are not intended to preempt the field," and "state law may condemn conduct that would be held lawful under the Sherman Act"). The problem is acute for another important area of supposedly delegated lawmaking—federal common law under the Labor Management Relations Act (LMRA) of 1947, ch. 120, § 301, 61 Stat. 136, 156 (codified as amended at 29 U.S.C. § 185 (2000)). That area is so rife with problems that one scarcely knows where to begin. Federal judicial authority in the field originates with a bare jurisdictional grant, which a majority of the Supreme

form of delegation claim, which relates to the federal courts' authority to fill in "gaps" in federal statutes. In administrative law, the existence of a gap in a federal regulatory scheme is often construed as an implicit delegation by Congress to the agency that administers the statute of authority to make law that "fills in" the gap.¹⁴⁹ Judicial gap-filling must be justified on similar grounds,¹⁵⁰ but the case is not an easy one to make. Even in the agency context, the legislative intent to delegate in such cases is generally conceded to be fictitious.¹⁵¹

The more plausible argument for judicial gap-filling imputes approval to Congress on grounds of necessity. I have already noted Justice Jackson's famous assertion that "our federal system would be impotent" without federal common law on account of "the recognized

Court nonetheless found to confer affirmative lawmaking authority in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456–57 (1957). *But see* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938) (holding that federal common lawmaking authority could *not* be inferred from the constitutional or statutory grant of federal jurisdiction to adjudicate diversity cases). *Lincoln Mills'* finding of lawmaking authority has then been bootstrapped into a doctrine that, even when plaintiffs rely on *state* law in formulating claims related to a collective bargaining agreement, the preemptive force of federal law is so great as to create federal question jurisdiction. *See* *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968); *see also* Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775, 1812–19 (2007) (criticizing *Avco's* doctrine of "complete preemption"). In any event, to the extent that federal common law under the LMRA can be justified at all, it is probably best justified not by delegation but by the preemptive effect of the LMRA's substantive policies. *See* HART & WECHSLER, *supra* note 14, at 742 (suggesting that "federal common lawmaking in *Lincoln Mills* [is] best viewed as rooted in the need to carry out the substantive policies of the federal labor laws").

149 *See, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

150 One might say, I suppose, that gap-filling amounts to "interpretation" of the overall federal statutory scheme rather than lawmaking at all. *Cf.* Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332–33 (1980) (denying any distinction between the common law and statutory interpretation).

151 *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (stating that "legislative intent to delegate the law-interpreting function" is "a kind of legal fiction"); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 350 n.33 (2007) (book review); *see also* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–25 (explaining that "Congress so rarely makes its intentions about deference clear").

futility of attempting all-complete statutory codes.”¹⁵² This necessity argument evaporates, however, once one recognizes the possibility of filling statutory gaps by reference to state law. Sometimes Congress requires such reference by explicit statutory command, as it did with gaps in the federal civil rights cause of action under § 1983.¹⁵³ Congress’ decision to use state law to fill gaps in the basic federal civil rights statute seriously undermines any claim that federal law would be “impotent” without judicial authority to fill statutory gaps by fashioning new federal rules.¹⁵⁴ To be sure, there may be cases in which the available state law rule would present some particular conflict with federal interests inherent in the statutory scheme, so that those inter-

152 *D’Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring). Justice Jackson added that federal common lawmaking authority “is apparent from the terms of the Constitution itself,” *id.*, but there is no such explicit grant of judicial lawmaking authority in the text. Jackson’s best example was the Contracts Clause. Noting that “[t]his provision is meaningless unless we know what a contract is,” Jackson cited authority “that in applying this clause we are not bound by the state’s views as to whether there is a contract.” *Id.* (citing *Irving Trust Co. v. Day*, 314 U.S. 556 (1942)). But other cases suggest that the existence of a contract in a Contracts Clause case is a question “primarily of state law,” *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); see also HART & WECHSLER, *supra* note 14, at 528–29. In any event, there is a great deal of difference between having to define a term that appears in the Federal Constitution—e.g., “contract”—and formulating an entire jurisprudence of contracts for cases involving the federal government, as in *Clearfield*. The “gaps” I have in mind here involve not the interpretation of ambiguous textual terms in statutes or constitutional provisions, but the fashioning of entire rules—e.g., a statute of limitations or measure of damages—where Congress has simply omitted to address the issue.

153 *Ku Klux Klan (Civil Rights) Act of 1871*, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2000)); see 42 U.S.C. § 1988(a) (2000) (“The jurisdiction in civil and criminal matters conferred on the district and circuit courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.”); see also *Robertson v. Wegmann*, 436 U.S. 584, 588–93 (1978) (applying § 1988 to adopt state law concerning survivorship of a § 1983 action).

154 See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (recognizing a strong presumption that, where federal statutes fail to provide a statute of limitations for a federal claim, the applicable limitations period will be borrowed from state law).

ests can only be vindicated by fashioning a federal rule.¹⁵⁵ But that, I submit, is simply an instance of the familiar *Clearfield* conflict preemption analysis that I have already discussed. There is no reason to posit any broader federal judicial lawmaking authority in cases involving gaps in federal statutes.

What about “preemptive” federal common lawmaking? *Clearfield*, as I have suggested, is a rule of conflict preemption, but many scholars have suggested that the Constitution somehow “preempts the field” in particular areas, so that the federal courts have license to behave essentially like state courts, exercising a freewheeling lawmaking power not tied to statutory authorization or specific conflicts with federal interests.¹⁵⁶ Any such suggestion would run afoul of Justice Jackson’s recognition that “[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them.”¹⁵⁷ In the remainder of this Part, I hope to show that broad theories of preemptive lawmaking cannot be defended even in the areas of admiralty and foreign relations law.

Admiralty is in many ways the quintessential arena of federal common law authority: it is the land that *Erie* forgot.¹⁵⁸ Whereas *Erie* took the general common law regime of *Swift* and ceded the vast bulk of it to state law, *Erie*’s maritime counterpart, *Southern Pacific Co. v. Jensen*,¹⁵⁹ had taken the opposite course two decades earlier, purporting to federalize the general corpus of the law of the sea and render it supreme over contrary state law.¹⁶⁰ But whereas nonspecialists tend to assume a placid regime of uniform federal common law rules in admiralty,¹⁶¹ in reality the waters have been considerably more troubled.¹⁶²

155 See *Robertson*, 436 U.S. at 594 (acknowledging this possibility even in suits governed by § 1988).

156 See Hill, *supra* note 8, at 1068–70.

157 *D’Oench, Duhme & Co.*, 315 U.S. at 472.

158 See, e.g., Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 718 (1963) (“From the beginning admiralty judges have retained the inventiveness and initiative characteristic of common law courts in private law areas.”).

159 244 U.S. 205 (1917).

160 See *id.* at 214–15. Federal admiralty judges were so protective of their common law prerogatives that they even struck down attempts by Congress to delegate authority to the states to legislate in the maritime field. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164–65 (1920). Although never explicitly overruled, these cases are of highly questionable authority today, and their main importance is to demonstrate just how far out of step maritime jurisprudence had gotten with the dominant thinking in federal jurisdiction.

161 See, e.g., Hill, *supra* note 8, at 1034–35; Strauss, *supra* note 91, at 1569, 1579–88.

162 It is a characteristic feature of admiralty jurisdiction that bad nautical puns are practically *de rigueur*.

The founding generation reserved an important place in admiralty for state law with the “saving to suitors” clause of the 1789 Judiciary Act,¹⁶³ and courts have struggled mightily to demarcate the line between state and federal authority that *Jensen* required them to draw.¹⁶⁴ David Currie memorably described the results a half-century ago as the “Devil’s Own Mess,”¹⁶⁵ and things have not become much clearer since.¹⁶⁶

I have argued at length elsewhere that the exercise of broad federal common lawmaking powers in admiralty is unconstitutional,¹⁶⁷ and I will merely summarize that argument here. Like the statutory and constitutional grants of diversity jurisdiction, the Admiralty

163 This famous clause, incorporated in the first Judiciary Act’s grant of admiralty jurisdiction, qualifies the exclusive grant of jurisdiction to the federal courts by “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.” Act of Sept. 24, 1789, ch. 20, § 9(a), 1 Stat. 73, 77. The current version makes federal jurisdiction in admiralty exclusive “saving to suitors in all cases all other remedies to which they are otherwise entitled.” 28 U.S.C. § 1333(1) (2000). The saving to suitors clause effectively confers concurrent jurisdiction over maritime disputes on the state courts, except for in rem cases. See *Madruga v. Superior Court*, 346 U.S. 556, 560 (1954); DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 19 (1970).

164 See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (“It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.”); *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961) (Frankfurter, J., dissenting) (“[N]o decision in the Court’s history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than . . . *Jensen*.” (citation omitted)).

165 David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158.

166 See, e.g., David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L.J. 81, 91–96 (1996) (tabulating fifty-three cases decided by the Supreme Court since *Jensen* and concluding that “none of the traditionally posited patterns is actually reflected in the United States Supreme Court’s work”); Michael F. Sturley, *Was Preble Stolz Right?*, 29 J. MAR. L. & COM. 317, 323 (1998) (“This mess is causing real confusion for the lower courts and the bar.”); Young, *Preemption at Sea*, *supra* note 102, at 294–306 (surveying the Court’s tangled jurisprudence under *Jensen*).

167 See Young, *Preemption at Sea*, *supra* note 102, at 325–28; see also Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 485–517 (2004) (considering more recent defenses of federal maritime law); Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349, 1357–65 (1999) (same). I have argued elsewhere that neither § 1333 nor its parallel provision in Article III should be so construed. See Young, *Preemption at Sea*, *supra* note 102. For further discussion, see Clark, *Federal Common Law*, *supra* note 3, at 1341–60 (surveying the historical treatment of maritime law and reaching similar conclusions).

Clause of Article III and its statutory counterparts are mere grants of jurisdiction, without any reference to substantive lawmaking authority. Admiralty is thus presumptively subject to *Erie's* principle that bare grants of jurisdiction do not ordinarily confer lawmaking authority on the federal courts.¹⁶⁸ The contrary approach of *Jensen* is typically justified by recourse to history, but it is relatively clear that maritime law was *general* law, not federal law, in the eighteenth and nineteenth centuries,¹⁶⁹ and I have already noted the general hostility of the founding generation to *federal* forms of common law.¹⁷⁰ Federal common lawmaking in admiralty must thus be based instead on a quite different argument—that is, on strong federal *interests* in guaranteeing uniform rules for maritime commerce.¹⁷¹

It is hard to argue, however, that federal interests provide a *general* warrant for federal common lawmaking in maritime cases.¹⁷² Ordinarily, we expect such interests to be protected by federal legislation, and in fact much of modern admiralty law is governed by federal

168 See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) (“The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law . . .”).

169 See Clark, *Federal Common Law*, *supra* note 3, at 1280–81 (noting that maritime law was a branch of the law of nations); see also GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 1-3, at 6 (2d ed. 1975) (stating that maritime law did not “derive[e] its force from a territorial sovereign”); ROBERTSON, *supra* note 163, at 138 (acknowledging that “the federal maritime law is in some sense a brooding omnipresence over the sea”); Young, *Preemption at Sea*, *supra* note 102, at 318–22 (collecting sources).

170 See Young, *Preemption at Sea*, *supra* note 102, at 322–25; *supra* notes 79–81 and accompanying text.

171 See, e.g., *The Lottawanna*, 88 U.S. 558, 574–75 (1875) (“[T]he Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention [of the Framers] to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.”); see also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 466–67 (1994) (Kennedy, J., dissenting) (making a similar argument); Theodore F. Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 247, 252–57 (1950) (discussing “the evolution of the requirement of a uniform application of the maritime law”); Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 380 (1996) (“Admiralty jurisdiction was given to the federal courts to insure a uniform application of the law to encourage trade and foster the United States maritime industry’s growth.”).

172 Similar arguments were made that federal interests in uniform rules to govern interstate commercial cases justified maintaining the *Swift* regime. See, e.g., *R.R. Co. v. Nat’l Bank*, 102 U.S. 14, 41–42 (1880) (Clifford, J., concurring); FREYER, *supra* note 84, at 82–84. *Erie* rejected these arguments, of course.

statutes rather than judge-made rules.¹⁷³ Some of these statutes contain express *savings* clauses designed to preserve state regulatory authority over certain maritime matters, such as remedies for oil spills.¹⁷⁴ The dormant Commerce Clause, moreover, remains available to cut off state laws that discriminate against out-of-staters or unduly burden maritime commerce.¹⁷⁵ There is simply no good reason not to extend the Court's general skepticism of "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity"¹⁷⁶ to maritime cases.

Notwithstanding the Court's occasional careless suggestion that maritime cases always require application of federal law,¹⁷⁷ in practice the Court has not treated admiralty as an area of automatic constitutional preemption. In a wide variety of maritime contexts, the Court has refused to find state law preempted by federal common lawmaking authority.¹⁷⁸ Justice Stevens has even gone so far as to suggest that "*Jensen* 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."¹⁷⁹ Although the Court's approach to drawing the line between federal and state authority in maritime cases has varied over the years, some of the more coherent decisions look a great deal like *Clearfield's* conflict preemption analysis. In *Kossick v. United Fruit Co.*,¹⁸⁰ for example, Justice Harlan rejected any notion of categorical

173 See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (discussing maritime tort law).

174 See 33 U.S.C. § 2718(a) (2000); see also *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 631 (1st Cir. 1994) (discussing this aspect of the Oil Pollution Act).

175 See Young, *Preemption at Sea*, *supra* note 102, at 351–52.

176 *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994).

177 See, e.g., *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law."). The most recent example is *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), which held that federal law governed the interpretation of a bill of lading in a maritime contract dispute. See *id.* at 27–28. But *Kirby* did not suggest that the application of federal law was automatic, and it acknowledged that state law could sometimes govern aspects of maritime contracts. See *id.* Much less did the Court seek to reconcile the various conflicting positions it has taken on the general issue of maritime preemption since *Jensen*.

178 See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 207–08 (1996); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449–50 (1994); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 329–30 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321 (1955); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123–24 (1924).

179 *Am. Dredging Co.*, 510 U.S. at 458 (Stevens, J., concurring in part and in the judgment) (citation omitted).

180 365 U.S. 731 (1961).

federal preemption, insisting that “the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern.”¹⁸¹ Although *Kossick* is frequently read as employing a balancing test, it does no violence to Harlan’s analysis to see it as a species of conflict preemption, applying a federal rule where state law would disserve particular federal interests, but reserving the possibility of applying state law in other cases. Similarly, Justice Souter has recognized the possibility that “federal admiralty courts sometimes do apply state law” as “a fundamental feature of admiralty law.”¹⁸²

Much the same can be said of foreign relations law—supposedly another sphere of “constitutional preemption” in which federal common law reigns supreme. Here, there is not even a specific grant of federal subject matter jurisdiction over “foreign affairs cases,” either in Article III or in a federal statute. Most of the foreign-directed heads of jurisdiction are party-based—e.g., citizen vs. foreign-citizen diversity, suits involving ambassadors—and the subject-based grant considered most directly related to foreign affairs in the early Republic was admiralty.¹⁸³ Foreign affairs suits might “arise under” federal law as well, if they involve a federal treaty or if Congress exercised its power, under Article I, to “define and punish” offenses against the “Law of Nations.”¹⁸⁴ None of this suggests any intent by the founding generation to categorically preempt state authority over cases implicating foreign affairs or to grant a broad federal common lawmaking authority to the federal courts.

Absent a delegation of lawmaking power, federal courts must rely on a “constitutional preemption” theory to justify federal common law

181 *Id.* at 739. He went on to state that “[s]urely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.” *Id.*

182 *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 (1995).

183 *See, e.g.*, THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (observing that “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”); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 407 (1997) (acknowledging that a provision in early drafts of Article III referring to cases that “arise . . . on the Law of Nations” was later removed and replaced with a set of party-based provisions); Young, *Customary International Law*, *supra* note 21, at 426–32 (considering the structure of the original jurisdictional grants over cases implicating foreign affairs).

184 U.S. CONST. art. I, § 8, cl. 10.

in foreign affairs cases. Although there is some rhetorical support for the notion that federal power over foreign affairs is exclusive¹⁸⁵—even that the States simply “do[] not exist” in foreign affairs¹⁸⁶—this rhetoric simply does not reflect reality. As Peter Spiro has written, “[g]lobalization makes everything international,”¹⁸⁷ so that many if not most things states do—whether it is regulating highway safety,¹⁸⁸ or adjudicating contract or tort suits,¹⁸⁹ or executing their own citizens that commit capital crimes,¹⁹⁰ may well implicate foreign affairs in one way or another. The history of the early Republic, in which state governmental action on everything from debtor relief to criminal justice raised foreign affairs issues, suggests that this is hardly a new phenomenon. But in any event, a growing literature in both law and political science recognizes that globalization makes state participation in foreign affairs inevitable.¹⁹¹ Indeed, the line between “for-

185 See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding that a state law was preempted, even in the absence of congressional action, because it allegedly interfered with the federal government’s ability to conduct foreign affairs); see also Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831 (1998) (“[W]ith respect to international and foreign affairs law, the Constitution envisions no . . . role for state legislative or judicial process.”).

186 *United States v. Belmont*, 301 U.S. 324, 331 (1937).

187 Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567, 578 (2000); see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1673 (1997) (observing that “the changing nature of international regulation and concern means that even domestic law that applies to domestic persons for domestic acts can implicate foreign relations”).

188 See *Cross-Border Trucking Under NAFTA*, PUB. CITIZEN, Sept. 1998, <http://www.publiccitizen.org/trade/nafta/chapter11/articles.cfm?ID=4336>.

189 See *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003) (challenge under the North American Free Trade Agreement to a Mississippi state court’s decision in a tort case); *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2 42 I.L.M. 85 (NAFTA Ch. 11 Arb. Trib. 2002) (challenge under the North American Free Trade Agreement to a Massachusetts state court’s decision in a contracts case).

190 See, e.g., Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1263 (1999) [hereinafter Spiro, *Foreign Relations Federalism*] (noting that “in the face of [Texas’] execution of Karla Faye Tucker, some members of the European parliament called for an investment boycott of states employing the death penalty”).

191 See, e.g., Jong S. Jun & Deil S. Wright, *Globalization and Decentralization: An Overview*, in GLOBALIZATION AND DECENTRALIZATION 1, 3–4 (Jong S. Jun & Deil S. Wright eds., 1996) (“When a country’s political, economic, and developmental activities become globalized, the national government may no longer be the dominant entity; transnational cooperations emerge at all levels of government (national and subnational) and among all types of organizations (public organizations, multi-national corporations, and nongovernmental organizations). . . . Global changes occurring today are creating new, complex, and decentralized systems of networks that are radically different from the old centralized systems of governance which controlled the

eign” and “domestic” affairs is becoming so difficult to draw that it can hardly serve as a workable boundary for a general federal common lawmaking power.¹⁹²

Not surprisingly, the leading cases about federal common lawmaking in foreign affairs are considerably more nuanced. The key case is *Banco Nacional de Cuba v. Sabbatino*,¹⁹³ which fashioned a federal common law “act of state” doctrine that “precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.”¹⁹⁴ Although *Sabbatino* was a diversity case, and the state of New York had its own act of state doctrine that largely dovetailed with the federal rule, Justice Harlan felt “constrained to make it clear” that the issue “must be treated exclusively as an aspect of federal law.”¹⁹⁵ But the Court’s rationale for fashioning a rule was closely tied to the particular separation of powers concerns implicated by judicial review of foreign acts of state;¹⁹⁶ moreover, the act of state doctrine is itself a doctrine of judicial *restraint*, which precludes the courts from exercising power rather than deferring to the political branches.¹⁹⁷ It is thus

processes of international activities and decision making.”); *see also* Goldsmith, *supra* note 187, at 1671, 1670–80 (discussing the interdependency among nations that has resulted from “the increasing integration of the international economy, changes in transportation and communications technology, and the growth of international law and institutions”); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 476–99 (2004) (contrasting the nationalist view with “the system of state control over international law compliance”); Spiro, *Foreign Relations Federalism*, *supra* note 190, at 1259–70 (arguing for the abandonment of the rule of federal exclusivity); Young, *Dual Federalism*, *supra* note 112, 179–85 (listing aspects of strain resulting from trying to distinguish domestic affairs from foreign affairs).

192 *See, e.g.*, HENKIN, *supra* note 21, at 6 (admitting that it is “hardly obvious” that “‘foreign affairs’ can be defined, isolated, distinguished”); Young, *Customary International Law*, *supra* note 21, at 415–23.

193 376 U.S. 398 (1964).

194 *Id.* at 401.

195 *Id.* at 425. Because Justice Harlan conceded that “[w]e could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation,” *id.* at 424, and that “our conclusions might well be the same whether we dealt with this problem as one of state law or federal law,” *id.* at 425 (citations omitted), the Court’s holding is plainly dicta. But the Court has consistently relied on it in subsequent cases, so that it is probably too late in the day to revisit the matter.

196 *See id.* at 423.

197 *See* Young, *Customary International Law*, *supra* note 21, at 441. In this respect, the act of state doctrine is similar to the prudential rules of standing, which are also creatures of federal common law. *See* *Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing prudential standing rules).

hard to read *Sabbatino* as recognizing categorical federal common law-making power based on some sort of “constitutional preemption.” Rather, its holding is much more consistent with a nuanced, conflicts-based analysis recognizing that, on the particular question of judicial review of foreign acts of state, federal interests did require a uniform federal rule of deference.¹⁹⁸

I do not wish to gloss over the fact that my claims about federal common law in admiralty and foreign affairs law are both debatable and much debated. Nor is this the place to play those debates out in the rich detail that they deserve. The point is simply to show that even these areas—the heartland of “constitutional preemption” and categorical federal common lawmaking authority—are more readily assimilable to the *Clearfield* model than one might think. Further, I do want to insist that judicial lawmaking power needs a theory, and that a general one derived from principles of conflict preemption under the Supremacy Clause is most likely to hold up. There are too many examples of the persistence of state law, even in admiralty and foreign affairs cases, to support broad notions of “constitutional preemption.” And local theories based on the special history or federal interests inherent in particular areas are problematic on their own merits and produce too many line-drawing problems.

Adopting the perspective advanced here might not radically change the doctrinal landscape. Any number of situations will remain in which persistent conflicts between state law and federal interests would justify durable federal common law rules. My approach would, however, accord federal common law a more modest role in both theory and practice. Most important, it would keep the focus firmly on the laws made by Congress, rather than ascribing legislative authority to courts.

CONCLUSION

Erwin Chemerinsky has observed that “federal common law has developed in an ad hoc fashion in a number of different areas,” with “little attention to developing general principles for when federal common law may or may not be created.”¹⁹⁹ It is time that changed.

198 Cf. G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1115 (1999) (“Today’s judges do not think of themselves as discerning boundaries between the essentialist spheres of federal and state power; most think of themselves as balancing interests, making pragmatic adjustments based on an appreciation of the consequences of extending or contracting the scope of federal law where choice of law or federalism issues are at stake.”).

199 CHEMERINSKY, *supra* note 36, § 6.1, at 368.

Brad Clark has taught us that the procedures by which federal law is made are not simply a question of separation of powers, but rather an integral portion of the system by which the federal balance between states and nation is maintained. Disciplining federal common law-making by restricting it to the scope of its preemptive rationale would be an important step toward repairing these procedural safeguards of our federalism.