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Martha A. Field

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# The Legitimacy of Federal Common Law

Martha A. Field\*

It is wonderful now to have a permanent Federal Courts section; we owe thanks to Jack Beerman and Michael Wells and others who helped bring this about. It seems to me the challenge for this group is to find topics for discussion that are not too convoluted. With federal courts, we are dealing with a field so intellectually overdeveloped that it is almost impossible to have an intelligible conversation about it. But it is wonderful to have here a group dedicated to trying. And it is nice for us to have the opportunity to come together and to see some faces behind the names on those law review articles we're always reading.

I want to start by drawing a comparison between this issue of the scope of federal common law and the more-often-discussed Tenth Amendment issue, most recently developed in the *National League of Cities*<sup>1</sup> and *Garcia*<sup>2</sup> cases, concerning the scope of congressional power to regulate the states. There the question has been whether there is any separate area of activity that only states can regulate — where only state law can apply — or whether instead, all subject matter areas may be subject to regulation by Congress under the commerce clause of the U.S. Constitution or other expansive congressional powers. The resolution, for the moment at least, is that there is no separate area where only states can regulate, even though all agree that it is important that there be areas where state law controls. Indeed it is not an overstatement to say that the existence of such areas is crucial to our federal system.

Instead of finding areas immune from congressional reach, however, the Court, for the moment at least, has left the choice

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\* Professor of Law, Harvard University. This paper was delivered as a talk at the AALS meeting in San Antonio, Federal Courts section, January 6, 1992, and as a comment upon papers prepared by Professors George Brown and Thomas Merrill.

1. 105 S. Ct. 1005 (1985).

2. Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 884, 110-118 (1985).

of where to legislate to Congress. It has suggested that the only limit is that states must remain significant governmental units. If Congress were effectively to eradicate the states, it would have passed constitutionally-permissible limits, but up until that point the choice of both *how much* and *what* to regulate rests with the democratically-elected Congress, in which the states are represented, and not with the Supreme Court.

Some charge that by deferring so much to Congress courts violate separation of powers and federalism.<sup>3</sup> The system does give very broad power to Congress but relies on congressional restraint. In theory Congress could take over almost everything but it has in fact left vast areas where only state law controls.<sup>4</sup> No outside watchdog has forced these limits on Congress; it has limited itself.

There are some parallels behind that rather familiar topic and our topic for today: whether there are limits on federal *judicial* decisionmaking, and, if so, where they come from. Both are characterized by an extremely broad power being bestowed upon an institution as a theoretical matter, and they are both also characterized by the exercise of great restraint.

In discussions of federal common law, as we've heard from Professor Brown for example, alarms are often raised about how far courts *could* go — alarms similar to those raised concerning Congress's power unlimited by any Tenth Amendment restraints. But in the situation of federal common law as well, it is important to recognize that the opportunity has not been pursued. Courts have shied away from wielding the power that in theory has been left to them. Just as Congress has not come close to the outer limit of its potential reach under the commerce, spending, and taxing powers, to name but a few, so the federal courts have been sparing in their forays into federal common law.

The real issue is not whether federal common law is all-encompassing, because all agree that it should not be. The real issue is whether there should be a check from *without* on the judiciary or whether the judiciary should police itself through

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3. See, e.g., William Van Alstyne, *The Second Death of Federalism*, 85 MICH. L. REV. 1709 (1985).

4. For example, family law, real estate, licensing, and zoning to name a few.

application of the doctrine of judicial restraint. One reason that the outside parameters of the courts' power have not been well-defined to date is that the Court has not come close to any limits that exist — a point equally valid with respect to exercise of Congress' power without judicial restriction in the form of Tenth Amendment review.

But the particular question put to us today is whether the creation of federal common law violates the separation of powers, and concerning that question my answer is a resounding no. Indeed, I believe that making federal common law poses a more serious threat to federalism than it does to separation of powers; it affects the federal-state balance more than the relationship between the branches of the federal government.

Federal courts can make common law only where Congress has not exercised its power to act; if a congressional enactment exists, courts are bound to follow it. Federal court exercise of a common law power cuts down on congressional power only if one believes that congressional failure to act represents a congressional judgment that no federal lawmaking should exist. That judgment surely rarely describes the real significance of a congressional failure to legislate in an area in its competence.<sup>5</sup> Moreover federal courts making federal common law attempt to implement congressional intent, insofar as they can know it, and if they err and make a federal common law rule that Congress does not like, Congress can alter the rule by passing an enactment clearly stating what it wants done.

States' power would be significantly more affected than Congress's power by a broad exercise of judicial power to make federal common law. Without judge-made law, where Congress had not acted the consequence would be no federal law, and usually state law would be free to operate. Federal common law can compromise state lawmaking authority because federal courts make law more easily, more readily, than Congress will, at least in some situations. Indeed every instance in which a federal court does exercise this power to make federal common law is by definition one in which Congress *has not* acted, so therefore every exercise of federal common law making power takes away

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5. See generally HART AND SACKS, *THE LEGAL PROCESS* (10th ed. 1958).

from the powers of states.<sup>6</sup>

Although considerations of federalism are more relevant to federal common law power than are concerns of separation of powers, I don't believe federal common law violates either doctrine. Indeed, I don't think it violates any constitutional principle, as the ensuing discussion will explain.

In a minute I'm going to talk about separation of powers and about federal common law on the merits, but first I want to say something about the alternative title for this session, "The New Erie Doctrine Revisited." I have problems with referring to this question as "New Erie." The title may be a catchy, but it obscures analysis rather than aiding it. It obscures analysis, first, because "the doctrine" as I understand it has little to do with *Erie*, and even more, because the label is being used to refer to several quite different ideas or doctrines, each of which deserves independent consideration. I will discuss the two problems in turn.

My first problem with the "New Erie" label is that the scope of federal law and its relation to the separation of powers has very little to do with *Erie R.R. v. Tompkins*<sup>7</sup> and the *Erie* doctrine. To me the important aspect of *Erie's* holding is that the same law is to apply in state and federal court, including state-created common law. *Erie* said little or nothing about *which* law applies in which forum, except to say that identity of substantive law is the goal — including the identity of treatment of common law. There is a separate question of *which* law — state or federal — applies to which type of issue, a question *Erie* does not answer. *Erie's* main contribution there is to hold that the neither the Rules of Decision Act nor article III gives federal courts power to create common law in ordinary diversity actions. But it does not enunciate general principles for deciding when federal and when state law applies.<sup>8</sup>

This description of *Erie* contradicts Professor Brown's

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6. This is not the case, however, if there would otherwise be federal preemption. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (oil tanker design standards); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) (airport noise regulation).

7. 305 U.S. 673 (1938).

8. See generally Martha A. Field, *Sources of Law: The Scope of Federal Common Law.*, 99 HARV. L. REV. 881 (1986).

description of the case as a limit on national power, an attempt to give life to the Tenth Amendment. I do not see *Erie* that way at all. Instead the main theme the opinion addresses is the need for law to be the same in both fora — with the consequent reduction in forum-shopping that will accomplish.

My second objection to the use of the term “New *Erie*” is that I can’t figure out what it means. In trying, I have become convinced that it is being used to refer to very different things. This has it made difficult for me to fulfill my assignment of stating my position on “the New *Erie* doctrine,” because I agree with some ideas that are put forth as constituting “New *Erie*,” while I strongly disagree with others.

Sometimes “New *Erie*” is taken to mean there is *some* separation of powers aspect to concerns about federal common law, in addition to an aspect of federalism. Thus viewed, the doctrine stresses that courts should be more limited in lawmaking than Congress is; they should not too readily make federal common law, should not fill all gaps in congressional legislation, and should not act to the limit of Congress’s powers. I would not use “New *Erie*” in this sense; *Erie* may have some relevance to the issue, but surely the position is not “new.” From the outset, there was *some* separation of powers aspect to the *Erie* holding.<sup>9</sup> And almost everyone agrees that courts should not feel free to make federal common law up to the limit of Congress’s powers; I certainly do.

A different meaning often assigned to “New *Erie*” — indeed I believe the most usual meaning — is a position developed mostly by Justices Powell and Rehnquist, in several cases and most notably in Justice Powell’s dissent in *Cannon v. University of Chicago*<sup>10</sup> — a position that is potentially highly restrictive of federal common law. In fact, if the position were followed consistently, it would make almost all federal common law illegitimate. Both because it is so restrictive and because it emphasizes separation of powers instead of federalism as a primary restraint upon federal common law, this Powell-Rehnquist position is “new.” It seems, however, to have little to do with *Erie*. Moreover, this “New *Erie*” doctrine is one with

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9. *Id.* at 905, 915-27, 933.

10. 441 U.S. 677, 730 (1979) (Powell, J. dissenting).

which I emphatically disagree, as I will explain later.

An additional, more workable variation is the same doctrine but limited to implied federal remedies; federal common law could persist but implied remedies are distinguished and are never or almost never permissible. This is a plausible limitation of the Powell-Rehnquist position, enunciated almost entirely in cases dealing with implied remedies. Again, I would say the position is new, has little to do with *Erie*, and has little to offer on the merits.

A final and very different use of the "New Erie" terminology is to refer to the idea of a "judicial prerogative." For example, Professor Doernberg describes Professor Redish as a supporter of "New *Erie*" based upon a quotation in which Redish states that courts should not contradict congressional intent.<sup>11</sup> Until I read Professor Merrill's paper, I thought everyone agreed that courts cannot appropriately create federal common law in *derogation* of congressional intent (unless the common law is created to fulfill a constitutional mandate).<sup>12</sup> I myself do not accept any notion of judicial prerogative, as I will discuss later, but have not thereby considered myself a supporter of "New *Erie*."

Instead of lumping together such an assortment of positions, as "New Erie" apparently does, it would be better to sort them out and to employ a label that refers to the substance of each. It would advance analysis if scholars would describe the particular position they want to put forward or criticize and would define its terms.

I had a related concern in reading Professor Brown's paper and seeing his references to what liberals say and what conservatives say. The assumption was that whatever one believes politically will control how she views these doctrines, and that one will subscribe either to one set of positions or another. Yet one criticism many of us have of the current Supreme Court is that the Justices use these doctrines only instrumentally. As federal courts scholars — certainly as followers of Hart & Wechsler

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11. Donald Doernberg, *Judicial Chameleons in the "New Erie" Canal*, 4 UTAH L. REV. 759, 772 (1990).

12. The commentator who goes the furthest in endorsing federal common law and the judiciary's right to create it is Louis Weinberg, in a very thoughtful and interesting series of articles.



with whom Professor Brown associates himself — we should expect persons to value federal courts doctrines at least partly for their own sake, as great federal courts judges like Judge Friendly and Justice Harlan have done. I myself agree with some of the positions that Professor Brown labels as “what conservatives think” and some he attributes to liberals, and I suspect that many federal courts scholars, even if they consider themselves clearly liberal or clearly conservative, would find themselves in that position.

To return to the main question put to us today, I do not believe that federal common law making violates the separation of powers. Instead, I believe that attempts like Justice Powell’s and Rehnquist’s to create rigid rules limiting federal common law are fundamentally misguided. (You will note that of the several “New Erie” doctrines described above, the one I am considering here, and the one that description probably most frequently refers to, is the Powell-Rehnquist series of arguments that making federal common law, or at least finding implied federal remedies, violates the separation of powers.)

But the issue is a complicated one, as is typical of federal courts. I am going to give you two examples to think about as we consider the question whether it is all right for a federal court to make federal common law. One involves an implied right of action and one does not.

The first is *Cannon v. University of Chicago*.<sup>13</sup> The issue was whether there was a private right of action for damages under a federal statute outlawing sex discrimination in admissions policies. The statute, Title IX, provided a procedure for withdrawing federal funds from institutions that violated the law, but the law did not spell out any private remedies.

The second example to consider does not involve implied rights of action. This is significant because one of the subissues in the federal common law debate is whether or not implied rights of action are different from other federal common law. The second example is judicial and executive immunities from civil rights or constitutional tort actions. These would include suits against state officers under section 1983, the Civil Rights

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13. 441 U.S. 677 (1979).

Act,<sup>14</sup> and suits against federal officers under the Constitution, which have been recognized at least since *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.<sup>15</sup> In these cases, use of federal common law has enabled courts to find broad immunities from suits — especially suits for damages — although no enacted language suggests any such immunities.<sup>16</sup>

The Powell approach, first thoroughly set forth in *Cannon*, suggests that it is not appropriate for courts to make federal common law (or at least find implied federal remedies) unless Congress specifically so intended. Courts should not infer causes of action from a federal statute “absent the most compelling evidence that Congress in fact intended such an action to exist.”<sup>17</sup>

Justice Powell gives two reasons for saying that this presumption against federal common law is required by the doctrine of separation of powers. The first is the one argument that applies only and peculiarly to federal remedies, or implied rights of action, and not to other issues of federal common law: Powell claims that courts’ finding such remedies amounts to courts’ expanding their own jurisdiction, in violation of Article III of the Constitution which reposes in Congress the power to delineate the courts’ jurisdiction.<sup>18</sup> It is true that when a court finds that a federal remedy exists (or even that a colorable argument is made that one exists<sup>19</sup>) that finding gives the federal courts jurisdiction to hear the dispute, under the prevailing judicial interpretation of Congress’ grant of federal question jurisdiction.<sup>20</sup>

Justice Powell’s second argument is that making federal common law more easily than he suggests amounts to judicial

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14. 42 U.S.C. § 1983.

15. 403 U.S. 388 (1971).

16. *See, e.g.*, *Mireles v. Waco*, 112 S. Ct. 286 (1991); *Nixon v. Fitzgerald* 457 U.S. 731 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

17. *Cannon*, 441 U.S. at 749 (Powell, J., dissenting); *see also id.* at 718 (Rehnquist, J., concurring).

18. *Id.* at 730-31, 745-47.

19. *Bell v. Hood*, 327 U.S. 78 (1946).

20. An argument that federal common law should govern an aspect of the case *other than* the cause of action or remedy, does not usually result in federal question jurisdiction, even if the argument is correct, and even if the outcome of the case depends upon it. *See also* Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 638, 687-694 (1981).

usurpation of Congress's lawmaking functions. He speaks of the courts as contradicting Congress's intent. But no Justice believes that courts should create causes of action when Congress has decided not to do so. The problem arises because Congress's enactments are often silent concerning some questions, and it is not at all clear just what Congress has decided with respect to them, if it has thought about them at all. Justice Powell would strongly presume against congressional intent to create a cause of action; he would have state law — or no law — apply by default.

The *Cannon* majority, by contrast, would allow courts a third option as well: courts could apply a federal common law rule — a rule of the judiciary's making — whenever that result best fits with the policies behind congressional legislation. Judicial lawmaking would be possible even if no evidence shows that Congress adverted to the possibility of federal common law. This approach might be described as a search for a "generalized" rather than a "specific" congressional intent; it represents an effort to apply the rule most in accord with congressional intent insofar as it is ascertainable, but courts are not precluded by Congress's failure to advert to or resolve the problem at hand.<sup>21</sup>

The range of choices available to judges in a no-federal-common-law universe are familiar to constitutional law scholars because of the jurisprudence of the commerce clause. There, when federal legislation is not explicit about a governing rule, courts have long undertaken to decide whether no law applies — Congress having "decided" to leave the area unregulated — or whether instead states are free to apply their own rules. It was early decided that when faced with a commerce clause issue to which Congress had not spoken, courts would choose between these two possibilities, and would make a choice based upon all the circumstances, but would not exercise a third alternative of itself creating the governing rule — that is, making federal common law. Justice Powell's proposal seemingly is a proposal to carry over the commerce clause approach to all constitutional and statutory provisions. It leaves the courts faced

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21. See, e.g., *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (court's power to grant remedy is "to be exercised in the light of relevant policy determinations made by the Congress"); *Merrill Lynch v. Curran*, 456 U.S. 353, 374-388 (1982).

with a silent congressional enactment two choices — nonregulation and state regulation — but not the third choice of creating an appropriate federal rule.

If the Court had accepted Powell's position in *Cannon*, one of two results would have followed: Either no damage action could be found under Title IX unless and until Congress revised the enactment; or instead state law would be applicable so that it would determine whether or not a damage remedy, or any other remedy, supplements the withdrawal of funds that federal law provides. A finding that federal common law cannot or should not be created in a particular instance does not resolve all facets of the inquiry what law is to apply. When, for example, a court passing on a federal enactment decides that a new federal remedy should not be created to supplement those specified in the enactment, other questions remain concerning what law applies: Can state remedies supplement the federal remedies expressly provided, especially if the federal remedies are narrow and inadequate?<sup>22</sup> It would be difficult to eliminate discretion on this issue by adopting any hard and fast rule, and the Court has never attempted to, relying instead on a "generalized intent" approach.<sup>23</sup> Justice Powell's approach would, therefore, confine judicial discretion, but it would by no means eliminate it.

If, per contra, the legitimacy of federal common law is recognized, courts can consider as well the alternative of announcing what the federal rule is — a rule they would derive from the federal policy that is reflected in enacted law. They would opt for a federal rule, rather than no law or state law, only if con-

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22. There are other approaches as well as these two courses, and the choices that the Court has made have depended on the context. The Court has sometimes prohibited state remedies altogether, *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); it sometimes has found it optional with the states whether to provide any remedy, *Moore v. Chesapeake & Ohio RR.*, 291 U.S. 205 (1934); it has sometimes said that states must provide a remedy but has left to the states what remedy to choose, *Ward v. Love County*, 253 U.S. 17 (1920); and it has sometimes placed federal limitations upon remedies that states can provide, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

23. Arguably, to be consistent, Powell should require judicial decisions on this issue as well to be governed by a specific intent standard. If courts were so limited, a strong presumption would have to be crafted either for preemption or for regulation by state law, allowing judicial departure from the presumption only if Congress specifically so intended. Any such standard applied across the board would produce some uncomfortable results, which is one reason it has not been adopted. Instead courts decide which approach is better under all circumstances.

vinced it was most consonant with congressional intent that they do so. In *Cannon* that means courts can find it most consistent with Title IX that private litigants be permitted to enforce its requirements; in the immunity cases it means courts can find executive and judicial immunities despite the absence of any mention of those immunities in enacted constitutional or statutory law.

Of course, any formulation — specific intent, specific directive, generalized intent, or any other — can be applied generously or stingily, and the degree of presumption Powell would create against federal common law — or implied federal remedies — is not entirely clear. But there are indications that the Powell position, especially as it has been developed by Chief Justice Rehnquist and others, not only erects a presumption against federal common law but actually undercuts the legitimacy of all federal common law.

First, Justice Powell is ambiguous concerning what it is that Congress must specifically have intended. The most sensible construction is that Congress must specifically have intended that courts should make federal common law, or define causes of action to enforce the statute. But in some parts of Powell's opinion he seems to go further, requiring also specific congressional intent as to the *content* of the law. Must Congress have specifically intended the particular cause of action (or other common law rule) that the court creates? If not, claims Justice Powell, "the court's implication doctrine encourages . . . political default by Congress" and

"invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be employed through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process, with its public scrutiny and participation, has been bypassed, with attendant prejudice to everyone concerned . . . ."24

The problem with that approach is that it leaves *no* room for federal common law; even when Congress affirmatively seeks to

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24. *Cannon*, 441 U.S. at 743.

use the courts to fill out the contours of the statutory scheme, it is prohibited from doing so. Courts can make no rules except ones the Congress specifically intended and yet, for some reason, did not spell out in the enactment.

True, Congress as the representative branch might be well-advised to decide on remedies and other applicable issues itself, rather than delegate the decision to the courts. Delegation means that more policy-making will be made by the non-democratically selected judiciary. It is also probably true that more federal law will result, because it is easier for Congress to enact a law federalizing an area and telling the courts to devise the law than it is for Congress to create the law itself. But any such objections are more properly directed to Congress than imposed upon Congress by the Supreme Court. And not all agree with Justice Powell that it is objectionable for Congress to utilize the courts to formulate federal law. Judge Henry Friendly has described Congress's ability to pass on these decisions as "one of the beauties of" our system:

"[I]t permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function — with Congress always able to set matters right if they go too far off the desired beam.<sup>25</sup>

A specific intent prerequisite to federal common law should relate to the authorization of judicial lawmaking and not to the substance of the law to be made. To require specific intent (or a directive) relating to the content of the law strikes out at the very concept of federal common law. Surely one cannot force Congress always to decide all issues in legislation. Surely it is sometimes better to allow Congress to leave gaps in the legislation to be filled in by courts. Case-by-case development is sometimes the wisest choice; sometimes situations or even solutions emerge that one could not foresee at the time of the legislation.<sup>26</sup>

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25. Henry Friendly, *In Praise of Erie — and the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1943).

26. Perhaps the issues of congressional endorsement of lawmaking and congressional endorsement of the content of the rule have been confused because in the remedial con-

Second, the approach — inaugurated in Justice Powell's opinion in *Cannon* — developed further in later opinions and moved toward a no-federal-common-law position. This development has been detailed in other papers<sup>27</sup> so I will review it here only in the sketchiest fashion. In *Carlson v. Green*, Justice Rehnquist in dissent adopted a stricter approach than specific intent, saying that no federal common law should be found absent an explicit directive in the enactment.<sup>28</sup> His comments were limited to rights of action inferred from the Constitution, but in *Milwaukee v. Illinois* the majority adopted the standard and applied it in the statutory context as well. Federal common law should be found only when an enactment specifically so directs.<sup>29</sup> Earlier Supreme Court majorities had rejected such rigid positions.<sup>30</sup>

Consistently applied, the *Milwaukee v. Illinois* approach would bring an end to federal common law because Congress has not often to date enacted explicit directives that courts should create federal common law.<sup>31</sup> (It has not enacted prohibitions ei-

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text, the main context in which the strict rules are being suggested, the distinction is not always apparent or important. It may be, for example, that Congress adverting to judicially-created causes of action would correctly assume that damage actions were the form that would be chosen. The distinction can be important, however, even in cases involving remedies: Is it acceptable for Congress to enact a statute and decide that the full remedial scheme is to be worked out by the judiciary? If Congress explicitly provides that the judiciary shall decide upon the remedies, does the explicit directive obviate any constitutional difficulties with the federal common law, or does such delegation itself raise issues about the limits of federal common law? As my comments in text should make clear, I believe that such a statute is constitutionally unassailable and that Congress should be able to use judicial lawmaking when it desires to do so.

27. See, e.g., Doernberg, *supra* note 11.

28. *Carlson v. Green*, 446 U.S. 14 (1980).

29. *Milwaukee v. Illinois*, 406 U.S. 91 (1972).

30. For example, in *United States v. Little Lake Misere Land Co.*, the Court, through Chief Justice Burger, rejected the argument that state law applies "in absence of an explicit congressional command to the contrary." 412 U.S. 580, 591 (1973). Similarly, in *Bush v. Lucas*, the Court rejected a requirement of explicit authorization. 462 U.S. 367, 375-76 (1983).

31. There are occasional examples of explicit congressional directives, however, such as the mandate in rule 501 of the Federal Rules of Evidence that certain questions of evidentiary privilege "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." Moreover, Congress sometimes explicitly adopts state standards. See, e.g., Social Security Act, 42 U.S.C. § 416(h)(1)(A) (1982); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1982); FED. R. EVID. 302, 601.

ther, though if it did not want courts to act, such prohibitions would be fully effective.) Unless Congress changes its ways and affirmatively decides and states that courts should fill in the contours of its legislation, a rule requiring an explicit directive in order to make federal common law would result in no federal common law being permissible.

Proponents of this approach avoid this result only by finding exceptions — areas where their ban on federal common law does not operate — for example if federal law preempts state law; or when the federal rule can be called “interpretation” rather than “federal common law.”<sup>32</sup> After the Court’s anti-federal common law stance in *Milwaukee v. Illinois*, for example, it used federal common law powers to create a cause of action that Congress not only did not specifically intend but had even repeatedly and specifically rejected. The Court rationalized its result by making a preemption exception to the strict ban on federal common law.<sup>33</sup> In other instances also, Justices who have opposed judge-found causes of action occasionally themselves find it necessary to create one and simply proceed without reference to their strict rules. For example, Justice Powell’s opinion for the Court in *County of Oneida v. Oneida Indian Nation*,<sup>34</sup> recognized an implicit federal common law right of Indians to sue to enforce their aboriginal land rights and determined from all the circumstances that Congress did not preempt or bar those rights. Justice Powell has nowhere attempted to reconcile his views in cases like *Cannon* and his views in cases like *Oneida*.

One way to prevent the Powell-Rehnquist position from becoming the equivalent of a no-federal-common law rule would be to limit it to remedies. After all, their approach has been crafted in cases involving implication of federal causes of action, and Powell has stated that courts should be most reluctant to create federal common law in that area because it increases courts’ ju-

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32. See Field, *supra* note 9, at 931. Moreover, some believe that courts in any event can provide federal remedies for federal rights, when they find that course appropriate. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 402-06 (1971) (Harlan, J., concurring).

33. *Boyle v. United Technologies Corp.* 487 U.S. 500 (1988).

34. 105 S. Ct. 1245, 1251-59 (1985).



risdiction.<sup>35</sup> That argument is the only one, however, that gives any basis for treating implied remedies differently from any other federal common law issue, and the argument is a weak one.<sup>36</sup> Other Justices — Frankfurter and Harlan, for example — have believed it *easier* to create federal remedies than to make other types of federal common law.<sup>37</sup> In short, while it would be convenient to limit the *Powell-Rehnquist-Milwaukee v. Illinois* approach to implied rights of action, there is little basis for separating that category of cases out from other federal common law questions or for treating them more restrictively. In both situations the problem is how the judiciary should act in face of a congressional enactment that is silent on the issue before them.

Unlike Justice Powell, I believe that creating federal common law in an attempt to effectuate the generalized intent of enacted law does not violate separation of powers. Indeed it is more consonant with it than the rules that have been suggested to limit federal common law. Federal common law should not be seen as setting the various branches of the federal government at odds with each other; the power conflict it raises is much more between federal and state power, as described above.

The first reason federal common law does not violate the separation of powers is that the whole purpose of federal common law is to effectuate the intent of enacted law and not to countermand it. When courts make federal common law they strive to carry out Congress's plan in the way most consonant with congressional intent and policies, while recognizing that congressional intent cannot always be known. Moreover, the rule courts create operates only as an interim measure, to govern until Congress acts and makes its choice explicit.<sup>38</sup>

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35. *Texas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 644-46 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 748-49 (1979) (Powell, J., dissenting).

36. See *infra* notes 44-46 and accompanying text.

37. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 402-06 (1971) (Harlan, J., concurring); *Montana & Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261-62 (1951) (Frankfurter, J. dissenting); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Royal Indem. Co. v. United States*, 313 U.S. 289, 296 (1941); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1528 (1969) (stating that specific congressional intent is needed to support rights but not remedies).

38. The only exception is the very few cases where the Court is interpreting the Constitution to require a federal common law rule, in which case it is more insulated

Not only is the generalized intent approach designed to fulfill congressional intent, but the specific intent and other strict rules of construction are often used in derogation of congressional intent. While purporting to be rules of construction, often they are used to fulfill purposes of the judiciary that Congress does not share. They purport to limit judicial activism, but in fact these rules allow courts to insist upon their own policies in the face of apparently contrary congressional enactments.

One example is clear statement approach employed in *The Slaughter House Cases*.<sup>39</sup> There the Supreme Court in 1873 interpreted the privileges and immunities clause in the Fourteenth Amendment to have almost no meaning and then embarked upon equally narrow definitions of the due process and equal protection clauses. The Court's explanation for so underreading the Fourteenth Amendment was that otherwise

“the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . [and] radically changes the whole theory of the relations of the state and the Federal governments to each other and of both of these governments to the people.”<sup>40</sup>

But it was precisely such expansion of federal power at the expense of state power that the Fourteenth Amendment contemplated — a fact the Supreme Court has since recognized.

Another example is the recent series of cases in which congressional statutes purporting to let individuals sue states in federal court have been “construed” not to allow suit. The Supreme Court has held the Eleventh Amendment a bar to federal jurisdiction in the absence of a clear statement of congressional intent in the language of the statute itself. It is not the actual congressional intent that the Court is attempting to find in those cases; regardless of the clarity of congressional intent, the Court will not hold federal causes of action applicable to suits against states unless Congress in the legislation has employed the correct verbal formula.<sup>41</sup> In both examples, the clear statement ap-

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from congressional revision.

39. 83 U.S. 36 (1873).

40. *Id.* at 78.

41. *See, e.g., Dellmuth v. Muth*, 491 U.S. 223 (1989); *Employees of the Dept. of*

proach was used as a judicial check — and represents judicial activism more than restraint. Federal common lawmaking is not judicial usurpation of congressional power but aims to fulfill congressional intent not to transgress it. It represents an attempt to cooperate with and work with Congress to would sensible federal policy.

Justice Powell's second argument concerning separation of powers — that judicial discovery of federal remedies violates separation of powers because it increases the jurisdiction of the federal courts — is also a weak one, for Congress has nowhere manifested an intention that federal courts exercise federal question jurisdiction only when a federal remedy exists.<sup>42</sup> Courts have *interpreted* federal law to require a federal cause of action for federal question jurisdiction,<sup>43</sup> an interpretation that reflects substantial judicial restraint. If the judiciary has limited *itself* with the remedy test for federal question jurisdiction, it is hardly seizing jurisdiction of cases not intended for it when it finds a federal remedy exists.

If, as I contend, federal common law contributes to congressional-judicial cooperation, why does it have its detractors? What are their concerns about federal common law?

The first fear concerning broad federal common law power is that courts will find Congress allowed it when in fact Congress *did* not and *would* not have intended a federal rule (or alternatively, would not have intended the particular rule the court adopted). As my defense of federal common law as fulfilling congressional purposes should make clear, I do not accept the idea of judicial prerogative that is discussed by Professor Merrill. My reaction to his thesis is that *of course* federal common law must be in accord with enacted law. I was surprised about the doubt he expresses about my view, for I have consistently maintained that the central requirement of federal common law is that it be authorized by enacted law.<sup>44</sup>

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Public Health and Welfare of Missouri v. Dept. of Public Health and Welfare of Missouri, 411 U.S. 279 (1973).

42. See PAUL M. BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 943 (3rd. ed. 1988).

43. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).

44. See Field, *supra* note 9, at 927-30. Moreover, the overwhelming majority of Supreme Court cases are consistent with that approach, in reasoning as well as in holding.

I find it hard to understand how Professor Merrill can both support a requirement of an authorizing enactment and also take seriously the notion of a judicial prerogative to act in derogation of congressional intent, for it seems to me that the two positions are not consistent with each other. There is a contradiction in the way Professor Merrill uses the term "judicial prerogative" in his paper. At the beginning of the paper he talks about a prerogative "to act according to discretion for the public good, without the prescription of the law and *sometimes even against it.*"<sup>45</sup> Later, however, Professor Merrill states that "even if federal courts have inherent power to make law, presumably they would not make law that contradicts existing enacted law." I agree with the latter statement but do not understand how it fits in with the former. It seems to me there is all the difference between these two descriptions and it is important to maintain the distinction between them. A judicial lawmaking — or filling in of enacted law — in *pursuance* of congressional intent is a very different creature than the same power used to circumvent congressional intent. Moreover, in my view, the first of these exercises is wholly legitimate and the latter is utterly illegitimate.

But even though *properly* used federal common law may *fulfill* congressional intent, those fearful of federal common law point out that courts with power to make it also have power to usurp authority that Congress did not and would not intend for them. And a related fear is that courts will make too much federal common law; they will take over the decision whether federal law will displace state law and will sometimes go first with the decision that federal law is to govern. This would cut down

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While there are a few isolated cases that can serve as examples to the contrary, the same three or four cases are always discussed to illustrate this tendency, while there are many hundreds of cases that support this basic requirement for federal common law.

I also do not claim that all federal common law can be explained as "interpretation." I do think that interpretation and federal common law are on a spectrum, and that it is hard to know at what point to draw the line between them, so I would try to avoid relying upon a test depending upon this distinction.

For example, a rule forbidding federal common law but allowing "interpretation" might lead to some anomalous results. It might mean that it was not possible for courts to create federal executive or judicial immunities but that could still create such immunities for state officials; for state officials, the immunities could be seen as interpretation of section 1983, while no such statute exists in relation to federal officials.

45. quoting LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* 220 (Everyman ed. 1970) (emphasis added in Merrill's paper).

on the powers of the states vis a vis the federal government, as we have seen. Moreover, the ideal of federalism, as explained in both *National League of Cities* and *Garcia*, is that Congress — and not the politically-insulated courts or any other body — decides whether federal law should displace state law.<sup>46</sup>

One way of addressing these dangers that do lurk in judicial common law power is to adopt strict rules concerning when it can be made — like Powell's specific intent requirement or the stricter explicit directive approach of Rehnquist in *Carlson* and the Court in *Milwaukee v. Illinois*. Such rules consistently followed would cut back drastically on federal common law and reduce the opportunity for judicial usurpation. The problem, however, is that the cure would be far worse than the disease. The rigid rules would prevent courts from creating federal common law where it was not intended, but they would also prevent courts from fulfilling judicial functions.

Much can be said for Congress making these decisions rather than the courts, but the fact of the matter is that there will always be issues involved in congressional legislation that Congress does not think about and resolve. The judiciary often may be the first body that has actually considered whether a cause of action (or immunity or any other issue) exists in a particular situation; no one else may have adverted to the question of the appropriateness of federal versus state law. Courts are less suited than Congress to find facts, to deal with certain areas in a systematic fashion, and to decide questions of policy. But we should recognize as well the particular institutional advantages that courts have in lawmaking and not jeopardize the benefits of the judicial process in our endeavor to prevent excesses. Courts' perspective of hindsight means they may become better acquainted with the problems that actually arise under a federal scheme. And surely they often can understand — in a way that Congress, operating in the abstract, could not have — how a particular congressional scheme impacts on the parties before them. Moreover judges' detachment from the political process may increase our confidence that reason and fairness will guide their decisions. Because only the approach of judicial searching

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46. For a fuller description of valid separation of powers and federalism concerns about federal common law, see Field, *supra* note 9, at 930-34.

for the framers' intent, in the sense of generalized intent, allows the judiciary properly to perform its function, it is more consonant with separation of powers than the rules strictly limiting federal common law.

Supporters of an explicit directive requirement may believe that it would force Congress actively to make the decision now made by the judiciary — to think about whether state or federal law would best fill any gap, and to express itself on that point. Congress is free to make the decision now, of course, but it does not do so. The threat that otherwise state law must always apply — that no other body can address the issue and come to the proper conclusion — is to make Congress change its ways.

Even if one believes it appropriate to attempt to manipulate Congress in this way, there is a substantial question whether a different judicial approach really would produce a change in congressional practice. And even if Congress did attempt to address these issues, so that specific directives in favor of federal (or state) law sometimes resulted, it seems inevitable that Congress could not foresee all possible questions that would arise. If, as I predict, a rigid rule limiting federal judicial creativity — such as those requiring specific intent or an explicit directive — would create a need to add “other categories” where federal courts *can* make federal common law more easily, then judicial discretion would still control, but the whole controversy over federal common law would have had the principal effect of creating one more set of analytical hoops for litigants, courts and scholars to jump through.

In this respect the attempt to create strict rules as to when federal common law is authorized reminds me of the Tenth Amendment issue with which we started. Just as in that context courts have found over time that there is no way to set out a separate sphere into which congressional regulation cannot intrude, so here there is no way satisfactorily limit court power with a hard and fast rule. Because it is impossible to delineate a clear rule that is satisfactory, it is best to leave the judiciary to draw lines. It has done that to date by a presumption for state law and a general policy of restraint.<sup>47</sup>

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47. See Field, *supra* note 9, at 950-62. Justice Harlan summed up the appropriate

Because it is not possible to create effective, strict standards for federal common law without displacing courts in their central role, the real limits upon federal common law are forged by judicial self-restraint. Great Justices like Justice Harlan understood that it is this policy that must hold the judiciary within proper bounds and not any limitation from without. Justice Harlan cared about protecting states' rights, but he did not employ rigid formulas in defining the bounds between state and federal power. He employed this approach not only in this area of federal common law and implied rights of action but also in other areas. For example, he maintained that the Fourteenth Amendment's Due Process Clause is violated by rules that violate fundamental fairness or that shock the conscience, and he avoided the more rigid formulas, such as the incorporation approach, that some Justices claimed would more effectively keep the Court from writing its own preferences into the Constitution.<sup>48</sup>

The formulas Harlan used — such as fundamental fairness — give great room for judicial leeway; they could only achieve the purpose Harlan desired of them by the exercise of judicial self-restraint. Harlan talked often of the importance of such restraint but was prepared to rely upon the judiciary to supply it. Indeed reliance upon judicial self-restraint concerning federal common law, as well as other subjects, is almost inevitable, because judges are the decisionmaker to whom the argument for limits on the judiciary are addressed; they are the guardians of the standard and have been ever since *Marbury v. Madison*.<sup>49</sup>

In one sense the argument for strict standards — whether

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inquiry in *Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 68-69 (1966). He there suggested that the first inquiry a judge should make in deciding whether to displace state law with federal is whether state law poses "any significant threat to any identifiable federal policy or interest." Only after it crosses this hurdle should the court proceed "to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern, . . . the feasibility of creating a judicial substitute, . . . and other similar factors." This test creates a presumption for state law, allowing the creation of federal common law only when there is an overriding need for it.

48. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) for an example of the debate between Justice Harlan and others, most notably Justice Black.

49. 5 U.S. (1 Cranch) 137 (1803).

the Powell or the Rehnquist version — is that the judiciary should create a *per se* rule to limit itself. Perhaps the courts' reply should be that if Congress wants to limit the courts to any particular procedure or to take away judicial power in any class of cases it can do so by statute, but in the absence of congressional action the judiciary will leave the judicial function unimpaired.<sup>50</sup>

Professor Merrill expresses great reluctance to rely upon judicial restraint, but I believe we should not feel uncomfortable with this as a resting place. I do not understand his position, especially since the standards he recommends ostensibly to limit the judiciary — notably requiring that there be an implicit (not explicit) directive as a precondition for federal common law — are essentially *equivalent* to relying on judicial restraint.<sup>51</sup> In any case, judicial restraint seems to have worked so far, causing federal common law to be made only sparingly. If Professor Merrill finds this resolution objectionable, he should tell us what rule he plans to substitute for judicial restraint that will lead both to less discretion and to better results.

While I think he should frankly acknowledge and accept our dependence upon judicial restraint in the proper delimitation of federal common law, I agree with most of what Professor Merrill says about the federal common law's limits, and I found his paper very interesting and informative. Probably the biggest difference between us concerns how easily an enactment should be construed to authorize the making of federal common law. The issue is a difficult one. In fact I agree with Professor Merrill's position that courts should not easily find federal common law, but unlike him I am not ready to accept any rules to back up that precept. Without such rules, the call for moderation amounts to a call for judicial restraint. I believe we must neces-

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50. Professor Redish argues that in the Rules of Decision Act the Congress *has* directed federal courts not to make common law. Martin Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761, 766,867 (1989). His construction of the RDA is, however, by no means obvious. See Field, *supra* note 9, at 903-904. As I have explained thoroughly elsewhere, *Erie* interprets the Rules of Decision Act to command that the grant of diversity jurisdiction is not alone sufficient to support federal common law and that statutes granting federal jurisdiction do not necessarily enable federal courts to make common law. *Id.* at 922-23, 928-29.

51. See Field, *supra* note 9, at 941-42.



sarily rest here because it is not possible to craft rules to restrict courts that are both workable and set real limits. Certainly none has yet been suggested. In this respect, this area is like the Tenth Amendment issue that we started with: Congress should not displace state lawmaking, but we have not found any good rules to impose from the outside to limit Congress's power. With both congressional and judicial lawmaking, it may be better for Congress and the courts to limit themselves — at least for as long as they continue to do so within reasonable bounds.