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# Trapped in the Amber

## STATE COMMON LAW, EMPLOYEE RIGHTS, AND FEDERAL ENCLAVES

*Chad DeVeaux*<sup>†</sup>

*“Have you ever seen bugs trapped in amber? . . . Well, here we are . . . trapped in the amber of this moment. There is no why.”*<sup>1</sup>

### INTRODUCTION

“The common law grows like a tree,”<sup>2</sup> periodically sprouting new branches, shedding dead limbs. Stagnation is antithetical to this concept. “[T]he continued vitality of the common law . . . depends upon its ability to reflect contemporary community values and ethics.”<sup>3</sup> As Oliver Wendell Holmes Jr. observed,

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>4</sup>

Led by luminaries like Justice Holmes, Karl Llewellyn, and Benjamin Cardozo, the twentieth century witnessed dramatic advances in private-law jurisprudence: the virtual demise of the centuries-old doctrines of caveat emptor,<sup>5</sup>

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<sup>1</sup> KURT VONNEGUT, *SLAUGHTERHOUSE-FIVE* 76-77 (1969) (emphasis omitted).

<sup>2</sup> Professor Lewis Sargentich invoked this metaphor during his Jurisprudence class at Harvard Law School in 2007.

<sup>3</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (quoting *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943, 946 (1960)).

<sup>4</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>5</sup> Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 580-82 (1988).

contributory negligence,<sup>6</sup> and the tort of alienation of affections;<sup>7</sup> the recognition of an implied warranty of habitability for residential dwellings;<sup>8</sup> and the legislative enactment of the Uniform Commercial Code (UCC).<sup>9</sup>

Yet in 2012, more than a million Americans<sup>10</sup>—probably several million<sup>11</sup>—live and work in places governed by long-discarded nineteenth-century precepts, jurisprudential purgatories where the revenants of long-dead legal doctrines stalk the living.

We call these places federal enclaves—military bases, federal office buildings and residential complexes, post offices, and national parks.<sup>12</sup> Their existence stems from the Constitution’s so-called “Enclave Clause,” Article I, Section 8, Clause 17. This provision empowers Congress to

exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .<sup>13</sup>

With the surrounding state’s consent, Congress may establish a federal enclave for any “legitimate governmental

<sup>6</sup> Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 877 (2004).

<sup>7</sup> Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 774 (2001).

<sup>8</sup> CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 499 (6th ed. 2007).

<sup>9</sup> Robert L. Masterson, *Converting Obsolete Musical Media to Current Formats: A Copyright Infringement Defense Arising from the Right to Repair and Implied Warranty of Fitness*, 82 TEMP. L. REV. 281, 298 (2009) (noting that Article 2 of the UCC has been adopted by the District of Columbia, the U.S. Virgin Islands, and every state except Louisiana).

<sup>10</sup> *Adams v. Clinton*, No. 1:98CV01665, 1998 U.S. Dist. LEXIS 22848, at \*13 (D.D.C. June 30, 1998).

<sup>11</sup> See Lawrence H. Mirel, *Restoration Project: Give D.C. the Vote It Once Had*, WASH. POST, Mar. 21, 1999, at B01 (“Millions of people live in so-called federal enclaves, those territories that have been purchased by, or ceded to, the federal government for use as military bases, national parks and other federal facilities.”); Gary Thompson & Lois G. Williams, *If We Can’t Vote for Them, Why Can They Tax Us?*, WASH. POST, Apr. 30, 2000, at B02 (noting that “the millions of federal enclave residents enjoy congressional representation—by voting either in their home state or the state where the enclave is located”).

<sup>12</sup> See Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. ENVTL. L. & POL’Y 145, 152 (1982) (discussing different types of federal enclaves).

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 17.

purpose.”<sup>14</sup> When an enclave is created, “the jurisdiction theretofore residing in the State passes . . . to the United States.”<sup>15</sup> State regulatory authority over the ceded property ceases and the federal authority becomes “exclusive.”<sup>16</sup> This “grant of ‘exclusive’ legislative power to Congress . . . by its own weight, bars state regulation without specific congressional action.”<sup>17</sup> While the land remains legally part of the state in which it sits<sup>18</sup> and enclave citizens retain the right to vote in state elections,<sup>19</sup> from a regulatory standpoint enclaves “are to [the surrounding state] as the territory of one of her sister states or a foreign land.”<sup>20</sup>

Enclave status extinguishes state regulatory authority, but “[t]he Constitution does not command that every vestige of the laws of the [state] must vanish.”<sup>21</sup> In order to ensure “that no area will be left without a developed legal system,” state laws “existing at the time of the [state’s] surrender of sovereignty”<sup>22</sup> continue in force as federal laws indefinitely until “abrogated” by Congress.<sup>23</sup> Such preexisting state laws “lose their character as law of the state and become laws of the Union.”<sup>24</sup> But postcession changes in state law “are not a part of the body of laws” because “[c]ongressional action is necessary to keep [the enclave’s law] current.”<sup>25</sup> The lower federal courts have uniformly held that this principle also applies to state common-law rules in effect at the time of cession.<sup>26</sup>

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<sup>14</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 542 n.11 (1976) (citing *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528-30 (1938)).

<sup>15</sup> *Surplus Trading Co. v. Cook*, 281 U.S. 647, 657 (1930).

<sup>16</sup> *United States v. State Tax Comm’n*, 412 U.S. 363, 370 (1973).

<sup>17</sup> *Id.* (quoting *Paul v. United States*, 371 U.S. 245, 263 (1963)).

<sup>18</sup> *Howard v. Comm’rs of Sinking Fund of Louisville*, 344 U.S. 624, 626 (1953).

<sup>19</sup> *Evans v. Cornman*, 398 U.S. 419, 425-26 (1970).

<sup>20</sup> *State Tax Comm’n*, 412 U.S. at 378 (internal quotation marks omitted).

<sup>21</sup> *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99 (1940).

<sup>22</sup> *Id.* at 99.

<sup>23</sup> *Id.* at 99-100.

<sup>24</sup> *Bd. of Supervisors v. United States*, 408 F. Supp. 556, 563-64 (E.D. Va. 1976) (quoting *Stokes v. Adair*, 265 F.2d 662, 665 (4th Cir. 1959)); accord *Sadrakula*, 309 U.S. at 100.

<sup>25</sup> *Sadrakula*, 309 U.S. at 99.

<sup>26</sup> *E.g.*, *Cooper v. S. Cal. Edison Co.*, 170 F. App’x 496, 497-98 (9th Cir. 2006) (holding that common law action for wrongful termination of whistleblower and common law tort of intentional infliction of emotional distress not cognizable on federal enclave established before state supreme court recognized cause of action); *Stuckstede v. NJVC LLC*, No. 4:09CV0663 JCH, 2010 WL 234953, at \*1 (E.D. Mo. Jan. 15, 2010) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); *Bussey v. Edison Int’l, Inc.*, No. CV 08-0158 AHM (RCx), 2009 U.S. Dist. LEXIS 14057, at \*9-10 (C.D. Cal. Feb. 23, 2009) (same); *McMullen v. S. Cal. Edison*, No. EDCV 08-957-VAP (PJWx), 2008 WL 4948664, at \*7-8 (C.D. Cal. Nov. 17, 2008)

To date, Congress has created more than five thousand federal enclaves.<sup>27</sup> Collectively, these enclaves encompass “[r]oughly *thirty percent of land in the United States*”—more than 659 million acres.<sup>28</sup> Over forty are larger than Washington, D.C.<sup>29</sup> Congress created the vast majority of these enclaves between 1840 and 1940.<sup>30</sup> Few have been created since the end of World War II.<sup>31</sup> Absent congressional action, state laws effective at the moment the federal government accepted jurisdiction over these lands remain in force, frozen in time, like bugs trapped in amber.

Congress has kept criminal law current by enacting the Assimilative Crimes Act (ACA), which “makes applicable on federal enclaves . . . criminal laws of the State in which the enclave is located.”<sup>32</sup> Whenever the surrounding state alters its criminal law, the ACA incorporates the modification by

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(same); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1149 (S.D. Cal. 2007) (holding that common law tort of intentional infliction of emotional distress not cognizable on federal enclave established before state supreme court recognized cause of action); *Sundaram v. Brookhaven Nat'l Labs.*, 424 F. Supp. 2d 545, 570 (E.D.N.Y. 2006) (same); *Celli v. Shoell*, 995 F. Supp. 1337, 1344 (D. Utah 1998) (same); *Snow v. Bechtel Constr. Inc.*, 647 F. Supp. 1514, 1521 (C.D. Cal. 1986) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 425 F. Supp. 81, 88 (D. Conn. 1977) (finding that pre-cession state common law governing personal-injury torts no longer applied within federal enclave because Congress enacted statute abrogating application of pre-cession personal-injury torts and applying modern state common law to enclave-based personal-injury and wrongful-death actions), *overruled on other grounds by* *Vasina v. Grumman Corp.*, 644 F.2d 112, 117-18 (2d Cir. 1981); *Orlovetz v. Day & Zimmerman, Inc.*, 848 P.2d 463, 466-67 (Kan. Ct. App. 1993) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); *Buttery v. Robbins*, 14 S.E.2d 544, 548 (Va. 1941) (citing *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929), for the proposition that state common law rules in effect at time of cession remain in force on an enclave until abrogated by Congress); *Norfolk & P.B.L.R. Co. v. Parker*, 147 S.E. 461, 463 (Va. 1929) (holding that state common law rules in effect at time of cession remain in force on an enclave until abrogated by Congress), *superseded by statute*, VA. CODE ANN. § 8.01-34 (1950), *as recognized in* *Hudgins v. Jones*, 138 S.E.2d 16, 22 (Va. 1964).

<sup>27</sup> *Adams v. Clinton*, No. 1:98CV01665, 1998 U.S. Dist. LEXIS 22848, at \*13 (D.D.C. June 30, 1998).

<sup>28</sup> Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 362 (2008) (emphasis added).

<sup>29</sup> Carl Strass, *Federal Enclaves—Through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754, 755 (1964).

<sup>30</sup> Congress amended the United States Code in 1940 to stop the flood of enclave creation “end[ing] a period of 100 years during which the Federal Government, with relatively minor exceptions, acquired legislative jurisdiction over substantially all of its land acquisitions within the States.” Wilkinson, *supra* note 12, at 152 n.21 (quoting U.S. DEP’T OF JUSTICE, FEDERAL LEGISLATIVE JURISDICTION 49-50 (1969)).

<sup>31</sup> *Id.*

<sup>32</sup> *Lewis v. United States*, 523 U.S. 155, 158 (1998).

reference into the federalized state law governing the enclave.<sup>33</sup> Congress has similarly incorporated contemporary state wrongful-death,<sup>34</sup> personal-injury,<sup>35</sup> and workers' compensation statutes<sup>36</sup> into enclave law. But Congress has otherwise failed to "keep . . . current"<sup>37</sup> the body of private law governing enclaves.<sup>38</sup> With respect to legal areas neglected by Congress, federal enclaves have devolved into jurisprudential Jurassic Parks, "sanctuar[ies] for the obsolete restrictions of the common law."<sup>39</sup>

One such arena is labor law. More than a million people are likely employed on federal enclaves.<sup>40</sup> Almost every state endows employees with greater rights and remedies than federal law requires.<sup>41</sup> Such state-enacted protections include:

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<sup>33</sup> United States v. Sharpnack, 355 U.S. 286, 292 (1958).

<sup>34</sup> 16 U.S.C. § 457 (2006).

<sup>35</sup> *Id.*

<sup>36</sup> 40 U.S.C. § 3172 (2006).

<sup>37</sup> James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940).

<sup>38</sup> See Stephen E. Castlen & Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 124 (1997) ("Congress . . . has not passed legislation for enclaves relative to contracts, sales, agency, probate, guardianship, family relations, and torts not involving death or personal injury.").

<sup>39</sup> Capetola v. Barclay-White Co., 48 F. Supp. 797, 800 (E.D. Pa. 1943).

<sup>40</sup> No official statistics are available concerning the number of individuals employed on federal enclaves. I base my assertion that the number likely exceeds one million upon several facts. First, nearly thirty percent of the United States falls within the boundaries of a federal enclave. Turley, *supra* note 28, at 362. Second, more than a million citizens live on enclaves. Adams v. Clinton, No. 1:98CV01665, 1998 U.S. Dist. LEXIS 22848, at \*13 (D.D.C. June 30, 1998). Indeed, several million people likely reside on federal enclaves. Mirel, *supra* note 11, at B01; Thompson & Williams, *supra* note 11, at B02. Finally, the sheer number of decisions concerning suits by federal enclave employees suggests that the number of individuals employed in such places is very large. *E.g.*, Cooper v. S. Cal. Edison Co., 170 F. App'x 496, 497-98 (9th Cir. 2006); Manning v. Gold Belt Falcon, LLC, 681 F. Supp. 2d 574, 576 (D.N.J. 2010); Klausner v. Lucas Film Entm't Co., No. 09-03502 CW, 2010 WL 1038228, at \*4 (N.D. Cal. Mar. 19, 2010); Stuckstede v. NJVC LLC, No. 4:09CV0663 JCH, 2010 WL 234953, at \*1 (E.D. Mo. Jan. 15, 2010); Rosseter v. Indus. Light & Magic, No. C 08-04545 WHA, 2009 WL 210452, at \*2 (N.D. Cal. Jan. 27, 2009); McMullen v. S. Cal. Edison, No. EDCV 08-957-VAP (PJWx), 2008 WL 4948664, at \*7-8 (C.D. Cal. Nov. 17, 2008); Mersnick v. USProtect Corp., No. C-06-03993 RMW, 2007 WL 2669816, at \*2 (N.D. Cal. Sept. 7, 2007); Janulewicz v. Bechtel Corp., No. 06-CV-1413-H (WMC), 2007 WL 2462110, at \*3-4 (S.D. Cal. Aug. 27, 2007); Sundaram v. Brookhaven Nat'l Lab., 424 F. Supp. 2d 545, 570 (E.D.N.Y. 2006); Hutchinson v. Andrulis Corp., No. 5:03CV1-MCR/WCS, 2004 WL 691790, at \*1-2 (N.D. Fla. Mar. 19, 2004); Kelly v. Lockheed Martin Servs. Grp., 25 F. Supp. 2d 1, 5 (D.P.R. 1998); George v. UXB Int'l, Inc., No. C-95-20048-JW, 1996 WL 241624, at \*2 (N.D. Cal. May 3, 1996); Miller v. Wackenhut Serv., Inc., 808 F. Supp. 697, 699-700 (W.D. Mo. 1992); Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1521 (C.D. Cal. 1986); Lockhart v. MVM, Inc., 97 Cal. Rptr. 3d 206, 212-13 (Ct. App. 2009); Orlovetz v. Day & Zimmerman, Inc., 848 P.2d 463, 466-67 (Kan. Ct. App. 1993); Dep't of Labor & Indus. v. Dirt & Aggregate, Inc., 837 P.2d 1018, 1021-22 (Wash. 1992).

<sup>41</sup> Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 503 (2006).

- the right to higher minimum wages than those guaranteed by federal law,<sup>42</sup>
- the right to receive overtime under circumstances not required by federal law,<sup>43</sup>
- the right to receive benefits for dependents and domestic partners not provided by federal law,<sup>44</sup>
- greater rights to medical leave to care for ailing family members than those provided by federal law,<sup>45</sup>
- protections against discrimination not provided by federal law,<sup>46</sup>
- more stringent workplace safety standards than federal law requires,<sup>47</sup> and
- common law causes of action against employers for the termination of at-will employees for reasons or under circumstances that violate public policy,<sup>48</sup> including the termination of whistleblowers.<sup>49</sup>

Because nineteenth- and early twentieth-century precepts govern most aspects of enclave private law, civilians employed on federal enclaves typically enjoy none of these rights.<sup>50</sup>

Modern state private law should not necessarily extend to government employees or military personnel acting in their official capacities within an enclave. Such extension of state law might “frustrate specific [federal] objectives” for the enclave.<sup>51</sup> But no compelling reason exists to deny civilians—and government and military officials acting in their private capacities—the application of modern private law. Today, private corporations unaffiliated with the military derive millions of dollars in revenue from transactions conducted within federal enclaves.<sup>52</sup> A teenager employed at a fast-food restaurant within an enclave ought to be entitled to the same wage-and-hour and workplace-safety laws as an employee who works just outside the boundaries of the enclave. Under the current law, he is not. An army servicewoman who purchases a bicycle for her child from an enclave retailer ought to enjoy the

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<sup>42</sup> See *infra* note 294 and accompanying text.

<sup>43</sup> See *infra* note 299 and accompanying text.

<sup>44</sup> See *infra* note 296 and accompanying text.

<sup>45</sup> See *infra* note 295 and accompanying text.

<sup>46</sup> See *infra* note 300 and accompanying text.

<sup>47</sup> See *infra* note 302 and accompanying text.

<sup>48</sup> See *infra* note 313 and accompanying text.

<sup>49</sup> See *infra* note 320 and accompanying text.

<sup>50</sup> See *infra* notes 303-25 and accompanying text.

<sup>51</sup> *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

<sup>52</sup> See *infra* Parts V & VI.

implied warranties imposed by the UCC. Because most enclaves predate the adoption of the UCC, such sales are virtually always governed by the outmoded doctrine of caveat emptor.<sup>53</sup>

I am personally acquainted with the eccentricities of federal-enclave law. As a young attorney, I represented a pro bono client facing eviction from a residential apartment in the Presidio of San Francisco, a federal enclave administered by the National Parks Service.<sup>54</sup> I removed the case to federal court on the basis of federal-question jurisdiction because the law governing his suit was California's 1872 unlawful-detainer statute, which lived on as "federalized" state law.<sup>55</sup> The Presidio is a bustling commercial center in the heart of San Francisco. Millions of dollars of commercial transactions take place on the Presidio each year.<sup>56</sup> Yet nineteenth-century private law governs most conduct there. As then-Congressman James Buchanan observed in 1823, federal enclaves represent a "palpable defect in our system" because "a great variety of actions, to which a high degree of moral guilt is attached, and which are punished . . . at the common law . . . by every State . . . may be committed with impunity [within enclaves]."<sup>57</sup> So it is with the Presidio today.<sup>58</sup>

The premise that when jurisdiction is transferred from one government to another existing laws remain in force until abrogated by the new sovereign is derived from international

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<sup>53</sup> Most federal enclaves were established between 1840 and 1940. Wilkinson, *supra* note 12, at 152 n.21. Most states enacted the Uniform Commercial Code during the 1960s. See Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 101 (2004).

<sup>54</sup> See *Swords to Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1032 (N.D. Cal. 2005).

<sup>55</sup> *Id.* at 1037. As "federalized" law, the "assimilated state [unlawful detainer] law [wa]s distinctly federal in nature," thus "its application establishe[d] the basis for federal question jurisdiction." *Id.* at 1038. My client resided in federal housing. *Id.* at 1038 n.7. I removed the case to federal court because I planned to challenge his eviction on due-process grounds and I preferred to make this argument before a federal forum. This strategy proved successful. See *Swords to Plowshares v. Kemp*, No. C05-01661MJJ, 2005 WL 3882063, at \*1-2 (N.D. Cal. Oct. 18, 2005). While my client resided in federally subsidized housing, notably, the majority of housing units on the Presidio are not subsidized and operate for profit. Dan Levy, *A Green Belt in the Black: Presidio as National Park Achieves Self-Sustaining Goal 8 Years Early*, S.F. CHRON., June 19, 2005, at A-1.

<sup>56</sup> Levy, *supra* note 55, at A-1.

<sup>57</sup> *Lewis v. United States*, 523 U.S. 155, 160 (1998) (quoting 40 ANNALS OF CONG. 930 (1823)).

<sup>58</sup> The state of the law in the Presidio is reminiscent of the phenomenon astronomers refer to as a *singularity*—the center of a black hole where the past and present collide rendering invalid the ordinary laws of physics. Marcus Chown, *Dark Matter Rockets and Black Hole Starships*, NEW SCIENTIST, Nov. 28, 2009, at 34, 36-37.



law.<sup>59</sup> The principle “assures that no area however small will be left without a developed legal system for private rights.”<sup>60</sup> But these assimilated laws are not meant to live on into perpetuity. They are intended to serve only as a jurisprudential backstop to prevent anarchy during the transition period.<sup>61</sup> Upon accepting jurisdiction, the new sovereign assumes the responsibility to actually govern the territory.<sup>62</sup> In common-law countries, the new sovereign’s courts likewise assume the responsibility to promulgate common-law rules for the territory.<sup>63</sup> I posit that enclave common law should not remain forever frozen in time at the moment of cession. While state court common-lawmaking jurisdiction is extinguished, the responsibility to maintain enclave private law should pass from the state to the federal courts and become a matter of *federal* common law.

Congress and the federal courts share the blame for the nonsensical state of enclave law. Both have wholly abdicated their respective responsibilities. Congress has failed to enact private-law legislation for enclaves. More critically, the federal courts have refused to assume responsibility for enclave common-law development.

This article argues that as federal instrumentalities, enclaves should be subject to federal common law. Moreover, federal courts should use their discretion to borrow<sup>64</sup> the common law of the surrounding state, so long as doing so does not “frustrate specific [federal] objectives” for the particular enclave.<sup>65</sup> Because many aspects of state labor law, like wage-and-hour provisions, cannot be enacted through the common-lawmaking process, Congress should enact a statute, similar to the ACA, making state labor laws applicable to civilians employed within federal enclaves.

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<sup>59</sup> See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (holding that Spanish private law governed Florida territory until abrogated by Congress).

<sup>60</sup> *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940) (citing *Chi., Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 542 (1885)).

<sup>61</sup> See *Bd. of Cnty. Comm’rs v. Donoho*, 356 P.2d 267, 271 (Colo. 1960) (asserting that adoption of preexisting state laws was intended to temporarily “fill the vacuum which would otherwise exist” in enclave private law).

<sup>62</sup> See *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 253-54 (1819) (ruling that acquisition of possession and control of territory endows the sovereign with exclusive prerogative to govern that territory).

<sup>63</sup> See Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 265-66 (1963) (arguing that courts historically assume responsibility for private-law development subject to sporadic legislative involvement).

<sup>64</sup> *California ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 283 (1982); accord *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979).

<sup>65</sup> *Kimbell Foods*, 440 U.S. at 728.

Part I of this article explores the origin and development of the federal-enclave doctrine from its genesis, as a rule of international law adopted by the Marshall Court in 1828,<sup>66</sup> to the Court's most recent reaffirmation of the principle in 1973.<sup>67</sup>

Part II addresses Congress's authority to assimilate contemporary state law, making such law applicable within federal enclaves. In particular, this part examines federal statutes making modern state criminal codes, workers' compensation laws, and wrongful-death acts applicable in federal enclaves.

Part III discusses limitations upon the authority ceded by the states to the federal government. This part examines the right of states to reserve limited legislative authority as a condition of cession. In addition, this part addresses the Supreme Court's somewhat paradoxical assertion that an enclave is "to [the surrounding state] as the territory of one of her sister states or a foreign land,"<sup>68</sup> yet nonetheless "d[oes] not cease to be a part of [the surrounding state]."<sup>69</sup> This part also addresses the right of enclave residents to vote in state elections.

Part IV addresses the inapplicability of modern state choice-of-law rules in litigation arising on federal enclaves. Today, most states employ interest-balancing tests when deciding which jurisdiction's law to apply in litigation involving contact with multiple states.<sup>70</sup> Because the law applicable to federal enclaves is viewed as federal law—notwithstanding its origin as state law—the Supremacy Clause bars courts from balancing the enclave's interests against those of surrounding states.<sup>71</sup> The Supremacy Clause dictates that the enclave's federalized state law must be applied when the pertinent events giving rise to a suit occur on a federal enclave even if the surrounding state possesses materially greater interests in the litigation's outcome.

Part V explores some of the federal-enclave doctrine's perverse effects. Because the doctrine freezes in time existing state private law—both statutory and common law—long-dead canons such as the tort of alienation of affections and the doctrine of caveat emptor live on in most enclaves as

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<sup>66</sup> See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

<sup>67</sup> *United States v. State Tax Comm'n*, 412 U.S. 363, 378 (1973) (reaffirming doctrine of exclusive federal jurisdiction over enclaves).

<sup>68</sup> *Id.* (internal quotation marks omitted).

<sup>69</sup> *Howard v. Comm'rs of Sinking Fund of Louisville*, 344 U.S. 624, 626 (1953).

<sup>70</sup> See *infra* Part IV.

<sup>71</sup> See *infra* Part IV.

jurisprudential zombies.<sup>72</sup> Meanwhile, modern legal innovations like comparative fault and the UCC are inapplicable because post-acquisition changes to state law do not apply within enclaves absent congressional action.<sup>73</sup>

Part VI addresses the enclave doctrine's pernicious impact upon labor law. In the latter half of the twentieth century, the vast majority of states amended their labor codes to provide employees greater rights and remedies than those mandated by federal law.<sup>74</sup> Additionally, state courts now offer employees common-law claims for relief not recognized by federal law, particularly the tort of wrongful termination in violation of public policy.<sup>75</sup> States did not recognize these rights and remedies when most federal enclaves were established. Thus, federal courts routinely dismiss such claims when brought by civilian workers employed by private corporations on federal enclaves.<sup>76</sup>

Finally in Part VII, I offer two solutions to the problems posed by the federal-enclave doctrine. First, I argue that the lower federal courts are incorrect in their conclusion that the federal-enclave doctrine freezes in time state common-law rules. I assert that as federal instrumentalities, enclaves fall within the ambit of federal common law. Since no need exists for enclaves to be governed by "a nationally uniform body of [common] law,"<sup>77</sup> federal courts should, for each enclave, use their discretion to borrow<sup>78</sup> the common law of the surrounding state.<sup>79</sup> Second, I propose that Congress enact an Assimilative Labor Act—in the spirit of the ACA—affording the rights and remedies provided by contemporary state labor statutes to nongovernmental workers employed within federal enclaves.

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<sup>72</sup> See *infra* Part V.

<sup>73</sup> See *infra* Part V.

<sup>74</sup> See *infra* Part VI.

<sup>75</sup> See *infra* Part VI.

<sup>76</sup> See *infra* Part VI.

<sup>77</sup> *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

<sup>78</sup> *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982); accord *Kimbell Foods*, 440 U.S. at 727-28.

<sup>79</sup> *Kimbell Foods*, 440 U.S. at 728.

I. STATE LAWS IN EFFECT AT THE TIME OF FEDERAL ACQUISITION REMAIN IN FORCE UNTIL CHANGED BY CONGRESS

A. *The Ballad of McGlinn's Cow*

The genesis of the federal-enclave doctrine lies in the Supreme Court's 1885 opinion *Chicago, Rock Island & Pacific Railway Co. v. McGlinn*.<sup>80</sup> The decision addresses the application of a Kansas statute to the Fort Leavenworth Military Reservation, a federal enclave.<sup>81</sup>

On February 22, 1875, Kansas's legislature passed an act ceding jurisdiction over Fort Leavenworth to the federal government.<sup>82</sup> The defendant, Chicago, Rock Island & Pacific Railway, operated a railroad that passed through the reservation.<sup>83</sup> In February 1881, a cow owned by the plaintiff, McGlinn, wandered onto the reservation and was struck by one of the defendant's trains.<sup>84</sup> McGlinn brought suit under a Kansas statute enacted in 1874, which rendered railroads strictly liable for collisions with livestock if the railroad failed to enclose its tracks "with a good and lawful fence to prevent the animal from being on the road."<sup>85</sup> The defendant railroad failed to fence its tracks on the reservation.<sup>86</sup> A jury awarded McGlinn forty-five dollars in damages, twenty-five dollars for the value of the cow, and twenty dollars in attorneys' fees.<sup>87</sup> The railroad appealed the verdict, asserting that the Kansas statute had no application because the reservation was a federal enclave. The case ultimately found its way to the Supreme Court's docket in 1885.

The *McGlinn* Court concluded that the U.S. government exercised exclusive dominion over Fort Leavenworth because it was a federal enclave.<sup>88</sup> Thus, upon ceding jurisdiction to the federal government, Kansas forfeited all regulatory authority over the reservation.<sup>89</sup> But this did not end the inquiry.

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<sup>80</sup> 114 U.S. 542 (1885).

<sup>81</sup> *Id.* at 543-44.

<sup>82</sup> *Id.* at 544.

<sup>83</sup> *Id.* at 543.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 544.

<sup>86</sup> *Id.* at 543-44.

<sup>87</sup> *Id.* at 544.

<sup>88</sup> *Id.* at 545-46.

<sup>89</sup> *Id.*

The Court applied a rule of international law it had utilized fifty-seven years earlier in *American Insurance Co. v. Canter*.<sup>90</sup> *Canter* recognizes “that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the . . . laws which are intended for the protection of private rights continue in force until . . . by direct action of the new government, they are altered or repealed.”<sup>91</sup> “This assures that no area however small will be left without a developed legal system for private rights.”<sup>92</sup>

The *Canter* Court concluded that property-rights disputes in the newly acquired Florida Territory were governed by Spanish laws in effect at the time Spain ceded the territory.<sup>93</sup> The *McGlinn* Court applied this principle to federal enclaves and concluded that state private-law statutes in effect at the time of cession remain in force until altered by Congress.<sup>94</sup> Kansas’s cattle-wounding law predated the federal government’s acquisition of Fort Leavenworth, and Congress had taken no action to abrogate the statute.<sup>95</sup> Thus, the law remained in effect on the enclave as federalized state law, and the trial court properly entered judgment for *McGlinn* pursuant to that law.<sup>96</sup>

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<sup>90</sup> 26 U.S. (1 Pet.) 511 (1828).

<sup>91</sup> *McGlinn*, 114 U.S. at 546-47 (citing *Canter*, 26 U.S. (1 Pet.) at 542).

<sup>92</sup> *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940) (citing *McGlinn*, 114 U.S. at 542).

<sup>93</sup> *Canter*, 26 U.S. (1 Pet.) at 544. Of course, Spanish laws in effect at the time of Florida’s acquisition that conflict with American law—constitutional or statutory—would terminate when the United States assumed jurisdiction. As the *McGlinn* Court noted:

As a matter of course, all laws . . . in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

*McGlinn*, 114 U.S. at 546-47.

<sup>94</sup> *McGlinn*, 114 U.S. at 547.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

*B. While State Laws in Effect at the Moment of Cession Live On as Federalized Law, Post-Acquisition Changes in State Law Have No Effect Within Federal Enclaves*

The *McGlinn* doctrine recognizes that state laws in force at the time of cession that do not conflict with federal law live on as federalized state law until abrogated by Congress.<sup>97</sup> The Supreme Court has repeatedly reaffirmed this principle in the years since it decided *McGlinn*.<sup>98</sup>

*McGlinn*, like *Canter*, embraces the legal fiction that Congress consciously chose to incorporate the territory's existing body of private law into federal law by reference at the moment of acquisition.<sup>99</sup> The doctrine presumes Congress's awareness of laws in effect at the moment of cession.<sup>100</sup> But congressional assent cannot be inferred with respect to changes in the law made after the state cedes regulatory authority to the federal government.<sup>101</sup> "Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current."<sup>102</sup> Accordingly, the body of private law governing an enclave in effect at the moment of cession remains in force—effectively frozen in time—until altered by Congress.

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<sup>97</sup> *Bd. of Supervisors v. United States*, 408 F. Supp. 556, 563-64 (E.D. Va. 1976) (citing *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940)); *accord* *Swords to Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1036-37 (N.D. Cal. 2005). As the Supreme Court later summarized, *McGlinn* stands for the proposition that:

The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights.

*Sadrakula*, 309 U.S. at 99-100 (citing *McGlinn*, 114 U.S. at 542) (footnote omitted).

<sup>98</sup> *E.g.*, *United States v. State Tax Comm'n*, 412 U.S. 363, 369-70 (1973); *Paul v. United States*, 371 U.S. 245, 265 (1963); *Pac. Coast Dairy, Inc. v. Dep't of Agric.*, 318 U.S. 285, 294 (1943); *Sadrakula*, 309 U.S. at 95; *Surplus Trading Co. v. Cook*, 281 U.S. 647, 657 (1930); *McGlinn*, 114 U.S. at 542.

<sup>99</sup> *McGlinn*, 114 U.S. at 546-47 (citing *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828)).

<sup>100</sup> *See Sadrakula*, 309 U.S. at 99-100.

<sup>101</sup> *See id.* at 100.

<sup>102</sup> *Id.*

C. *Lower Federal Courts Have Uniformly Held that the McGlenn Doctrine Applies to State Statutory and Common-Law Rules Alike*

Lower federal courts have uniformly concluded that the *McGlenn* doctrine dictates that “state common law rules in effect at the time of cession,” like state statutes, “become the law of the enclave . . . until displaced by act of Congress.”<sup>103</sup> Courts and commentators frequently attribute this assertion to the Supreme Court’s decision in *Arlington Hotel Co. v. Fant*.<sup>104</sup>

In *Fant*, the Court considered whether to apply an Arkansas statute to a tort action arising in Hot Springs National Park.<sup>105</sup> Arkansas ceded exclusive jurisdiction over the park to the federal government in 1904.<sup>106</sup> At the time of the transfer, Arkansas’s common law subjected innkeepers to strict liability for fire damage to their guests’ personal property.<sup>107</sup> In 1913, Arkansas’s Legislature statutorily repealed the common law strict-liability rule, limiting innkeepers’ liability to cases of negligence.<sup>108</sup>

In 1923, a fire destroyed the Arlington Hotel, which was located in the park.<sup>109</sup> Thereafter, several guests sued the hotel’s owners in Arkansas state court seeking damages for personal property lost in the fire.<sup>110</sup> Arkansas’s Supreme Court concluded that the state’s 1913 statute was inapplicable because it post-dated cession of the park to the federal government.<sup>111</sup> The

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<sup>103</sup> *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 425 F. Supp. 81, 88 (D. Conn. 1977) (finding that pre-cession state common law governing personal-injury torts no longer applied within federal enclave because Congress enacted statute abrogating application of pre-cession personal-injury torts and applying modern state common law to enclave-based personal-injury and wrongful-death actions), *overruled on other grounds by Vasina v. Grumman Corp.*, 644 F.2d 112, 117-18 (2d Cir. 1981).

<sup>104</sup> 278 U.S. 439 (1929). Courts and commentators have cited *Fant* for the proposition that “state common law rules in effect at the time of cession become the law of the enclave until displaced by act of Congress.” *Quadrini*, 425 F. Supp. at 88; *accord* *Buttery v. Robbins*, 14 S.E.2d 544, 548 (Va. 1941) (same); *Norfolk & P.B.L.R. Co. v. Parker*, 147 S.E. 461, 464 (Va. 1929) (same), *superseded by statute*, VA. CODE ANN. § 8.01-34 (1950), *as recognized in* *Hudgins v. Jones*, 138 S.E.2d 16, 22 (Va. 1964); Michael J. Malinowski, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 194 (1990) (citing *Fant* for the proposition that “[s]tate . . . common law changes made subsequent to the transfer . . . have no force within the enclave unless authorized by specific congressional legislation”).

<sup>105</sup> *Fant*, 278 U.S. at 445.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 445-46.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 449.

<sup>110</sup> *Id.* at 445.

<sup>111</sup> *Id.* at 446.

Arkansas court chose to apply the state's former common-law rule, subjecting the innkeeper to strict liability.<sup>112</sup> The United States Supreme Court reviewed the case in 1929.<sup>113</sup>

The *Fant* Court reaffirmed that “only the [state] law in effect at the time of the [enclave’s] transfer of jurisdiction continues in force” and that “future statutes of the state are not part of the [enclave’s] body of laws” because “Congressional action is necessary to keep it current.”<sup>114</sup> Courts have since cited *Fant* for the proposition that “state common law rules in effect at the time of cession . . . become the law of the enclave until displaced by act of Congress.”<sup>115</sup> But this constitutes a fundamental misreading of *Fant*.

*Fant* does not contemplate the status of enclave common law. Rather, the sole question before the Court in *Fant* concerned whether a national park could constitute a federal enclave.<sup>116</sup> The innkeeper asserted that “no jurisdiction was . . . conferred on the United States” because Congress could not create an enclave for such a purpose.<sup>117</sup> The innkeeper defendant relied on the canon *expressio unius est exclusio alterius*, which posits that “one item of [an] associated group or series excludes another left unmentioned.”<sup>118</sup> The defendant argued that by enumerating the purposes for which Congress could establish enclaves—“Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”<sup>119</sup>—the Constitution impliedly prohibits the establishment of enclaves for purposes not enumerated, including national parks.<sup>120</sup> Accordingly, the innkeeper asserted that the Arkansas court erred in refusing to

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<sup>112</sup> *Id.* at 445-46.

<sup>113</sup> *Id.* at 439.

<sup>114</sup> *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940) (citing *Fant*, 278 U.S. at 445-46).

<sup>115</sup> *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 425 F. Supp. 81, 88 (D. Conn. 1977) (finding that pre-cession state common law governing personal-injury torts no longer applied within federal enclave because Congress enacted statute abrogating application of pre-cession personal-injury torts and applying modern state common law to enclave-based personal-injury and wrongful-death actions), *overruled on other grounds by* *Vasina v. Grumman Corp.*, 644 F.2d 112, 117-18 (2d Cir. 1981); *accord* *Buttery v. Robbins*, 14 S.E.2d 544, 548 (Va. 1941); *Norfolk & P.B.L.R. Co. v. Parker*, 147 S.E. 461, 464 (Va. 1929), *superseded by statute*, VA. CODE ANN. § 8.01-34 (1950), *as recognized in* *Hudgins v. Jones*, 138 S.E.2d 16, 22 (Va. 1964); Malinowski, *supra* note 104, at 194.

<sup>116</sup> *Fant*, 278 U.S. at 449.

<sup>117</sup> *Id.*

<sup>118</sup> *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

<sup>119</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>120</sup> *Fant*, 278 U.S. at 449-51.



apply the 1913 state statute because the United States never validly divested Arkansas of jurisdiction over the park.<sup>121</sup> The *Fant* Court unanimously rejected the contention that Congress's authority to establish federal enclaves is limited to the purposes enumerated in the Enclave Clause.<sup>122</sup> The Court did not address the status of preexisting state common law in a federal enclave.

*Fant* predated *Erie Railroad Co. v. Tompkins*<sup>123</sup> by nine years. At the time of the *Fant* decision, the Court still subscribed to the *Swift v. Tyson* doctrine.<sup>124</sup> *Swift* dictated "that federal courts ha[d] the power to use their judgment as to what the rules of common law are."<sup>125</sup> Thus, *Fant* does not support the proposition that federal courts must apply preexisting state common law rules on federal enclaves because, pursuant to the *Swift* doctrine, the *Fant* Court necessarily regarded Arkansas's common law as nonbinding authority regardless of whether the federal government exercised exclusive jurisdiction over Hot Springs National Park.<sup>126</sup> Prior to *Erie*, the Supreme Court viewed common law not as a form of state action, but rather as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."<sup>127</sup> Thus, in the absence of a controlling statute, courts—both state and federal—possessed "the power to use their judgment as to what the rules of common law are."<sup>128</sup> The *Fant* Court did not grant review regarding the appropriate rule of common law, nor did the Court venture an opinion on the matter. The Court merely concluded that "the cession of exclusive jurisdiction" over the park "was valid" and the Arkansas statute "modifying the liability of innkeepers, passed after the cession, did not extend over the ceded land."<sup>129</sup> Accordingly, *Fant* cannot stand for the

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 454-55. The Court unequivocally reaffirmed this position in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), concluding that the United States validly acquired exclusive jurisdiction over Yosemite National Park. *Id.* at 530. Thus, it is now well settled that Congress may establish federal enclaves within States for "any legitimate governmental purpose." *Kleppe v. New Mexico*, 426 U.S. 529, 542 n.11 (1976).

<sup>123</sup> 304 U.S. 64 (1938).

<sup>124</sup> 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. at 79.

<sup>125</sup> *Erie*, 304 U.S. at 79 (explaining the underlying assumption of *Swift*).

<sup>126</sup> *See id.* at 79-80.

<sup>127</sup> *Id.* at 79 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (Holmes, J., dissenting)).

<sup>128</sup> *Id.*

<sup>129</sup> *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 440 (1929) (syllabus); *accord Standard Oil Co. v. California*, 291 U.S. 242, 244 (1934).

proposition that federal courts are bound to apply state common law rules in effect at the time of an enclave's cession.

The lower federal courts' uniform misconstruction of *Fant* has wreaked more havoc than any other aspect of federal-enclave doctrine. Federal acquisition should not freeze enclave common law in time. Rather, the power to promulgate common law for the affected territory must necessarily pass from the state courts to the federal courts as a matter of *federal* common law. While legislatures sometimes intervene to correct perceived deficiencies, responsibility for the vast majority of private-law development rests with the courts in their common-lawmaking function.<sup>130</sup>

*D. Contrary to the Hopeful Claims of Some Commentators, the McGlinn Doctrine Remains in Force*

The Supreme Court added a wrinkle to the *McGlinn* doctrine with its 1963 decision in *Paul v. United States*.<sup>131</sup> *Paul* addresses the applicability of regulations promulgated by California's Department of Food and Agriculture governing the price of milk sold on three military bases within the state.<sup>132</sup> The Court found that the three bases each constituted federal enclaves<sup>133</sup> and that the state agency promulgated the price regulations after California ceded jurisdiction over the bases to the federal government.<sup>134</sup> Based on these facts, the United States asserted that the *McGlinn* doctrine dictated that only the agency's regulations in effect at the time of cession applied to the sale of milk on the three enclaves.<sup>135</sup> The Court rejected this contention.<sup>136</sup>

*Paul* deviates from the previous strict application of the *McGlinn* doctrine by allowing state administrative-agency regulations promulgated after federal acquisition to be applied within a federal enclave.<sup>137</sup> *Paul* holds that such regulations apply on the enclave if the "same basic" state-enabling act<sup>138</sup>

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<sup>130</sup> Edward A. Tomlinson, *Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law*, 58 LA. L. REV. 101, 107 (1997).

<sup>131</sup> 371 U.S. 245 (1963).

<sup>132</sup> *Id.* at 247. The three bases were Travis Air Force Base, Castle Air Force Base, and the Oakland Army Terminal. *Id.*

<sup>133</sup> *Id.* at 263-64.

<sup>134</sup> *Id.* at 268-69.

<sup>135</sup> *Id.* at 265.

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> An enabling act is a "statute conferring powers on a[n] [administrative] agenc[y] to carry out various delegated tasks." BLACK'S LAW DICTIONARY 592 (2d pocket ed. 1996).

authorizing the agency to promulgate the regulations “ha[s] been in effect [prior to the] time[s]” of the federal acquisitions of the property comprising the enclave.<sup>139</sup> The *Paul* Court was likely motivated by the fact that strict application of the *McGlinn* doctrine would lead to a particularly nonsensical result. The regulations at issue imposed “price controls over [the sale of] milk.”<sup>140</sup> The enabling act tasked California’s Department of Food and Agriculture to establish minimum prices sufficient to guarantee milk producers “stability and prosperity”<sup>141</sup> in light of market conditions and rates of inflation.<sup>142</sup> If the price regulations were frozen in time, the government-mandated milk prices applicable when *Paul* was decided in 1963 would have been those in effect when the bases were established in 1942.<sup>143</sup> This would undermine the purpose of the statute—which was incorporated into federal law upon the enclaves’ creation—to guarantee producers “stability and prosperity” as the applicable prices could not be adjusted to account for present market conditions.<sup>144</sup>

Some commentators have argued that *Paul*’s apparent deviation from the strict rule against the application of post-acquisition state law demonstrates a repudiation of *McGlinn*’s doctrine of exclusive federal jurisdiction.<sup>145</sup> The Court’s subsequent decision in *United States v. State Tax Commission of Mississippi*<sup>146</sup>—its most recent federal-enclave opinion—proved this assertion false, reaffirming *McGlinn*. The Court held that the Enclave Clause’s “grant of ‘exclusive’ legislative power to Congress . . . by its own weight, bars state regulation without specific congressional action,”<sup>147</sup> subject only to the proposition that existing “local law[s] not inconsistent with federal policy remain[] in force until altered by national legislation.”<sup>148</sup> State laws “adopted . . . after the transfer of sovereignty” are “without force in [an] enclave.”<sup>149</sup>

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<sup>139</sup> *Paul*, 371 U.S. at 269.

<sup>140</sup> *Id.*

<sup>141</sup> CAL. FOOD & AGRIC. CODE § 735.1(d) (1937).

<sup>142</sup> *Challenge Cream & Butter Ass’n v. Parker*, 142 P.2d 737, 739 (Cal. 1943).

<sup>143</sup> *Paul*, 371 U.S. at 266.

<sup>144</sup> See CAL. FOOD & AGRIC. CODE § 735.1(d).

<sup>145</sup> See, e.g., Richard T. Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 55, 68 (1976).

<sup>146</sup> 412 U.S. 363 (1973).

<sup>147</sup> *Id.* at 370 (quoting *Paul*, 371 U.S. at 263).

<sup>148</sup> *Id.* at 369.

<sup>149</sup> *Id.*

*Tax Commission* demonstrates that *Paul* does not stand for the proposition, advanced by some scholars, that a state can “legislate for [an] enclave, provided that no interference with federal law . . . is involved.”<sup>150</sup> Rather, *Paul* rests on a fiction common in administrative-law decisions: “The rulemaking power granted to an administrative agency charged with the administration of [an enabling act] is not the power to make law” but rather “is ‘the power to adopt regulations to carry into effect the will of [the legislature] as expressed by the statute.’”<sup>151</sup> Since the expression of legislative “will” at issue in *Paul* predated the enclaves’ establishment, that “will” was incorporated into and lived on as federal law. Subsequent administrative regulations “carry[ing] into effect” that legislative “will” applied on the enclaves as federal law because the enabling act manifesting it predated the transfer of sovereignty.<sup>152</sup>

*E. Subsequent Cessions Expanding Existing Federal Enclaves Have Created Jurisprudential “Crazy Quilts,” Where Different Laws Apply in Different Parts of the Same Enclave*

The federal government has compounded the *McGlinn* doctrine’s complexity through piecemeal expansion of federal enclaves over time.<sup>153</sup> Because *McGlinn* incorporates existing state law into federal law at the moment of cession, the applicable private law may vary from one parcel of land to another. These circumstances “require the irrational application of different law to the various components of a single” federal enclave.<sup>154</sup> The private law applicable within a particular enclave may literally differ from one side of a street to the other because the United States acquired jurisdiction over the respective tracts at different times.

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<sup>150</sup> Altieri, *supra* note 145, at 68 (emphasis added).

<sup>151</sup> *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)).

<sup>152</sup> *See Paul*, 371 U.S. at 269.

<sup>153</sup> *Prof'l Helicopter Pilots Ass'n v. Lear Siegler Servs.*, 326 F. Supp. 2d 1305, 1311 n.1 (M.D. Ala. 2004), *aff'd*, 153 F. App'x 630 (11th Cir. 2005); Altieri, *supra* note 145, at 88 (“[M]ost enclave areas are composed of tracts of land acquired at different times.”); *Castlen & Block*, *supra* note 38, at 118 (“It is not unusual for property under federal control, including many military installations, to have been acquired piecemeal over extended periods of time by a variety of methods. . . . [T]he type of existing legislative jurisdiction may vary depending on when and how the specific tract was acquired.”).

<sup>154</sup> *Bd. of Supervisors v. United States*, 408 F. Supp. 556, 564 (E.D. Va. 1976); *accord Prof'l Helicopter Pilots Ass'n*, 326 F. Supp. 2d at 1311 n.1; *Castlen & Block*, *supra* note 38, at 118.

An analogous state of affairs exists in Indian Country. The federal government exercises, with certain exceptions, exclusive jurisdiction over land that is owned by Indian tribes or held in trust by the United States for the benefit of a tribe.<sup>155</sup> But when title to tribal land passes to a non-Indian, federal jurisdiction is terminated and the states exercise primary jurisdiction.<sup>156</sup> The result of this policy is a jurisprudential “crazy quilt”<sup>157</sup> in which “isolated tracts” of property under exclusive federal jurisdiction “may be scattered checkerboard fashion over a territory otherwise under state jurisdiction.”<sup>158</sup> The *McGlinn* doctrine creates the same nonsensical “crazy quilt” within many federal enclaves.<sup>159</sup>

## II. CONGRESS MAY INCORPORATE THE SURROUNDING STATE’S CONTEMPORARY LAW BY REFERENCE, MAKING SUCH LAW APPLICABLE WITHIN ENCLAVES AS FEDERALIZED STATE LAW

While “[t]he grant of exclusive legislative power to Congress over enclaves . . . bars state regulation,” state law may nonetheless apply within an enclave if “Congress consents to [such] state regulation.”<sup>160</sup> Courts generally read congressional consent to state regulation quite narrowly:

[B]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous.<sup>161</sup>

Although consent to state regulation within enclaves has been rare, Congress has exercised its power to incorporate contemporary state law to govern a few well-defined subjects.

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<sup>155</sup> 18 U.S.C. § 1151(c) (2006).

<sup>156</sup> *DeCoteau v. Dist. Cnty. Court*, 420 U.S. 425, 429 n.3 (1975).

<sup>157</sup> *Id.* at 466 (Douglas, J., dissenting).

<sup>158</sup> *Id.* at 429 n.3 (majority opinion).

<sup>159</sup> Altieri, *supra* note 145, at 88 (noting that “most enclave areas are composed of tracts of land acquired at different times”).

<sup>160</sup> *Miller v. Wackenhut Servs., Inc.*, 808 F. Supp. 697, 700 (W.D. Mo. 1992) (citing *Paul v. United States*, 371 U.S. 245, 263 (1963)).

<sup>161</sup> *Id.* (citing *Hancock v. Train*, 426 U.S. 167, 179 (1976)).

A. *The Assimilative Crimes Act*

The First Congress recognized that the absence of state regulation threatened to render enclaves lawless territories.<sup>162</sup> To avert this problem, Congress enacted the Federal Crimes Act in 1790, “defin[ing] a number of federal crimes” prohibited within enclave boundaries.<sup>163</sup> Because the duty to enact comprehensive criminal codes typically rests with the states, Congress’s piecemeal enumeration of offenses proved insufficient.<sup>164</sup> For this reason, in 1825 Congress enacted the first ACA, which “adopt[ed] for each enclave the offenses made punishable by the State in which it was situated.”<sup>165</sup> The ACA evidenced a congressional “policy of general conformity to local [criminal] law.”<sup>166</sup> The Act incorporated state criminal law into the federal law governing federal enclaves.<sup>167</sup> The Act did not delegate any jurisdiction to the states. Instead, it dictated that violations of the surrounding state’s criminal laws constituted violations of federal law triable in federal court.<sup>168</sup>

The 1825 version of the ACA “made no specific reference to new offenses that might be added by the State after the enactment of the . . . Act.”<sup>169</sup> Thus, enclave criminal law—like private law assimilated into federal law at the time of acquisition—became stale over time.

Due to the limitation of the [ACA] of 1825 to state laws in force at the time of its own enactment, the Act gradually lost much of its effectiveness in maintaining current conformity with state criminal laws. This result has been well called one of static conformity. To renew such conformity, Congress . . . enacted comparable Assimilative Crimes Acts in 1866, . . . in 1898, . . . in 1909, . . . in 1933, . . . in 1935, . . . [and] in 1940 . . .<sup>170</sup>

Apparently growing weary of the need to constantly renew the ACA, Congress amended the statute in 1948 to apply to “state laws . . . enacted” both “*before*” and “*after*” the Act so that it “at once reflects every addition, repeal or amendment of a state

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<sup>162</sup> United States v. Sharpnack, 355 U.S. 286, 288 (1958).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 288-89; United States v. Press Publ’g Co., 219 U.S. 1, 12 (1911) (noting that the Federal Crimes Act was insufficient because “[t]he criminal code of the United States is singularly defective and inefficient”).

<sup>165</sup> *Sharpnack*, 355 U.S. at 289.

<sup>166</sup> *Id.*

<sup>167</sup> United States v. Fields, 516 F.3d 923, 931 (10th Cir. 2008).

<sup>168</sup> *Id.*

<sup>169</sup> *Sharpnack*, 355 U.S. at 290.

<sup>170</sup> *Id.* at 291.

[criminal] law.”<sup>171</sup> The 1948 ACA drew the fire of critics questioning Congress’s authority to incorporate future state penal statutes prospectively.<sup>172</sup> The Supreme Court settled this issue ten years later with its decision in *United States v. Sharpnack*.<sup>173</sup>

The *Sharpnack* Court upheld the constitutionality of the ACA. In 1955, the United States indicted Gerald Sharpnack under the ACA for allegedly committing sex crimes within the boundaries of Randolph Air Force Base, a federal enclave in Texas.<sup>174</sup> The government predicated its indictment upon alleged violations of a Texas criminal statute enacted in 1950, two years after the passage of the modern ACA.<sup>175</sup> Sharpnack challenged the indictment, alleging that “Congress may not legislatively assimilate and adopt criminal statutes of a state which are enacted by the state subsequent to the enactment of the [ACA].”<sup>176</sup>

The *Sharpnack* Court began its analysis by noting “[t]here is no doubt that Congress may validly adopt a criminal code for each federal enclave . . . by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated.”<sup>177</sup> From this premise, the Court concluded that the ACA passed constitutional muster: “Having the power to assimilate the state laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress [acted] within its constitutional powers . . .”<sup>178</sup> *Sharpnack* regarded the ACA not as an improper delegation of legislative power to the states, but as “a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government.”<sup>179</sup>

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<sup>171</sup> *Id.* at 292 (emphasis added).

<sup>172</sup> See Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685, 688-89 (1957) (discussing contemporary arguments that the ACA constituted “an unconstitutional delegation of Congress’ legislative power” but ultimately arguing that the statute was constitutional).

<sup>173</sup> 355 U.S. 286 (1958).

<sup>174</sup> *Id.* at 286.

<sup>175</sup> *Id.* at 286-87.

<sup>176</sup> *Id.* at 287.

<sup>177</sup> *Id.* at 293.

<sup>178</sup> *Id.* at 293-94.

<sup>179</sup> *Id.* at 294.

While the ACA's critics persist,<sup>180</sup> the Supreme Court never again questioned Congress's authority to prospectively incorporate future state criminal statutes into the law governing federal enclaves. The Court traditionally scrutinizes federal penal statutes with extra care in light of "the limited constitutional power of Congress in criminal matters."<sup>181</sup> Thus, Congress possesses plenary power to enact non-criminal statutes continually adopting other aspects of state law into the law of federal enclaves.<sup>182</sup>

### B. Other Federal Assimilative Acts

Following in the well-laid path of the ACA, Congress enacted a handful of statutes that continually adopt other aspects of contemporary state law for application within federal enclaves. Federal laws now make state workers' compensation statutes,<sup>183</sup> wrongful-death acts,<sup>184</sup> and personal injury laws<sup>185</sup> applicable within federal enclaves. In addition, in 1947, Congress enacted the Buck Act, which authorizes states to collect income tax from individuals employed on federal enclaves within their borders.<sup>186</sup>

While Congress should be lauded for enacting these statutes, such piecemeal legislation falls far short of adequately governing the nation's enclaves. Congress has failed to implement modern state law in the areas of employment law,<sup>187</sup>

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<sup>180</sup> Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707, 731 (2007); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 249 (1997).

<sup>181</sup> *Bd. of Supervisors v. Stanley*, 105 U.S. 305, 313 (1881).

<sup>182</sup> *Sharpnack*, 355 U.S. at 294.

<sup>183</sup> 40 U.S.C. § 3172 (2006).

<sup>184</sup> 16 U.S.C. § 457 (2006).

<sup>185</sup> *Id.*

<sup>186</sup> 4 U.S.C. § 106 (2006).

<sup>187</sup> *E.g.*, *Cooper v. S. Cal. Edison Co.*, 170 F. App'x 496, 497 (9th Cir. 2006) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); *Manning v. Gold Belt Falcon, LLC*, 681 F. Supp. 2d 574, 576 (D.N.J. 2010) (holding that state wage-and-hour statutes inapplicable on federal enclave); *Klausner v. Lucas Film Entm't Co.*, No. 09-03502 CW, 2010 WL 1038228, at \*4 (N.D. Cal. Mar. 19, 2010) (holding that state employment discrimination statute inapplicable on federal enclave); *Stuckstede v. NJVC LLC*, No. 4:09CV0663 JCH, 2010 WL 234953, at \*1 (E.D. Mo. Jan. 15, 2010) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); *Rosseter v. Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at \*2 (N.D. Cal. Jan. 27, 2009) (holding that state employment discrimination statute inapplicable on federal enclave); *Bussey v. Edison Int'l, Inc.*, No. CV 08-0158 AHM (RCx), 2009 U.S. Dist. LEXIS 14057, at \*9-10 (C.D. Cal. Feb. 23, 2009) (holding that common law action for wrongful termination of whistleblower not



housing law,<sup>188</sup> consumer protection,<sup>189</sup> contracts, agency, probate, guardianship, family relations, and noninjury torts.<sup>190</sup> In these arenas, outmoded nineteenth- and early twentieth-century state laws prevail in most enclaves.

### III. LIMITATIONS UPON STATE CESSIONS OF JURISDICTION

#### A. *States May Reserve Limited Legislative Authority over Federal Enclaves as a Condition of Cession*

It is well settled that when a state gives its consent to federal acquisition of an enclave, it “may qualify its cession by reservations [of jurisdiction] not inconsistent with the

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cognizable on federal enclave established before state supreme court recognized cause of action); McMullen v. S. Cal. Edison, No. EDCV 08-957-VAP (PJWx), 2008 WL 4948664, at \*7-8 (C.D. Cal. Nov. 17, 2008) (same); Mersnick v. USProtect Corp., No. C-06-03993 RMW, 2007 WL 2669816, at \*2 (N.D. Cal. Sept. 7, 2007) (holding that state wage-and-hour statutes inapplicable on federal enclave); Janulewicz v. Bechtel Corp., No. 06-CV-1413-H (WMC), 2007 WL 2462110, at \*3-4 (S.D. Cal. Aug. 27, 2007) (holding that state occupational safety laws and state common law action for wrongful termination of whistleblower not cognizable on federal enclave); Sundaram v. Brookhaven Nat'l Lab., 424 F. Supp. 2d 545, 570 (E.D.N.Y. 2006) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); Hutchinson v. Andrulis Corp., No. 5:03CV1-MCR/WCS, 2004 WL 691790, at \*1-2 (N.D. Fla. Mar. 19, 2004) (same); Kelly v. Lockheed Martin Servs. Grp., 25 F. Supp. 2d 1, 5 (D.P.R. 1998) (holding that state employment discrimination statute inapplicable on federal enclave); George v. UXB Int'l, Inc., No. C-95-20048-JW, 1996 WL 241624, at \*1-2 (N.D. Cal. May 3, 1996) (holding that state wage-and-hour statutes inapplicable on federal enclave); Miller v. Wackenhut Servs., Inc., 808 F. Supp. 697, 699-700 (W.D. Mo. 1992) (holding that state employment discrimination statute inapplicable on federal enclave); Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1521 (C.D. Cal. 1986) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); Lockhart v. MVM, Inc., 97 Cal. Rptr. 3d 206, 212-13 (Ct. App. 2009) (holding that state employment discrimination statute inapplicable on federal enclave); Orlovetz v. Day & Zimmerman, Inc., 848 P.2d 463, 466-67 (Kan. Ct. App. 1993) (holding that common law action for wrongful termination of whistleblower not cognizable on federal enclave established before state supreme court recognized cause of action); Dep't of Labor & Indus. v. Dirt & Aggregate, Inc., 837 P.2d 1018, 1021-22 (Wash. 1992) (holding that state occupational safety laws inapplicable on federal enclave).

<sup>188</sup> *Swords to Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1037-38 (N.D. Cal. 2005). The states have enacted unlawful-detainer statutes permitting expedited proceedings to evict individuals from rental housing. *See, e.g.*, CAL. CIV. PROC. CODE § 1161 (West 2009). Because these provisions conflict with the federal rules of civil procedure, they are inapplicable in federal court; thus, removal proceedings, which take a few months in state court, can be prolonged for years in federal court. *S.S. Silberblatt, Inc. v. U.S. Postal Serv.*, Nos. 98-16570, 98-16572, 2000 WL 61295, at \*2-3 (9th Cir. Jan. 21, 2000); *Traverso v. Clear Channel Outdoor Inc.*, No. C07-03629 MJJ, 2007 WL 3151449, at \*1-2 (N.D. Cal. Oct. 26, 2007).

<sup>189</sup> *Mersnick*, 2007 WL 2669816, at \*4 (holding that California consumer protection law, CAL. BUS. & PROF. CODE § 17200, inapplicable on federal enclave).

<sup>190</sup> *Castlen & Block*, *supra* note 38, at 124.

governmental uses.”<sup>191</sup> In *James v. Dravo Contracting Co.*,<sup>192</sup> the Supreme Court considered the permissible scope of such reservations. In 1931, the United States acquired jurisdiction over land beneath and adjacent to the Ohio River to construct a dam.<sup>193</sup> In the statute consenting to the federal government’s acquisition, West Virginia expressly reserved the right to exercise “concurrent jurisdiction” over the ceded property.<sup>194</sup> Later, the State sought to tax a general contractor conducting business within the cession.<sup>195</sup> *Dravo* upheld West Virginia’s authority to impose the tax because the State validly reserved the right to exercise this power as a term of cession.<sup>196</sup>

Unfortunately, West Virginia’s expansive reservation of jurisdiction is an anomaly. In most instances, states simply reserved the right to serve criminal and civil process within ceded territory.<sup>197</sup> These routine reservations of jurisdiction are simply intended “to prevent [enclaves] from becoming . . . sanctuar[ies] for fugitives from justice.”<sup>198</sup>

Additionally, once a state has ceded exclusive jurisdiction to the United States, it cannot retroactively reassert authority not claimed in the act of cession.<sup>199</sup> In *United States v. Unzeuta*, the Supreme Court addressed a Nebraska statute seeking to retroactively reclaim concurrent criminal and civil jurisdiction over the Fort Robinson Military Reservation, a federal enclave.<sup>200</sup> The *Unzeuta* Court struck down the statute, concluding that after a state cedes exclusive jurisdiction over an enclave to the federal government, prior state jurisdiction cannot “be recaptured by the action of the state alone . . . .”<sup>201</sup> Congressional consent is required for a state to reclaim jurisdiction not reserved at the time of cession.<sup>202</sup>

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<sup>191</sup> *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937).

<sup>192</sup> *Id.* at 148.

<sup>193</sup> *Id.* at 143.

<sup>194</sup> *Id.* at 144.

<sup>195</sup> *Id.* at 137.

<sup>196</sup> *Id.* at 149.

<sup>197</sup> *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 533 (1885). States also sometimes retain jurisdiction to tax sales made within an enclave, *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 530 (1938), or to operate and make repairs to state roads intersecting an enclave. *United States v. Unzeuta*, 281 U.S. 138, 143 (1930).

<sup>198</sup> *Lowe*, 114 U.S. at 534.

<sup>199</sup> *Unzeuta*, 281 U.S. at 143.

<sup>200</sup> *Id.* at 143.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* The Supreme Court has held that in the event the federal government were to wholly abandon a federal enclave, jurisdiction over the parcel would impliedly return to the surrounding state. *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 563-64 (1946); *Palmer v. Barrett*, 162 U.S. 399, 403 (1896). This rule is necessary to prevent

*B. Enclaves Remain Legally Part of the Surrounding State Notwithstanding Their Jurisdictional Status*

Because a state's assent to transfer exclusive jurisdiction terminates its regulatory authority over an enclave, in the past most courts concluded that such property "cease[s] to be part of [the surrounding state]."<sup>203</sup> The Supreme Court rejected this reasoning as fallacious in *Howard v. Commissioners of the Sinking Fund*.<sup>204</sup> In that case, the Court addressed the purported annexation of a federal enclave by the city of Louisville, Kentucky.<sup>205</sup>

In 1947 Congress enacted the Buck Act, authorizing states and municipalities to collect income taxes from individuals employed on federal enclaves within their borders.<sup>206</sup> Shortly after passage of the Act, the city of Louisville enacted an ordinance annexing adjacent territory, including Naval Ordnance Station Louisville,<sup>207</sup> a federal enclave established in 1941.<sup>208</sup> Upon annexing the station, the city began taxing the incomes of workers employed there.<sup>209</sup>

A group of station employees challenged the annexation and the income tax, asserting that the enclave "could not be annexed by the City since it ceased to be a part of the Commonwealth of Kentucky when exclusive jurisdiction over it was acquired by the United States."<sup>210</sup> The Supreme Court rejected this contention:

When the United States . . . acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of

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abandoned property from devolving into Hobbesian states of nature. See *S.R.A.*, 327 U.S. at 563-64. But exclusive federal jurisdiction persists so long as the federal government "continues to hold [the enclave under] its primary jurisdiction and control." *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369, 372-73 (1964).

<sup>203</sup> *Howard v. Comm'rs of Sinking Fund of Louisville*, 344 U.S. 624, 626 (1953) (referring to a decision by a Kentucky trial court).

<sup>204</sup> 344 U.S. 624.

<sup>205</sup> *Id.* at 624-25.

<sup>206</sup> 4 U.S.C. § 106 (2006).

<sup>207</sup> *Howard*, 344 U.S. at 624-25.

<sup>208</sup> *Gun Weapon Systems Station Naval Ordnance Station Louisville (NOSL)*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/facility/louisville.htm> (last visited Aug. 29, 2011). The *Howard* decision never states the formal name of the station.

<sup>209</sup> *Howard*, 344 U.S. at 625.

<sup>210</sup> *Id.* at 626.

Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky.<sup>211</sup>

Because the station legally remained a part of Kentucky, the state retained the power to “conform its municipal structures to its own plan, so long as the state d[id] not interfere with the exercise of [exclusive] jurisdiction within the federal area by the United States.”<sup>212</sup> The *Howard* Court concluded that the “change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property.”<sup>213</sup> Because the annexation was proper, the Buck Act empowered the city to tax the income of the enclave’s employees.<sup>214</sup>

While *Howard* purports to lay to rest the century-old fiction that a federal enclave constitutes “a state within a state,”<sup>215</sup> the Court reaffirmed the proposition that the Constitution vested “the United States power to exercise *exclusive* jurisdiction within the area,” notwithstanding the municipal boundaries drawn by the state.<sup>216</sup> Kentucky only possessed the authority to tax incomes earned within the enclave because Congress authorized it to do so.<sup>217</sup> Otherwise, the state possessed no real power to regulate activities within the territory.<sup>218</sup> *Howard’s* conclusion that an enclave legally remains part of the surrounding state is primarily a semantic distinction. As the Court explained in its most recent enclave decision, from a regulatory standpoint enclaves “are to [the surrounding state] as the territory of one of her sister states or a foreign land.”<sup>219</sup>

### C. *Enclave Residents Retain the Right to Vote in State Elections*

The notion commonly embraced before *Howard*—that enclaves “ceased to be part of [the surrounding state]”<sup>220</sup>—imposed

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 626-27.

<sup>213</sup> *Id.* at 627.

<sup>214</sup> *Id.* at 629.

<sup>215</sup> *Id.* at 627. The Court’s conclusion that federal enclaves legally remain part of the surrounding state is difficult to square with the fact that the District of Columbia is a federal enclave and Congress’s power to create the District derived from the Enclave Clause. *Paul v. United States*, 371 U.S. 245, 263 (1963).

<sup>216</sup> *Howard*, 344 U.S. at 627 (emphasis added).

<sup>217</sup> *Id.* at 628-29.

<sup>218</sup> *Id.* at 627.

<sup>219</sup> *United States v. State Tax Comm’n*, 412 U.S. 363, 378 (1973).

<sup>220</sup> *Howard*, 344 U.S. at 626 (referring to a decision by a Kentucky trial court).

an additional consequence upon residents of federally governed territory: states routinely denied enclave residents the right to vote in local elections.<sup>221</sup> The Supreme Court struck down this century-old limitation in *Evans v. Cornman*.<sup>222</sup> *Evans* addresses an action brought by residents of the National Institutes of Health (NIH), a federal enclave located in Maryland, alleging that the State wrongfully denied them the right to vote.<sup>223</sup> Relying on two grounds, the Court found that the Constitution guaranteed NIH residents the right to vote in Maryland elections, notwithstanding the facility's enclave status.<sup>224</sup>

First, the *Evans* Court concluded that state authorities improperly relied upon the assumption that the appellees were "not residents of Maryland" because "the NIH grounds ceased to be a part of Maryland when the enclave was created."<sup>225</sup> Because *Howard* unequivocally rejects the "fiction" that an enclave constitutes "a state within a state," this argument was untenable and thus "c[ould not] be resurrected . . . to deny appellees the right to vote."<sup>226</sup>

Second, the Court found that NIH residents possessed substantial interests in the outcome of state elections because Congress assimilated several components of contemporary Maryland law into the federalized state law that governed the enclave.<sup>227</sup> NIH residents were subject to Maryland's criminal law, its workers' compensation statute, its wrongful-death act, and its income taxes.<sup>228</sup> Thus, "residents of the NIH grounds [were] just as interested in and connected with [Maryland's] electoral decisions as . . . their neighbors who live[d] off the enclave."<sup>229</sup> By denying suffrage to the enclave's residents, Maryland literally subjected them to "taxation without representation."<sup>230</sup>

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<sup>221</sup> *E.g.*, *Herken v. Glynn*, 101 P.2d 946, 955 (Kan. 1940) (denying enclave residents the right to vote on the ground that the State had no jurisdiction over them); *In re Opinion of the Justices*, 42 Mass. (1 Met.) 580, 580 (1841) (same); *Langdon v. Jaramillo*, 454 P.2d 269, 271 (N.M. 1969) (same); *Sinks v. Reese*, 19 Ohio St. 306, 317 (1869) (same); *McMahon v. Polk*, 973 N.W. 77, 78-79 (S.D. 1897) (same); *State ex rel. Lyle v. Willett*, 975 S.W. 299, 302-03 (Tenn. 1906) (same).

<sup>222</sup> 398 U.S. 419 (1970).

<sup>223</sup> *Id.* at 421-22.

<sup>224</sup> *Id.* at 426.

<sup>225</sup> *Id.* at 421.

<sup>226</sup> *Id.* at 421-22 (citing *Howard v. Comm'rs of Sinking Fund of Louisville*, 344 U.S. 624, 627 (1953)).

<sup>227</sup> *Id.* at 423-24.

<sup>228</sup> *Id.* at 424.

<sup>229</sup> *Id.* at 426.

<sup>230</sup> JOHN JOACHIM ZUBLY, *A HUMBLE ENQUIRY* (1769), reprinted in *PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-76* (Bernard Bailyn ed., 1965).

*Evans* ultimately concludes that the Constitution guarantees enclave residents the right to vote notwithstanding the exercise of “exclusive federal jurisdiction” because the “differences . . . between . . . residents who live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real.”<sup>231</sup>

#### IV. THE SUPREMACY CLAUSE BARS COURTS FROM APPLYING MODERN CHOICE-OF-LAW BALANCING TESTS TO CLAIMS ARISING FROM CONDUCT OR TRANSACTIONS WITHIN FEDERAL ENCLAVES

Modern choice-of-law rules frequently authorize courts to apply a state’s law to an action arising from conduct that did not occur in that state.<sup>232</sup> Courts applying these methodologies typically determine the applicable law by balancing the relative interests of the jurisdictions possessing contacts with the action.<sup>233</sup>

For example, in one oft-cited conflicts decision, the New York Court of Appeals applied New York law to a personal-injury suit stemming from an accident between two New Yorkers on an Ontario highway.<sup>234</sup> The court concluded that “[c]omparison of the relative ‘contacts’ and ‘interests’ . . . make it clear that the concern of New York [wa]s unquestionably the greater and more direct” and Ontario’s interests were “at best minimal.”<sup>235</sup> This was so because the action “involve[d] injuries sustained by a New York[er] . . . as the result of the [alleged] negligence of a [second] New York[er] . . . in the operation of an automobile . . . insured in New York.”<sup>236</sup> Conversely, “Ontario’s sole relationship with the occurrence [wa]s the purely adventitious circumstance that the accident occurred there.”<sup>237</sup> Thus, New York’s law governed because New York’s interests outweighed Ontario’s.

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<sup>231</sup> *Evans*, 398 U.S. at 424-25.

<sup>232</sup> See generally Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987) (discussing various choice-of-law methodologies).

<sup>233</sup> Lawrence C. George, *Asking the Right Questions*, 15 FLA. ST. U. L. REV. 449, 460 (1987). I have criticized the modern choice of law methodology as an “inherently indeterminate and manipulable doctrine,” which, in a great many cases, may be used to rationalize whatever law the judge feels inclined to apply.” Chad DeVaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1037 (2011) (quoting *Campbell v. Apfel*, 177 F.3d 890, 893 n.3 (9th Cir. 1999)).

<sup>234</sup> *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

Enclaves “are to [the surrounding state] as the territory of one of her sister states.”<sup>238</sup> Therefore, if two New Yorkers who reside outside of a federal enclave litigate over an incident that occurred within an enclave, one might be tempted to argue that the court should apply modern New York law rather than the enclave’s federalized state law because New York possesses a greater interest in the litigation’s outcome. But this is not so.

Enclave law, unlike state law, is distinctly federal in nature, notwithstanding the fact that it usually originated as state law.<sup>239</sup> As such, the Constitution’s Supremacy Clause precludes courts from balancing such competing interests because federal law, when constitutionally authorized, *always* supersedes state law.<sup>240</sup> “The supremacy clause . . . establishes a constitutional choice-of-law rule, mak[ing] federal law paramount . . . .”<sup>241</sup>

This principle bars the application of the interest-balancing tests employed by most states in choice-of-law cases.<sup>242</sup> The Supremacy Clause, in effect, dictates that courts apply the traditional *lex loci* doctrine—that “the law of the [place] where the wrong occurred” governs an action<sup>243</sup>—to transactions arising within federal enclaves. The *McGlenn* doctrine dictates that when the pertinent events giving rise to a suit “occurred on a federal enclave” the court must apply the federalized state law applicable on the enclave.<sup>244</sup> Thus, if a New York driver were to sue another New Yorker for damages to his car resulting from a collision within the confines of the Gateway National Recreation Area, a federal enclave lying on

<sup>238</sup> United States v. State Tax Comm’n, 412 U.S. 363, 378 (1973).

<sup>239</sup> James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940).

<sup>240</sup> Hancock v. Train, 426 U.S. 167, 178 (1976).

<sup>241</sup> Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569, 571 (Cal. 2007).

<sup>242</sup> See *Hancock*, 426 U.S. at 178 (stating that because enclave law is federal, the Supremacy Clause dictates that it supersedes state law).

<sup>243</sup> LEA BRILMAYER, CONFLICT OF LAWS 17 (4th ed. 1995).

<sup>244</sup> *Snow v. Bechtel Constr., Inc.*, 647 F. Supp. 1514, 1521 (C.D. Cal. 1986); accord *Klausner v. Lucas Film Entm’t Co.*, No. 09-03502 CW, 2010 WL 1038228, at \*4 (N.D. Cal. Mar. 19, 2010) (determining whether a claim arises on a federal enclave requires courts look to see where all the pertinent events took place); *Rosseter v. Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at \*2 (N.D. Cal. Jan. 27, 2009) (stating that the fact that defendant accused of tort maintains operations outside federal enclave is not pertinent in determining law applied to events occurring within enclave); *McMullen v. S. Cal. Edison*, No. EDCV 08-957-VAP (PjWx), 2008 WL 4948664, at \*8 (C.D. Cal. Nov. 17, 2008) (same); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1148 (S.D. Cal. 2007) (determining whether a claim arises on a federal enclave requires courts look to see where all the pertinent events took place); *Kelly v. Lockheed Martin Servs. Grp.*, 25 F. Supp. 2d 1, 6 (D.P.R. 1998) (same); *Lockhart v. MVM, Inc.*, 97 Cal. Rptr. 3d 206, 211-12 (Ct. App. 2009).

the outskirts of New York City,<sup>245</sup> the Supremacy Clause dictates that a reviewing court would have to apply the enclave's strict contributory-negligence bar—which survives as federalized state law—rather than New York's modern comparative-fault law.<sup>246</sup> This is so notwithstanding the fact that New York possesses materially greater interests in the outcome of the litigation than the federal government.<sup>247</sup>

#### V. THE *MCGLINN* DOCTRINE CONVERTS ENCLAVES INTO JURISPRUDENTIAL JURASSIC PARKS

While the ACA incorporates modern state criminal law, Congress has made little effort to update the body of private law applicable in its aging enclaves. As a result, federal enclaves—which encompass almost 30 percent the United States<sup>248</sup>—have devolved into jurisprudential Jurassic Parks, where long-dead legal doctrines prey upon unsuspecting litigants. The Presidio of San Francisco exemplifies this phenomenon.

California ceded exclusive jurisdiction of the Presidio to the federal government in 1897 to establish an army base.<sup>249</sup> Today, the Presidio, now administered by the National Parks Service,<sup>250</sup> is a bustling commercial center, home to thousands of people and the site of millions of dollars of commercial sales each year.<sup>251</sup>

As noted in the introduction, in 2005, I represented a pro bono client, who resided on the Presidio, in an unlawful-detainer action.<sup>252</sup> I removed the case to federal court on the basis of federal-question jurisdiction because the law governing his suit was California's 1872 unlawful-detainer statute, which lived on as federalized state law.<sup>253</sup> Fortunately, my client did

<sup>245</sup> See *Friends of Gateway v. Slater*, 257 F.3d 74, 82-83 (2d Cir. 2001).

<sup>246</sup> Congress established this enclave in 1972. Gateway National Recreation Area Act of 1972, 16 U.S.C. § 460cc (2006). New York first enacted the comparative-fault doctrine in 1975. N.Y. C.P.L.R. § 1411 (McKinney 1997). The contributory-negligence doctrine would not apply to a personal-injury claim (as opposed to a property-damage claim) because Congress has incorporated contemporary state personal-injury law into enclave law. 16 U.S.C. § 457.

<sup>247</sup> See *Evans v. Cornman*, 398 U.S. 419, 425 (1970) (noting the “differences . . . between . . . residents who live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real”).

<sup>248</sup> Turley, *supra* note 28, at 362.

<sup>249</sup> *Standard Oil Co. v. California*, 291 U.S. 242, 244 (1934); *Consol. Milk Producers v. Parker*, 123 P.2d 440, 441 (1942).

<sup>250</sup> Presidio of San Francisco Act of 1996, 16 U.S.C. § 460bb.

<sup>251</sup> Levy, *supra* note 55, at A-1.

<sup>252</sup> See *Swords to Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1038 (N.D. Cal. 2005).

<sup>253</sup> As federalized law, the “assimilated state [unlawful detainer] law [wa]s distinctly federal in nature,” thus “its application establishe[d] the basis for federal



not assert that his landlord breached the implied warranty of habitability. California did not recognize the existence of such a warranty until 1974, and thus it is not a part of the body of law governing the Presidio.<sup>254</sup> The prior rule—which originated in the Middle Ages<sup>255</sup>—still prevails: “[T]he lessor is not obligated to repair unless he covenants to do so in the written lease contract.”<sup>256</sup> The eviction statute applicable on the Presidio does offer one potentially troubling advantage to tenants; unlike modern statutes, the commission of a nuisance is not a valid ground for evicting a tenant.<sup>257</sup>

Other proverbial dinosaurs roam the enclave. California eliminated the tort of alienation of affections<sup>258</sup> in 1939.<sup>259</sup> Yet this long-dead cause of action lives on in the Presidio as a sort of *zombie tort*.<sup>260</sup> If one of the many thousands of Presidio residents were to carry on an extramarital affair with a neighbor, her jilted spouse could sue her lover.<sup>261</sup> If the paramour were himself engaged to another woman residing in the Presidio, his would-be bride could likewise sue him for breach of contract to marry.<sup>262</sup> California also eliminated this cause of action in 1939.<sup>263</sup> The Presidio’s enclave status would, however, afford the lothario wide latitude to retaliate for these suits that he would not enjoy in other parts of the city. The causes of action for intentional infliction of emotional distress and invasion of privacy do not exist on the enclave. California

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question jurisdiction.” *Id.* at 1038. My client resided in federal housing. *Swords to Plowshares v. Kemp*, No. C05-01661MJJ, 2005 WL 3882063, at \*1-2 (N.D. Cal. Oct. 18, 2005). I removed the case to federal court because I planned to challenge his eviction on due-process grounds and I preferred to make this argument before a federal forum. This strategy proved successful. *Id.* at \*1-2.

<sup>254</sup> *Green v. Superior Court*, 517 P.2d 1168, 1182 (Cal. 1974).

<sup>255</sup> *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir. 1970).

<sup>256</sup> *Id.* at 1076.

<sup>257</sup> CAL. CIV. PROC. CODE § 1161 (Deering 1906). California’s contemporary unlawful detainer statute includes “nuisance” as a ground for terminating tenancy. CAL. CIV. PROC. CODE § 1161(4) (West 2009).

<sup>258</sup> “[T]he common-law cause of action for alienation of affections had three elements: ‘(1) some wrongful conduct by the defendant with the plaintiff’s spouse, (2) the loss of affection or loss of consortium of plaintiff’s spouse, and (3) a causal relationship between the defendant’s conduct and the loss of consortium.’” Goutam U. Jois, Note, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509, 533-34 (2006) (citing BLACK’S LAW DICTIONARY 80 (8th ed. 2004)).

<sup>259</sup> CAL. CIV. CODE § 43.5 (West 1939).

<sup>260</sup> The lower federal courts have uniformly held that common-law rules in effect at the moment of cession live on until abrogated by Congress. *See* cases cited *supra* note 26.

<sup>261</sup> *Barlow v. Barnes*, 155 P. 457, 457 (Cal. 1916).

<sup>262</sup> *Buelna v. Ryan*, 73 P. 466, 467 (Cal. 1903).

<sup>263</sup> CAL. CIV. CODE § 43.5(d).

did not recognize the emotional-distress tort until 1950.<sup>264</sup> It first recognized the privacy action in 1973.<sup>265</sup>

The Presidio is home to a high-end bicycle shop.<sup>266</sup> Bike sales conducted at the shop are not governed by the UCC—which California did not adopt until 1965<sup>267</sup>—but rather by nineteenth-century common law. Sales include no implied warranties. Rather, they are subject to the doctrine of caveat emptor.<sup>268</sup> The bicycle shop is also immune from California’s consumer-protection and false-advertising laws, which were not enacted until 1941.<sup>269</sup> If a car struck the rider of a bicycle within the boundaries of the enclave, the driver could avoid liability for damage to the bike by simply demonstrating any contributory negligence by the rider.<sup>270</sup> California did not adopt the comparative-fault doctrine until 1975.<sup>271</sup>

Perhaps most troubling of all, private companies employ several thousand workers at the Presidio.<sup>272</sup> The enclave is the home of George Lucas’s special-effects studio, Industrial Light & Magic, which alone employs more than 1500 people.<sup>273</sup> California, like most states, provides significantly greater employment-law rights and remedies to workers than the federal government provides.<sup>274</sup> Yet, Presidio workers—most of whom presumably reside outside the enclave—enjoy only the modest protections of

<sup>264</sup> *Bowden v. Spiegel, Inc.*, 216 P.2d 571, 572-73 (Cal. App. 1950); *see also Cooper v. S. Cal. Edison Co.*, 170 F. App’x 496, 497 (9th Cir. 2006) (holding that common law tort of intentional infliction of emotional distress not cognizable on federal enclave established before state supreme court recognized cause of action); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1149 (S.D. Cal. 2007) (same); *Celli v. Schoell*, 995 F. Supp. 1337, 1343-44 (D. Utah 1998) (same).

<sup>265</sup> *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 272 (Ct. App. 1973).

<sup>266</sup> Paul McHugh, *Sports Basement Ready to Shake*, S.F. CHRON., June 14, 2007, at D-7.

<sup>267</sup> Marguerite Lee De Voll, Comment, *Neither “Free” nor “Clear”: The Real Costs of In re PW, LLC: A Look at § 363(F)(3) and How to Protect Creditors*, 26 EMORY BANKR. DEV. J. 167, 186 (2009).

<sup>268</sup> *Watson v. Sutro*, 24 P. 172, 179 (Cal. 1890).

<sup>269</sup> *Mersnick v. USProtect Corp.*, No. C-06-03993 RMW, 2007 WL 2669816, at \*4 (N.D. Cal. Sept. 7, 2007) (holding that California consumer-protection law, CAL. BUS. & PROF. CODE § 17200, inapplicable on federal enclave established before its enactment); *see Pfizer Inc. v. Superior Court*, 45 Cal. Rptr. 3d 840, 843 (Ct. App. 2006) (noting that California’s consumer protection and false advertising statutes were enacted in 1941).

<sup>270</sup> *See Basler v. Sacramento Gas & Elec. Co.*, 111 P. 530, 531-32 (Cal. 1910). The contributory-negligence doctrine would not apply to a personal-injury claim (as opposed to a property-damage claim) because Congress has incorporated contemporary state personal-injury law into enclave law. 16 U.S.C. § 457 (2006).

<sup>271</sup> *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229 (Cal. 1975).

<sup>272</sup> *Levy*, *supra* note 55, at A-1.

<sup>273</sup> *Id.*

<sup>274</sup> *Romer-Friedman*, *supra* note 41, at 503, 508, 511, 516.

*laissez faire* nineteenth-century state labor laws<sup>275</sup> simply because they work in a two square-mile<sup>276</sup> “federal island”<sup>277</sup> within San Francisco.<sup>278</sup> This is not an anomaly. The Presidio is just one of five thousand federal enclaves established by Congress throughout the United States.<sup>279</sup> Collectively, these enclaves are home to more than a million people.<sup>280</sup>

Much of the blame for this state of affairs lies with Congress. The rule of international law upon which *Canter* and *McGlinn* rest presupposes that upon accepting jurisdiction over territory, a new sovereign will promptly establish new laws to govern the territory. The assimilation of existing municipal laws is intended only to serve as a stop-gap measure to prevent “a hiatus in the legal system of the . . . enclave.”<sup>281</sup> Incorporated laws are not meant to survive into perpetuity because the new sovereign assumes an obligation to actually govern the territory.<sup>282</sup> For instance, when the United States acquired Florida from Spain, the United States promptly established a territorial legislature to govern the cession.<sup>283</sup> “The power of Congress over federal enclaves . . . is . . . the same as the power of Congress over the District of Columbia.”<sup>284</sup> When the federal government assumed jurisdiction over the District, the laws of Maryland likewise lived on as federalized state law.<sup>285</sup> But Congress governed the District of Columbia.<sup>286</sup> Congress has failed to provide such leadership for the multitude of other federal enclaves it established in the centuries that followed. As a result,

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<sup>275</sup> Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 766 (2009).

<sup>276</sup> Carl Nolte, *The Chance of a Lifetime at the Presidio*, S.F. CHRON., June 14, 1991, at A-21.

<sup>277</sup> *United States v. State Tax Comm'n*, 412 U.S. 363, 375 (1973).

<sup>278</sup> The Presidio remains a part of San Francisco notwithstanding its jurisdictional status. *Howard v. Comm'rs of Sinking Fund of Louisville*, 344 U.S. 624, 626-27 (1953).

<sup>279</sup> *Adams v. Clinton*, No. 1:98CV01665, 1998 U.S. Dist. LEXIS 22848, at \*13 (D.D.C. June 30, 1998).

<sup>280</sup> *Id.*

<sup>281</sup> *Bd. of Supervisors v. United States*, 408 F. Supp. 556, 563 (E.D. Va. 1976); *accord James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99-100 (1940).

<sup>282</sup> *See Bd. of Cnty. Comm'rs v. Donoho*, 356 P.2d 267, 271 (Colo. 1960) (asserting that adoption of preexisting state laws was intended to temporarily “fill the vacuum which would otherwise exist” in enclave private law).

<sup>283</sup> *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 541-42 (1828).

<sup>284</sup> *Paul v. United States*, 371 U.S. 245, 263 (1963).

<sup>285</sup> *Busby v. Elec. Utils. Emps. Union*, 323 U.S. 72, 73 (1944).

<sup>286</sup> *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 176 (1827).

nearly 30 percent of the United States<sup>287</sup> has devolved into a “sanctuary for the obsolete restrictions of the common law.”<sup>288</sup>

#### VI. THE *MCGLINN* DOCTRINE HAS PERNICIOUS EFFECTS UPON LABOR LAW

Like other aspects of municipal law, state labor laws federalize at the moment a state cedes jurisdiction over an enclave to the federal government.<sup>289</sup> In *James Stewart & Co. v. Sadrakula*, the Supreme Court affirmed the application of a New York workplace-safety law on a federal enclave because the state enacted the law before cession.<sup>290</sup> But state labor laws enacted after cession “are not a part of the body of laws in [an enclave]” because “[c]ongressional action is necessary to keep [them] current.”<sup>291</sup>

Today, almost every state provides its workers with greater rights and remedies than federal law mandates.<sup>292</sup> As one commentator noted,

There are four main circumstances where a worker is substantively better off under state law than under federal law, including when (1) the state law provides an affirmative right, but the federal government has no equivalent right; (2) the federal law exempts a worker from protection, but the state law has no exemption; (3) the state law standard is more rigorous than the equivalent federal standard . . . ; and (4) the state law provides a greater remedy or time period to recover than federal law.<sup>293</sup>

The precise situations where state labor law affords employees greater rights and remedies than federal law are too numerous to chronicle in detail here. Nonetheless, a few notable examples merit discussion.

Eighteen states guarantee employees a higher minimum wage than federal law requires.<sup>294</sup> Several states give employees significantly greater rights to medical leave to care for ailing family members than federal law provides.<sup>295</sup> Twelve

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<sup>287</sup> Turley, *supra* note 28, at 362.

<sup>288</sup> *Capetola v. Barclay-White Co.*, 48 F. Supp. 797, 800 (E.D. Pa. 1943).

<sup>289</sup> *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-04 (1940).

<sup>290</sup> *Id.* at 104-05.

<sup>291</sup> *Id.* at 100.

<sup>292</sup> Romer-Friedman, *supra* note 41, at 503.

<sup>293</sup> *Id.* at 503-04.

<sup>294</sup> The federal minimum wage is \$7.25 per hour. 29 U.S.C.A. § 206 (West, Westlaw through 2010 Sess.). As of January 1, 2012, eighteen states impose a higher minimum wage than required by federal law. *Minimum Wage Laws in the States*, U.S. DEP’T OF LABOR (Jan. 1, 2012), <http://www.dol.gov/whd/minwage/america.htm>.

<sup>295</sup> Michael J. Hayes, *Leaving Maryland Workers Behind: A Comparison of State Employee Leave Statutes*, 9 U. MD. L.J. RACE, RELIG., GENDER & CLASS 19, 28 (2009).

states afford employees the right to receive benefits for dependents and domestic partners not provided by federal law.<sup>296</sup> Five jurisdictions, California, Colorado, Nevada, Alaska, and Puerto Rico<sup>297</sup>—among the national leaders in federal land holdings<sup>298</sup>—require overtime pay for work exceeding a designated number of hours per day, while federal law only requires overtime for work in excess of forty hours per week.<sup>299</sup>

While federal law prohibits discrimination “based on race, sex, age, religion, national origin, and disability,” several states expand such protections to groups outside the ambit of federal law.<sup>300</sup> The federal Occupational Safety and Health Act imposes minimum workplace safety requirements on all employers.<sup>301</sup> But most states have opted to establish their own parallel statutes, many of which impose significantly more stringent safety standards and enforcement schemes than federal law requires.<sup>302</sup>

In addition, many states that have opted not to impose employment rules more rigorous than federal law nonetheless offer employees more significant state remedies for violations of the federally mandated standards.<sup>303</sup> Because Congress established most federal enclaves prior to 1940,<sup>304</sup> civilians

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California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin provide employees greater rights to medical leave to care for ailing family members than the federal Family and Medical Leave Act. *State Family Leave Laws that Are More Expansive than the Federal FMLA*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968> (last visited Feb. 21, 2011). These states provide employees greater rights to leave by expanding the family and medical leave requirements to businesses not covered by the FMLA, “allowing leave to be taken for additional purposes than those listed by the federal law, or providing a greater number of weeks of leave.” Hayes, *supra* at 28.

<sup>296</sup> CAL. LAB. CODE § 233 (West 2010); CONN. GEN. STAT. ANN. § 1-1m (West Supp. 2011); HAW. REV. STAT. § 572C-6 (2006); ME. REV. STAT. ANN. tit. 24, § 2319-A (Supp. 2010); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2010); N.J. STAT. ANN. § 37:1-32 (West Supp. 2011); OR. REV. STAT. § 106.340 (2009); R.I. GEN. LAWS § 36-12-1 (Supp. 2010); VT. STAT. ANN. tit. 15, § 8 (2010); WASH. REV. CODE ANN. § 26.60.015 (West Supp. 2011).

<sup>297</sup> Federal enclaves within Puerto Rico are subject to the same treatment as enclaves within the fifty states. *See Kelly v. Lockheed Martin Servs. Grp.*, 25 F. Supp. 2d 1, 5 (D.P.R. 1998).

<sup>298</sup> *Federal Lands in the Fifty States*, NAT'L GEOGRAPHIC, Oct. 1996.

<sup>299</sup> *Questions and Answers About the FLSA*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/flsa/faq.htm> (last visited Sept. 10, 2011).

<sup>300</sup> Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116 (2007).

<sup>301</sup> 29 U.S.C. § 651 (2006).

<sup>302</sup> Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535, 538-39 & n.27 (1987).

<sup>303</sup> Romer-Friedman, *supra* note 41, at 504.

<sup>304</sup> Most federal enclaves were established between 1840 and 1940. Wilkinson, *supra* note 12, at 152 n.21; *see also supra* note 53.

employed on enclaves typically enjoy none of these rights. Indeed, nineteenth- and early-twentieth-century legislatures and courts expressed open hostility to working people and those who sought greater rights for laborers.<sup>305</sup>

Federal courts routinely dismiss claims brought by enclave employees premised upon alleged violations of state labor laws enacted after the cession of jurisdiction.<sup>306</sup> George Lucas's Presidio-based special effects studio, Industrial Light & Magic, itself has been subject to two discrimination suits premised upon California labor law.<sup>307</sup> On both occasions, the courts dismissed the state-law claims because California enacted the applicable statutes after the federal government assumed jurisdiction over the Presidio.<sup>308</sup>

The lower federal courts have also unnecessarily compounded the problem by misreading the Supreme Court's decision in *Arlington Hotel v. Fant* to hold that state common-law rules, like statutes, freeze in time at the moment of cession until altered by Congress.<sup>309</sup> This places enclave workers at a serious disadvantage vis-à-vis their counterparts employed outside federal boundaries.

Modern state common law typically affords victims of workplace harassment a right to invoke the tort of intentional infliction of emotional distress to redress trauma stemming from abusive work environments.<sup>310</sup> Because judicial recognition

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<sup>305</sup> *McKay v. Retail Auto. Salesmen's Local Union*, 106 P.2d 373, 377 (Cal. 1940), *superseded by* CAL LAB. CODE § 1115 (West 1947), *as recognized in* *Chavez v. Sargent*, 339 P.2d 801, 825 (Cal. 1959).

<sup>306</sup> *E.g.*, *Manning v. Gold Belt Falcon, LLC*, 681 F. Supp. 2d 574, 576 (D.N.J. 2010) (holding that state wage-and-hour statutes inapplicable on federal enclave); *Klausner v. Lucas Film Entm't Co.*, No. 09-03502 CW, 2010 WL 1038228, at \*4 (N.D. Cal. Mar. 19, 2010) (holding that state employment discrimination statute inapplicable on federal enclave); *Rosseter v. Indus. Light & Magic*, No. C08-04545 WHA, 2009 WL 210452, at \*2 (N.D. Cal. Jan. 27, 2009) (same); *Mersnick v. USProtect Corp.*, No. C-06-03993 RMW, 2007 WL 2669816, at \*2 (N.D. Cal. Sept. 7, 2007) (holding that state wage-and-hour statutes inapplicable on federal enclave); *Janulewicz v. Bechtel Corp.*, No. 06-CV-1413-H (WMC), 2007 WL 2462110, at \*3 (S.D. Cal. Aug. 27, 2007) (holding that state occupational safety laws inapplicable on federal enclave); *Hutchinson v. Andrulis Corp.*, No. 5:03CV1-MCR/WCS, 2004 WL 691790, at \*1-2 (N.D. Fla. Mar. 19, 2004) (holding that state wrongful-termination statute inapplicable on federal enclave); *Kelly v. Lockheed Martin Servs. Grp.*, 25 F. Supp. 2d 1, 5 (D.P.R. 1998) (holding that state employment discrimination statute inapplicable on federal enclave); *George v. UXB Int'l, Inc.*, No. C-95-20048-JW, 1996 WL 241624, at \*1-2 (N.D. Cal. May 3, 1996) (holding that state wage-and-hour statutes inapplicable on federal enclave); *Miller v. Wackenhut Servs., Inc.*, 808 F. Supp. 697, 699-700 (W.D. Mo. 1992) (holding that state employment discrimination statute inapplicable on federal enclave).

<sup>307</sup> *Klausner*, 2010 WL 1038228, at \*4; *Rosseter*, 2009 WL 210452, at \*2.

<sup>308</sup> *Klausner*, 2010 WL 1038228, at \*4; *Rosseter*, 2009 WL 210452, at \*2.

<sup>309</sup> *See supra* Part I.C.

<sup>310</sup> *Gonzalez, supra* note 300, at 132-33.

of this tort postdates the establishment of virtually all federal enclaves,<sup>311</sup> federal courts regularly deny enclave workers' suits premised on this claim for relief.<sup>312</sup>

A vast majority of states now recognize a cause of action for wrongful termination in violation of public policy.<sup>313</sup> State supreme courts first recognized these claims in the latter half of the twentieth century, most in the early 1980s.<sup>314</sup> Prior to that time, such actions were strictly barred by the at-will employment doctrine.<sup>315</sup> Courts routinely deny wrongful-termination claims by enclave employees cognizable under state law because such actions did not exist at the time of cession.<sup>316</sup>

A series of cases involving the dismissal of workers employed at California's San Onofre Nuclear Generating Station illustrates the potential injustice of this precedent. In 1963, the Southern California Edison Company acquired an easement from the Secretary of the Navy to build the San Onofre station on the Camp Pendleton Naval Reservation,<sup>317</sup> a federal enclave near San Diego.<sup>318</sup> The federal government acquired exclusive jurisdiction over Camp Pendleton in 1942.<sup>319</sup> Between 1986 and 2009, at least four San Onofre-based employees brought suit against Southern California Edison or general contractors it retained, alleging they were terminated

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<sup>311</sup> Most federal enclaves were established between 1840 and 1940. Wilkinson, *supra* note 12, at 152 n.21; *see also supra* note 53.

<sup>312</sup> *E.g.*, *Cooper v. S. Cal. Edison Co.*, 170 F. App'x 496, 497-98 (9th Cir. 2006) (holding that common law tort of intentional infliction of emotional distress not cognizable on federal enclave established before state supreme court recognized cause of action); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1149 (S.D. Cal. 2007) (same); *Celli v. Shoell*, 995 F. Supp. 1337, 1343-44 (D. Utah 1998) (same).

<sup>313</sup> Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 774 n.154 (2006).

<sup>314</sup> *Id.* (noting that *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 386-87 (Conn. 1980), was one of the first decisions to recognize this cause of action).

<sup>315</sup> *Id.* at 708.

<sup>316</sup> *E.g.*, *Cooper*, 170 F. App'x at 497-98; *Stuckstede v. NJVC LLC*, No. 4:09CV0663 JCH, 2010 WL 234953, at \*1 (E.D. Mo. Jan. 15, 2010); *McMullen v. S. Cal. Edison*, No. EDCV 08-957-VAP (PJWx), 2008 WL 4948664, at \*7-8 (C.D. Cal. Nov. 17, 2008); *Janulewicz v. Bechtel Corp.*, No. 06-CV-1413-H (WMC), 2007 WL 2462110, at \*4 (S.D. Cal. Aug. 27, 2007); *Sundaram v. Brookhaven Nat'l Lab.*, 424 F. Supp. 2d 545, 570 (E.D.N.Y. 2006); *Hutchinson v. Andrulis Corp.*, No. 5:03CV1-MCR/WCS, 2004 WL 691790, at \*1-2 (N.D. Fla. Mar. 19, 2004); *Snow v. Bechtel Constr. Inc.*, 647 F. Supp. 1514, 1521 (C.D. Cal. 1986); *Orlovetz v. Day & Zimmerman, Inc.*, 848 P.2d 463, 466-67 (Kan. Ct. App. 1993).

<sup>317</sup> *McMullen*, 2008 WL 4948664, at \*2 n.2.

<sup>318</sup> *United States v. Hernandez*, 739 F.2d 484, 485 (9th Cir. 1984) (noting that Camp Pendleton is located forty miles north of San Diego).

<sup>319</sup> *McMullen*, 2008 WL 4948664, at \*2.

in retaliation for reporting safety violations at the station.<sup>320</sup> One of the employees alleged Edison fired him in retaliation for reporting violations to the Nuclear Regulatory Commission.<sup>321</sup> A fifth worker sued Edison alleging the company terminated him for reporting workplace harassment at the station.<sup>322</sup> The California courts first sustained the common law claim of wrongful termination in violation of public policy in 1959.<sup>323</sup> Camp Pendleton succumbed to federal jurisdiction in 1942.<sup>324</sup> Thus, in all five cases the federal courts dismissed the alleged whistleblower's action because the common law wrongful-termination tort was not part of the enclave's law.<sup>325</sup>

Congress undoubtedly possesses a strong interest in seeing that military personnel and federal workers employed on federal enclaves are immune from state labor laws. Private employers like Southern California Edison and George Lucas—based on the mere happenstance of their locus on federal enclaves—deserve no such immunity. The immunity they presently enjoy stems not from a conscious decision to protect them, but rather from the federal government's failure to keep enclave private law current.<sup>326</sup> As a result of this abdication, Camp Pendleton and the Presidio's enclave status afford Edison and Lucas protections that a squadron of imperial storm troopers would envy.

## VII. PROPOSED SOLUTIONS TO THE PROBLEMS POSED BY THE *MCGLINN* DOCTRINE

I propose a two-prong solution to the centuries-old federal-enclave problem. First, the federal courts, not Congress, should assume responsibility for keeping enclave common law current. Lower federal court precedent is erroneous in

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<sup>320</sup> *Cooper*, 170 F. App'x at 497; *Bussey v. Edison Int'l, Inc.*, No. CV 08-0158 AHM (RCx), 2009 U.S. Dist. LEXIS 14057, at \*9 (C.D. Cal. Feb. 23, 2009); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1149 (S.D. Cal. 2007); *Snow*, 647 F. Supp. at 1521.

<sup>321</sup> *Bussey*, 2009 U.S. Dist. LEXIS 14057, at \*9.

<sup>322</sup> *McMullen*, 2008 WL 4948664, at \*7-8.

<sup>323</sup> *Cooper*, 170 F. App'x at 497 (citing *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. App. 1959)). California adopted the wrongful-termination tort long before the cause of action was recognized in other states. See Lord, *supra* note 313, at 774-75 n.154.

<sup>324</sup> *Cooper*, 170 F. App'x at 497.

<sup>325</sup> *Id.* at 497-98; *Bussey*, 2009 U.S. Dist. LEXIS 14057, at \*9-10; *McMullen*, 2008 WL 4948664, at \*7-9; *Stiefel*, 497 F. Supp. 2d at 1149; *Snow*, 647 F. Supp. at 1521. The San Onofre dismissals are of particular concern to me because I live within the plant's fall-out zone.

<sup>326</sup> *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940).



concluding that the federal-enclave doctrine freezes in time state common-law rules. As federal instrumentalities, enclaves fall within the ambit of federal common law. It is well settled that in promulgating federal common law, the Constitution endows federal courts with the discretion to simply borrow from the ready-made common law of the surrounding state.<sup>327</sup> Thus, in most enclave-based cases, federal courts should simply apply the surrounding state's common-law rules.

Second, with respect to state labor codes, which generally fall outside the courts' traditional common-lawmaking authority, I propose that Congress enact an Assimilative Labor Act—in the spirit of the ACA—affording the rights and remedies provided by contemporary state labor statutes to nongovernmental workers employed within federal enclaves.

A. *Enclave Status Should Not Freeze a Territory's Common Law*

1. Private-Law Rules Applied in Actions Arising on Federal Enclaves Are Properly Governed by Federal Common Law

Congress bears significant responsibility for the nonsensical state of the law governing federal enclaves.<sup>328</sup> Notwithstanding this legislative abdication, the most confounding aspects of enclave law could be remedied by the federal courts without the involvement of the political branches of government. The lower federal courts have uniformly misread the Supreme Court's decision in *Arlington Hotel v. Fant* to apply the *McGlinn* doctrine to existing state common-law rules.<sup>329</sup> None of the Supreme Court's enclave decisions actually address *McGlinn's* effect on enclave common law.

The Enclave Clause empowers Congress “[t]o exercise exclusive Legislation” over federal enclaves.<sup>330</sup> But the Constitution is silent concerning the status of enclave common law.<sup>331</sup> Precedent demonstrates that state courts necessarily

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<sup>327</sup> *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982) (citing *Bd. of Comm'rs v. United States*, 308 U.S. 343 (1939)).

<sup>328</sup> See *supra* Part V.

<sup>329</sup> See *supra* Part I.C.

<sup>330</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>331</sup> This is probably so because at the time of the founding, legal scholars generally viewed common law not as a form of government action, but rather as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938)

lose their power to promulgate common-law rules for enclaves as each enclave is “to [the surrounding state] as the territory of one of her sister states or a foreign land.”<sup>332</sup> But the Constitution does not require that enclave common law cease to evolve at the moment the federal government assumes jurisdiction. As federal instrumentalities, enclaves fall within the ambit of federal common law. History supports this position. “The power of Congress over federal enclaves . . . is . . . the same as the power of Congress over the District of Columbia.”<sup>333</sup> The laws of Maryland lived on as federalized state law within the District for a time after federal acquisition.<sup>334</sup> Until Congress established the District’s own Court of Appeals in 1970,<sup>335</sup> the equivalent of a state supreme court, the District was subject to federal common law promulgated by Article III judges.<sup>336</sup> While the population of Washington, D.C., exceeds that of other federal properties, many more people live or work collectively within other enclaves than in the District,<sup>337</sup> and they deserve the same treatment as D.C. residents.<sup>338</sup>

State regulatory authority over an enclave is extinguished at the moment of cession. But as with the District of Columbia, the regulatory power assumed by the United States as the new sovereign should be divided between the branches of the federal government in the usual fashion. Congress assumes exclusive legislative jurisdiction and thus the federal courts should logically assume the common-lawmaking role

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(quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting)). Courts viewed this “transcendental body of law” as universally applicable irrespective of what sovereign governed a particular territory unless its legislature specifically enacted a statute abrogating it. *Id.* Thus, when a federal enclave was established, the “transcendental body” of common law remained applicable both inside and outside the enclave unless Congress enacted a statute abrogating it. *Id.*

<sup>332</sup> *United States v. State Tax Comm’n*, 412 U.S. 363, 378 (1973).

<sup>333</sup> *Paul v. United States*, 371 U.S. 245, 263 (1963).

<sup>334</sup> *Busby v. Elec. Utils. Emps. Union*, 323 U.S. 72, 73 (1944).

<sup>335</sup> *M.A.P. v. Ryan*, 285 A.2d 310, 311-12 (D.C. 1971).

<sup>336</sup> Peter L. Strauss, *Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 907 (2002); *M.A.P.*, 285 A.2d at 311-12.

<sup>337</sup> See Mirel, *supra* note 11, at B01 (“Millions of people live in so-called federal enclaves, those territories that have been purchased by, or ceded to, the federal government for use as military bases, national parks and other federal facilities.”); Thompson & Williams, *supra* note 11, at B02 (noting that “the millions of federal enclave residents enjoy congressional representation—by voting either in their home state or the state where the enclave is located”).

<sup>338</sup> It should be noted that federal enclave residents do possess one important right not possessed by D.C. residents: the right to vote in congressional elections. *Evans v. Cornman*, 398 U.S. 419, 425-26 (1970).

traditionally occupied by the judicial branch. This is consistent with the rule of international law applied in *American Insurance Co. v. Canter* upon which the *McGlinn* doctrine is based.<sup>339</sup> *Canter* presumes “that whenever political jurisdiction” is “transferred from one nation or sovereign to another,” existing laws will remain in force indefinitely as the new sovereign assumes the functions previously performed by the outgoing government.<sup>340</sup> The former sovereign’s laws live on for a time to prevent “a hiatus in the legal system of the [territory],”<sup>341</sup> but the instrumentalities of the new sovereign’s administration may change them in any manner permissible within its system of government.<sup>342</sup> In common-law countries, judges assume the primary responsibility for promulgating private-law rules.<sup>343</sup> Thus, when dominion over territory passes from one common-law jurisdiction to another, the new sovereign’s courts should inherit the common-lawmaking responsibility from those of the former, just as the new sovereign’s assembly inherits legislative responsibility from its predecessor.

When the United States achieved independence from Great Britain, each of the new states “received”<sup>344</sup> “the common law of England [then] . . . in force” as “the rule of decision” in private-law cases until altered by their new governments.<sup>345</sup> Independence divested the Crown and its courts of jurisdiction over the states, but this did not terminate the existing body of common law, nor did it freeze that law in time until changed by the legislative branches of the new state governments.<sup>346</sup> The state courts inherited the responsibility for maintaining the body of common law and the power to create new doctrines and abrogate rules promulgated by their English predecessors.<sup>347</sup> When the

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<sup>339</sup> See *supra* Part I.A.

<sup>340</sup> Chi., Rock Island & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 546-47 (1885) (citing Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828)).

<sup>341</sup> Bd. of Supervisors v. United States, 408 F. Supp. 556, 563 (E.D. Va. 1976); accord James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940).

<sup>342</sup> *Sadrakula*, 309 U.S. at 99 (noting that state laws promulgated by state legislatures live on as federal law within enclaves “until abrogated” by Congress).

<sup>343</sup> Tomlinson, *supra* note 130, at 107.

<sup>344</sup> Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 29 (2009).

<sup>345</sup> Michael G. Collins, *Justice Iredell, Choice of Law, and the Constitution—A Neglected Encounter*, 23 CONST. COMMENT. 163, 169 (2006) (referring to Virginia’s Receiving Act acknowledging receipt of the English common law until abrogated); see also Bellia & Clark, *supra* note 344, at 29 (noting that each of the thirteen original states expressly acknowledged “receiving” the English common law as the rule of decision in private-law cases after obtaining independence from Great Britain).

<sup>346</sup> Bellia & Clark, *supra* note 344, at 29.

<sup>347</sup> *Id.*

federal government assumes jurisdiction from a state, existing state common law should live on as English common law did. The courts of the new sovereign—the federal government—should inherit responsibility for maintaining that body of law.

Adoption of the federal-common-law model I propose would obviate the bulk of the jurisprudential anomalies presented by the *McGlinn* doctrine. While state legislatures occasionally intervene to correct perceived deficiencies, both historically and in modern times, the vast majority of private-law development rests with the courts in their common-lawmaking function.<sup>348</sup> Indeed, state legislatures have traditionally demonstrated indifference to the development of private law.<sup>349</sup>

Recognition that enclave private law falls within the ambit of federal common law would empower federal courts to extinguish zombie-torts like alienation of affections and to place enclave citizens and workers, like the civilian employees of the San Onofre Nuclear Generating Station, on equal footing with their counterparts employed outside the enclave's borders.<sup>350</sup> Denying enclave residents and employees such rights furthers no federal policy. The “differences . . . between . . . residents who live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real.”<sup>351</sup>

## 2. Federal Courts Should Ordinarily Borrow the Common-Law Rules of the Surrounding State

Assumption of common-lawmaking responsibility for federal enclaves imposes only modest responsibility on federal courts. In the vast majority of cases, reviewing courts should simply “borrow” the surrounding state's common-law rules for application within enclaves. It is well settled that matters falling within the ambit of federal common law “do not

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<sup>348</sup> Tomlinson, *supra* note 130, at 107. The *McGlinn* Court likely did not envision the modern state of federal-enclave law because pursuant to the *Swift v. Tyson* doctrine, then applicable, common law was viewed not as a form of state action, but rather as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting)). Thus, when a federal enclave was established, the “transcendental body” of common law remained applicable both inside and outside the enclave unless Congress enacted a statute abrogating it. *Id.*

<sup>349</sup> Peck, *supra* note 63, at 270.

<sup>350</sup> Application of this principle would also put an end to the jurisprudential “crazy quilt” problem existing in enclaves consisting of tracts of land acquired at different times. See *supra* Part I.E.

<sup>351</sup> *Evans v. Cornman*, 398 U.S. 419, 425 (1970).

inevitably require resort to uniform federal rules.”<sup>352</sup> The Supreme Court has repeatedly recognized that, when appropriate, state common law may be “borrowed and applied as the federal [common-law] rule for deciding the substantive legal issue at hand.”<sup>353</sup> As the Court said in *United States v. Kimbell Foods, Inc.*, “Whether to [borrow] state [common] law or to fashion a nationwide federal [common law] rule is a matter of judicial policy ‘dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.’”<sup>354</sup>

Federal courts engaging in the common-lawmaking process must make a case-by-case determination whether to fashion a federal rule or borrow applicable state law. Matters that require law that is “uniform in character throughout the Nation necessitate formulation of controlling federal [common-law] rules.”<sup>355</sup> “Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.”<sup>356</sup> Further, “[a]part from considerations of uniformity,” the reviewing court “must also determine whether application of state law would frustrate specific [federal] objectives” and if so, the court “must fashion special rules solicitous of those federal interests.”<sup>357</sup>

Federal courts should not necessarily borrow state common law in matters involving military personnel or government employees acting in their official capacities, but I posit that in the overwhelming majority of cases involving civilians or government officials acting in their private capacities, the courts should borrow law from the surrounding state. The *Kimbell Foods* factors weigh heavily in favor of this proposal. No need exists for a nationally uniform body of federal common law to govern suits between civilians arising within enclaves. The bulk of litigants involved in actions arising on enclaves are likely to be residents of the state encompassing the enclave. Thus, the surrounding state is likely to possess

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<sup>352</sup> *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979).

<sup>353</sup> *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982) (citing *Bd. of Comm'rs v. United States*, 308 U.S. 343 (1939)); *accord Kimbell Foods*, 440 U.S. at 727-28.

<sup>354</sup> *Kimbell Foods*, 440 U.S. at 728 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)).

<sup>355</sup> *Id.* (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

materially greater interests in seeing that the policy decisions underlying its common-law rules are applied to the litigants. Moreover, the litigants involved in these suits are much more likely to be aware of the private-law rules of the surrounding state than of post hoc rules promulgated by federal courts.<sup>358</sup>

*Kimbell Foods's* final factor—barring state law application where it would serve to frustrate federal objectives<sup>359</sup>—may counsel against incorporation of state common law in a few cases. The courts must consider this issue, just as *Kimbell Foods* instructs, on a case-by-case basis.<sup>360</sup> But the vast majority of private-law actions on federal enclaves trigger no federal interests—even when the litigants are federal officials. If a married ranger at Yosemite National Park carried on an affair with one of his colleagues, no federal interests would be frustrated if a court borrowed modern California law denying the ranger's wife the right to bring an action for alienation of affections.<sup>361</sup> Similarly, allowing a private right of action for wrongful termination for a whistleblower employed by private enterprises, like Southern California Edison's San Onofre nuclear plant, would frustrate no "specific [federal] objectives"<sup>362</sup> for a federal enclave like Camp Pendleton.<sup>363</sup>

### 3. Federal Courts Should Borrow as Federal Common Law Subsequent State Statutory Enactments That Could Have Been Enacted by the State Courts

While courts bear responsibility for the overwhelming majority of private-law development,<sup>364</sup> legislatures do sometimes intervene to alter common-law rules.<sup>365</sup> Nonetheless, usually legislative tweaks to the private law could have been made by the courts through the common-lawmaking process.

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<sup>358</sup> See Strass, *supra* note 29, at 758 (criticizing *McGlinn* doctrine's application of past state laws because "[t]he cost of legal research would make most suits impractical, leaving . . . claims unenforceable due to financial necessity").

<sup>359</sup> *Kimbell Foods*, 440 U.S. at 728.

<sup>360</sup> *Id.*

<sup>361</sup> The federal government acquired exclusive legislative jurisdiction over Yosemite from California in 1920. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 525-26 (1938). California eliminated the tort of alienation of affections in 1939. CAL. CIV. CODE § 43.5 (A.V. Lake & Co. 1939).

<sup>362</sup> *Kimbell Foods*, 440 U.S. at 728.

<sup>363</sup> *Evans v. Cornman*, 398 U.S. 419, 425 (1970) (noting that the "differences . . . between . . . residents who live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real").

<sup>364</sup> Tomlinson, *supra* note 130, at 107.

<sup>365</sup> *Id.*

For example, California legislatively abolished the tort of alienation of affections.<sup>366</sup> In other states, courts abolished the cause of action by judicial decision.<sup>367</sup> Some states adopted the comparative-fault doctrine legislatively;<sup>368</sup> in others, courts adopted the rule.<sup>369</sup> The implied warranty of habitability for residential dwellings was likewise adopted by either the courts or the legislature, alternately, in different jurisdictions.<sup>370</sup>

For this reason, I posit that federal courts are empowered to adopt as enclave common law subsequent legislative modifications of the private law made by a surrounding state so long as the modification at issue is of a type that could have been made by the state courts. If a particular modification falls within the ambit of a court's ordinary common-lawmaking authority, why should the fact that the surrounding state enacted the change legislatively abrogate a federal court's ability to adopt the change into the federal common law governing the enclave?

Because the courts themselves created the entire body of private law in the first instance, the law of contracts, property, and torts falls within the courts' common-lawmaking jurisdiction.<sup>371</sup> Conversely, aspects of modern regulatory schemes that have no common-law antecedents, such as

<sup>366</sup> CAL. CIV. CODE § 43.5.

<sup>367</sup> *E.g.*, *Hoye v. Hoye*, 824 S.W.2d 422, 427 (Ky. 1992); *O'Neil v. Schuckardt*, 733 P.2d 693, 698 (Idaho 1986); *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981); *Wyman v. Wallace*, 615 P.2d 452, 453 (Wash. 1980).

<sup>368</sup> *E.g.*, ARK. CODE ANN. §§ 27-1763 to 1765 (Supp. 1977); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1979); HAW. REV. STAT. § 663-31 (1976); IDAHO CODE ANN. § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. tit. 14, § 156 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 58-607-1 (Supp. 1975); NEB. REV. STAT. 25-1151 (1975 reissue); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7a (Supp. 1977).

<sup>369</sup> *E.g.*, *Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973); *Alvis v. Ribar*, 421 N.E.2d 886, 899 (Ill. 1981); *Kirby v. Larson*, 256 N.W.2d 400, 434 (Mich. 1977).

<sup>370</sup> Some state legislatures imposed the implied warranty of habitability. *E.g.*, ALASKA STAT. § 34.03.100 (1974); CONN. GEN. STAT. § 47a-7 (1981); DEL. CODE ANN. tit. 25, § 5303 (1975); FLA. STAT. § 83.51 (1976); HAW. REV. STAT. § 521-42 (1976); N.H. REV. STAT. ANN. §§ 48-A:14, 540:13-d (Supp. 1981); N.J. STAT. ANN. §§ 2A:42-86 to 80 (West Supp. 1981); OKLA. STAT. tit. 41, § 118 (1981); OR. REV. STAT. § 91.770 (1981); WASH. REV. CODE § 59.18.060 (1981); W. VA. CODE § 37-6-30 (Supp. 1982); WIS. STAT. § 704.07 (1979). In other jurisdictions, the courts adopted the doctrine. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970); *Green v. Superior Court*, 517 P.2d 1168, 1184 (Cal. 1974); *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973); *Wade v. Jobe*, 818 P.2d 1006, 1018 (Utah 1991).

<sup>371</sup> *See Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 881 (W. Va. 1979) (finding that the enactment and abolition of private-law causes of action are within the ambit of the courts' common-lawmaking function).

minimum-wage statutes, fall outside the ambit of the courts' common-lawmaking power.<sup>372</sup>

A federal court adjudicating an alienation-of-affections suit by a resident of the Presidio of San Francisco should pronounce the cause of action extinguished as a matter of federal common law, even though California abolished the tort legislatively. Similarly, a federal court considering the question of innkeepers' liability at issue in *Fant* should adopt, as federal common law, Arkansas's subsequent statutory repudiation of the former strict-liability rule.<sup>373</sup> The enactment and abolition of such causes of action fall squarely within the ambit of the courts' common-lawmaking function. The "power" of the courts "to alter or amend the common law" constitutes a quintessential feature of Anglo-American jurisprudence.<sup>374</sup>

Indeed, even comprehensive legislative modifications to the private law can be adopted as federal common law if state courts *could have* made those changes. Contract law consists mostly of a body of judge-made rules enacted over several centuries.<sup>375</sup> Legislative changes to the body of contract law by definition could have been made by the courts in the first instance.<sup>376</sup> For this reason, federal courts deciding admiralty cases, which are governed by federal common law, have borrowed Article 2 of the UCC when adjudicating cases involving transactions in goods.<sup>377</sup> The courts are empowered to do so because the UCC's provisions could have been adopted by the courts in their common-lawmaking capacity.<sup>378</sup> Federal courts adjudicating enclave-based contracts involving transactions in goods should likewise borrow the provisions of the UCC applicable in the surrounding state as federal common law.

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<sup>372</sup> See *infra* Part VII.B.

<sup>373</sup> *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 445-46 (1929).

<sup>374</sup> *Bradley*, 256 S.E.2d at 881.

<sup>375</sup> See *generally* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 1.5-1.7 (3d ed. 2004) (tracing the development of contract law from Early England to the modern United States).

<sup>376</sup> See Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966) (arguing that the UCC fits neatly within and should be thought of as part of the body of the common law of contracts).

<sup>377</sup> See, e.g., *Princess Cruises, Inc. v. Gen. Elec. Co.*, 143 F.3d 828, 832 (4th Cir. 1998); *Southworth Mach. Co. v. F/V Corey Pride*, 994 F.2d 37, 40 n.3 (1st Cir. 1993); *Interpool Ltd. v. Char Yigh Marine (Panama), S.A.*, 890 F.2d 1453, 1459 (9th Cir. 1989), *amended by* 918 F.2d 1476 (9th Cir. 1990); *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 189 (5th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

<sup>378</sup> See Gilmore, *supra* note 376, at 285-86 (arguing that the UCC fits neatly within and should be thought of as part of the body of the common law of contracts).



As the courts have noted in borrowing the UCC for admiralty cases, incorporation of the code into contracts governed by federal common law serves the “goals of uniformity and predictability.”<sup>379</sup> This is all the more true in the case of enclave-based contracts because the transacting parties are most often residents of the surrounding state.<sup>380</sup>

*B. Congress Should Enact a Federal Assimilative Labor Act*

While incorporating state private law into federal common law can remedy most of the private law anomalies created by the *McGlinn* doctrine, some state legislation falls outside the ambit of a court’s common-lawmaking authority. For example, courts lack the authority to enact many aspects of modern state labor codes, such as wage-and-hour provisions and workplace-safety ordinances. Thus, such ordinances cannot be incorporated as federal common law. To remedy inequities resulting from the inapplicability of state labor statutes on federal enclaves, I modestly propose that Congress enact a law in the vein of the ACA, making contemporary state labor and employment statutes applicable to nongovernment workers employed on federal enclaves.

As the *Sharpnack* Court recognized, Congress can choose to adopt existing and *future* state statutes into the body of law applicable within enclaves.<sup>381</sup> Using the Federal Reservations Act (which makes state wrongful-death statutes applicable on enclaves<sup>382</sup>) as a reference, Congress should enact the following:

Extension of State Labor and Employment Laws to buildings, works, and property of the Federal Government.

(a) Subject to the limitation enumerated in subsection (b), civilians employed by private enterprises within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, shall possess the same rights and remedies accorded by the Labor and Employment Laws of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of violation of such laws the rights and remedies of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

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<sup>379</sup> *Princess Cruises, Inc.*, 143 F.3d at 832.

<sup>380</sup> *See Evans v. Cornman*, 398 U.S. 419, 425 (1970) (noting that the “differences . . . between . . . residents who live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real”).

<sup>381</sup> *United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958).

<sup>382</sup> 16 U.S.C. § 457 (2006).

(b) A State Labor and Employment Law otherwise applicable under subsection (a) will be inapplicable within a national park or other place subject to the exclusive jurisdiction of the United States if application of such law would unduly burden specific federal objectives for the place.

Like the ACA, this proposed statute would constitute “a deliberate continuing adoption by Congress for federal enclaves” of labor and employment laws “as shall have been already put in effect by the respective States for their own government.”<sup>383</sup> It thereby places nongovernment workers employed on a federal enclave on par with their counterparts employed outside the enclave. Subsection (b) provides a safe harbor analogous to that offered by *Kimbell Foods*, enabling courts to decline to apply a state labor law if doing so “would frustrate specific [federal] objectives” for the enclave.<sup>384</sup>

In the overwhelming majority of cases, no federal objective justifies immunizing private employers such as George Lucas’s Industrial Light & Magic from state employment laws. The immunity presently enjoyed by enclave-based enterprises exists only because of a historical accident. Congress should remedy that mistake as it previously did, making contemporary state criminal, wrongful-death and workers’ compensation statutes applicable within enclaves.

## CONCLUSION

To many, the term *federal enclave* conjures images of distant military outposts on untamed frontiers. This is not an accurate picture. Over the last century, many enclaves evolved into bustling commercial centers,<sup>385</sup> often lying within major metropolitan areas.<sup>386</sup> Federal enclaves encompass a whopping 659 million acres—almost 30 percent of the United States.<sup>387</sup> Millions of civilians live in, work in, or pass through them everyday<sup>388</sup>—most likely unaware of the potential legal

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<sup>383</sup> *Sharpnack*, 355 U.S. at 293-94.

<sup>384</sup> *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

<sup>385</sup> See Levy, *supra* note 55, at A-1.

<sup>386</sup> Gateway National Recreation Area Act of 1972, 16 U.S.C. § 460cc (2006).

<sup>387</sup> Turley, *supra* note 28, at 362.

<sup>388</sup> See Mirel, *supra* note 11, at B01 (“Millions of people live in so-called federal enclaves, those territories that have been purchased by, or ceded to, the federal government for use as military bases, national parks and other federal facilities.”); Thompson & Williams, *supra* note 11, at B02 (noting that “the millions of federal enclave residents enjoy congressional representation—by voting either in their home state or the state where the enclave is located”).

consequences of doing so. Millions of dollars of commercial transactions take place within enclaves every year.<sup>389</sup>

The *McGlinn* doctrine relegates these places to the status of jurisprudential Jurassic Parks, reanimating extinct legal precepts to wreak havoc on unwary citizens. Zombie-doctrines like caveat emptor and the tort of alienation of affections lurk in the shadows, while modern innovations like implied warranties and the UCC do not exist. Worse yet, enclave status denies millions of state residents relief afforded under progressive state labor statutes enacted in the latter half of the twentieth century.

Much of the blame for this state of affairs lies with Congress. The rule of international law upon which the *McGlinn* doctrine rests presupposes that upon assuming jurisdiction a new sovereign will establish new laws to govern the territory. The assimilation of existing municipal laws is intended only to serve as a stop-gap measure to prevent “a hiatus in the legal system.”<sup>390</sup> Such laws are not meant to live into perpetuity. The new sovereign assumes an obligation to actually *govern* the territory. Congress has failed to fulfill this duty.

Even greater fault rests with the federal courts. Responsibility for the vast majority of private-law development lies with the courts in their common-lawmaking function.<sup>391</sup> Federal acquisition should not freeze enclave common law at the moment of cession. As federal instrumentalities, federal courts must assume the responsibility to promulgate federal common law to govern enclave-based private-law disputes. The courts have failed in this duty despite the fact that it imposes only de minimis responsibilities. The Supreme Court’s decision in *Kimbell Foods* empowers the lower federal courts to simply borrow<sup>392</sup> ready-made state common-law rules in cases where “there is little need for a nationally uniform body of law.”<sup>393</sup> Because the “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real,” in the overwhelming

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<sup>389</sup> Levy, *supra* note 55, at A-1.

<sup>390</sup> Bd. of Supervisors v. United States, 408 F. Supp. 556, 563 (E.D. Va. 1976); *accord* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940).

<sup>391</sup> Tomlinson, *supra* note 130, at 107.

<sup>392</sup> California *ex rel.* State Lands Comm’n v. United States, 457 U.S. 273, 283 (1982); *accord* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979).

<sup>393</sup> *Kimbell Foods*, 440 U.S. at 728.

majority of cases no federal need exists for a uniform body of enclave common law.<sup>394</sup>

Borrowing state common law rules as federal common law would cure the bulk of the jurisprudential anomalies afflicting enclaves. Nonetheless, many provisions of state labor codes—particularly wage-and-hour and workplace-safety regulations—lie beyond the ambit of the courts' traditional common-lawmaking authority. For this reason, I propose Congress utilize the familiar mold of the ACA to enact a statute making contemporary state labor and employment laws applicable within federal enclaves.

More than 130 years after McGlinn's cow stepped into the path of a Midwest train, the nation's federal enclaves continue to wallow in a state of jurisprudential entropy. "The common law grows like a tree."<sup>395</sup> Failure to mend its branches undermines the very edifice of the Anglo-American legal system. As Justice Cardozo recognized, "If judges have woefully misinterpreted the *mores* of their day or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."<sup>396</sup> For almost 30 percent of America's territory, they do.

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<sup>394</sup> Evans v. Cornman, 398 U.S. 419, 425 (1970).

<sup>395</sup> See *supra* note 2 and accompanying text.

<sup>396</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 152 (1921).