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THE INTEGRATION OF STATE PRIVATE LAW IN FEDERALIZED FIELDS OF LAW: THE CASE FOR FEDERAL COMMON LAW

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> *THOMAS MORE: What would you do? Cut a great road through the law to get after the Devil?*
>
> *ROPER: I'd cut down every law in England to do that!*
>
> *MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?*[1]

I. INTRODUCTION

Among the changes associated with the New Deal is the replacement of state private law with federal statutory and administrative law as the preeminent source of public law in the United States.[2] Before the New Deal, private lawsuits provided the predominant mechanism for governmental regulation of individual conduct, the economy, and private welfare. One commentator explains that before the New Deal,

> the vast majority of regulatory functions were undertaken by the common law courts, which elaborated the basic principles of property, tort, and contract. Public and private interactions were controlled largely through those principles. Governance was largely dependent on the states . . . . [J]udges performed the basic regulatory functions that might otherwise have been carried out by bureaucrats.[3]

To be sure, state courts structured private law to achieve certain public objectives.[4] State courts were nevertheless generally unwilling to expand the range of common law jurisprudence beyond traditional doctrines of tort, property, and contract law.[5] They were similarly reluctant to allow state

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1. ROBERT BOLT, A MAN FOR ALL SEASONS 39 (Heinemann Educational Exchange 1960) (play based on the life of Sir Thomas More, Chancellor of England from 1529-1532, during the reign of Henry VIII).

2. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 17-21 (1990).

3. *Id.* at 18-19. Of course the regulatory nature of these judicial interventions was not always appreciated. Professor Sunstein explains:

> By the late nineteenth century common law principles came to be treated as largely neutral and prepolitical, and indeed as purely facilitative—rather than constitutive—of private arrangements. These principles ultimately embodied much of the structure of laissez-faire, and they gave the nation a definitive albeit misleading sense of statelessness.

Id. at 18.

4. *See, e.g., id.* For example, otherwise valid contracts were not enforceable if they bound a party to commit an illegal act. Similarly, the "Fellow Servant" doctrine and the related doctrine of contributory negligence precluded suits against railroads and other nineteenth century industries. This was consistent with a philosophy that favored industrial expansion over social welfare. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 301-02 (2d ed. 1985).

5. *See, e.g.*, Marin H. Belsky, *Environmental Policy Law in the 1980's: Shifting Back the*

legislatures to disturb common law ordering.[6] The resulting legal regime is aptly characterized as "a system of public law that was built directly on private law principles."[7]

Advocates for the New Deal possessed a substantial and ultimately compelling arsenal of arguments challenging the hegemony of state courts.[8] Rather than relying solely on private lawsuits to regulate conduct, New Deal legislation established federal regulatory programs. These were often administered by federal agencies with the resources, authority, and mandate to develop and implement public policy in many fields of law.[9] As a part of the New Deal and the federal administrative state it initiated, there are now federal laws and agencies addressing most areas of public policy in the United States.[10]

The federal administrative state, however, leaves much of state private law intact. Even where federal programs constitute the predominant source of public law within a field, private law almost always retains some relevance. Congress often seems unwilling to preempt all state private law from a field.[11] Courts are similarly reluctant to find that federal public law is the sole

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Burden of Proof, 12 ECOLOGY L.Q. 1, 5-9 (1984). In his article, Professor Belsky explains that courts were unwilling to expand traditional tort law to allow claims by private individuals harmed by pollution, thereby necessitating the rise of environmental regulation enforced by administrative entities. *Id.*

6. "[F]or the first fifty years of modern, urban-industrial society in the United States, judicial review directly limited national and state legislative regulation of the economy to a material degree." JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 32 (1950).

> The most important organizing principle for interpretation was that regulatory statutes should be construed narrowly—so as to harmonize as much as possible with principles of private markets and private rights. This approach grew out of the idea that courts should narrowly construe statutes in derogation of the common law.

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408 (1989) [hereinafter Sunstein, *Interpreting Statutes*].

7. SUNSTEIN, *supra* note 2, at 20.

8. For instance, they demonstrated that many forms of conduct could not be adequately regulated within the context of private party lawsuits. They also pointed out that common law courts were neither sufficiently representative of the population nor politically accountable to adequately interject public concerns into private lawsuits. Common law judges were, after all, generally chosen from a very narrow and generally conservative segment of the population. *See, e.g.*, *infra* note 114. Furthermore, they argued that many of the matters requiring regulatory attention in a modern industrial democracy should be addressed by federal, rather than state authorities. These and other criticisms of the common law legal regime are discussed at *infra* Part III.A.2.

9. To be sure, in some instances, these statutes provide the basis for private legal actions either against individuals, corporations, or the government itself. Such lawsuits provide an important mechanism for courts—especially federal courts—to continue participating in both the implementation and development of public policy. A thorough treatment of their place in the modern federal administrative state can be found in Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). This article points out that these "private correctives" were rarely, if ever, created to replace state private law preempted by federal statutes. *See infra* Part III.D.2.

10. One commentator refers to the "orgy of statute making." GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

11. Presumably, out of deference to state institutions, Congress is reluctant to become the exclusive source of law in a field by making its work product the sole source of both public and private law. The Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1994) is an example of such exclusive remedies. *See, e.g.*, Pilot Life Ins. v. Deadeaux, 481 U.S. 41 (1987) (holding that the private remedies established by ERISA are the exclusive civil enforce-

source of law within a field.[12] One important source of commentary on judicial federalism captures the nature of this state of affairs:

> Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states . . . .[13]

The presence of state private law within fields of law heavily influenced by federal statutes presents courts with three choices: (1) to preempt some or all of the state private law within the field;[14] (2) to allow state private law to

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ment remedies in the field). This "deference" has created problems in preemption jurisprudence because courts are then left to determine whether and to what extent state law may be applied within the field. Another problem arises when federal legislation precedes the development of private law within a field. This issue is addressed at *infra* Part IV.A.2.

12. Part of the reticence on the part of federal courts to find that state private law is completely preempted may be the recognition that private law occupies an essential, if implicit, place in the legal culture of the United States and its Constitution. As one commentator points out: "[A]t base the Anglo-American tradition makes an assumption that is captured by the reference to the 'background' nature of common law. That is, there are rights and duties that exist notwithstanding the lack of action by a legislative body with respect to the area in question." Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1007 (1985). Justice Thurgood Marshall recognized this principle in his concurrence in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 89 (1980) (Marshall, J., dissenting). He wrote that "[t]he constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law." *Id.* at 93. He pointed out that this is demonstrated by the fact that "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *Id.* at 93-94. Marshall cautioned, however, that this argument should not be read to favor "a return to the era of [*Lochner v. New York*], when common law rights were also found immune from revision by State or Federal Government." *Id.* at 93. As Justice Marshall recognized, it is impossible to perceive these rules as static and unchanging; nevertheless, it is equally impossible to perceive of the Anglo-American judicial system functioning without such rules. Chief Justice John Marshall also saw such private rights as a fundamental part of our federal legal system: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of law whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

13. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (3d ed. 1988) [hereinafter HART & WECHSLER].

14. Courts frequently refer to a field of law being "occupied" to the exclusion of state law when they employ this basis for excluding state law. *See* cases cited *infra* notes 80-94. The principle of "field occupation" accompanied the development of broad federal regulatory authority and a judicial philosophy that was quite supportive of federal authority. *See infra* section II.B. Although references to "field occupation" have fallen out of favor, the recent rise of references to congressional "delicate balancing" as a basis for preemption (to prevent state law from disturbing such "balancing") means that state law is still subject to being preempted from entire fields. Indeed, one commentator argues that these tests are "functionally indistinguishable." Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HAST. CONST. L.Q. 69, 71 (1988). Before the twentieth century expansion of federal regulatory authority, courts were relatively unconcerned with the extent of the regulatory field occupied by federal statutes. Instead, they directed their inquiry to the question of whether a specific state law could be applied without interfering with

"operate of its own force" notwithstanding the presence or influence of federal legislation;[15] or (3) to employ common law process to integrate private law principles into the federal regime in a manner that does minimal damage to either these principles or federal objectives.[16] Courts generally assert that indicia of "congressional intent" control their choice of these options.[17] Statutory language is rarely so explicit, however, that it completely removes judicial discretion from this choice.[18] In this respect, federal preemption is one of

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federal laws or policies. Courts often stated that they were pursuing this inquiry to determine whether there was a "collision" between state law and federal policies. As discussed further *infra* at notes 64-66 and accompanying text, this approach to preemption reflected a desire to preserve state lawmaking authority. Falling somewhere in between "field" preemption or "delicate balancing" and "collision" is the approach that considers whether state law "stands as an obstacle" to federal policies. Although this inquiry is generally sensitive to federal policies, it often stops short of preempting entire fields from the activities of state lawmakers. *See infra* Part III.D.1.

15. According to the Supremacy Clause of the United States Constitution, both state and federal courts must apply federal law rather than contrary state law. U.S. CONST. art. VI, cl. 2. For the text of the Supremacy Clause, see *infra* note 30. The tests applying this principle, however, define the extent of the putative "conflict" and/or the requisite congressional "intent" to supersede state law that must exist before state law is displaced. By requiring a direct "conflict" or explicit congressional direction before preempting state law, courts easily find state law "operating of its own force" even within heavily federalized fields of law. *See, e.g.*, the cases discussed *infra* note 276. Although there are a number of criticisms of this phrase, it helps distinguish between state law that has been incorporated into federal law versus state law that exists in a federalized field because there is insufficient federalization for it to be preempted or to call for the creation of a distinct federal rule. For criticism of the this term, see Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 389 n.226 (1980), and Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 973-77 (1986). In some instances, courts create only the appearance that state law is operating of its own force. In these instances, courts allow state law to apply *to the extent that it does not interfere with federal objectives*. I argue that this approach *covertly* "federalizes" state common law and that it is more accurate to characterize this as a form of federal common law. *See infra* Section IV.B.

16. Professor Field explains that the creation of such "federal common law" is generally limited to instances where a federal court (or state court applying federal law) first establishes the "threshold" determination that the legal question at issue is of sufficient federal interest to warrant a federal rule of law that is not explicitly provided by a statute. For her discussion and insightful criticism of this "two-pronged" approach, see Field, *supra* note 15, at 950-53.

17. Typical of the Supreme Court's pronouncements concerning preemption is its statement in *Metropolitan Life Ins. Co. v. Massachusetts*, 417 U.S. 724, 738 (1985), that "[i]n deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." After a thorough review of the cases and commentary addressing federal preemption, the author believes that the best description of judicial reliance on congressional intent was made by then-Solicitor General of the United States Archibald Cox, who wrote: "More often than not Congress says nothing about the effect that federal legislation should have upon state laws, thus leaving the question to the Supreme Court, which under the conventional formula repays the compliment by divining the intent of Congress." Archibald Cox, *The Supreme Court and the Federal System*, 50 CAL L. REV. 800, 808 (1962). The reasons that congressional intent is of limited value for determining the preemptive scope of federal law are discussed further at *infra* notes 50, 270 and accompanying text.

18. As Professor Sunstein explains:

> The meaning of a statute inevitably depends on the precepts with which interpreters approach its text. Statutes do not have pre-interpretative meanings, and the process of interpretation requires courts to draw on background principles. These principles are not "in" any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture. Disagreements about meaning often turn not on the statutory terms "themselves," but instead on the appropriate interpretive principles. Courts sometimes make the governing norms explicit, but frequently they leave them unarticulated and latent. The principles are often misdirected or at least controversial.

Sunstein, *Interpreting Statutes*, *supra* note 6, at 411-12.

a number of contexts where courts can resolve a choice between federal and state authority only by applying "background assumptions"[19] concerning the appropriate balance of power between federal and state authority.[20] These assumptions foster federal authority when "nationalist" premises are employed by judges to support the view that Congress intends, if only by implication, to preempt state laws that may "stand as an obstacle" to federal programs.[21] Conversely, "federalist" assumptions often preserve state law by supporting the argument that a direct conflict between federal and state laws or the express intent of Congress must be demonstrated before state law is preempted.[22]

Many of the criticisms directed at contemporary preemption jurisprudence[23] can be attributed to these background assumptions. First, these assumptions are often implicit, making preemption decisions hard to predict and supporting the view that preemption is devoid of guiding principles.[24] Second, the conflict between nationalist and federalist assumptions ties preemption analysis to "rhetorical excesses and its attendant contradictions," resulting in "destabilizing swings between the Nationalist and Federalist extremes."[25] Finally, because courts and commentators approach federal preemption as a choice between federal and state authority, they tend to minimize or disregard the less obvious but equally significant questions of whether and how federal preemption should be employed to preserve private law within federalized fields of law.

This article addresses each of these concerns. First, it reviews the background assumptions that serve as the basis for many preemption decisions. Although these assumptions were initially solicitous of state authority, the rise of the federal administrative state required the development of preemption doctrines that removed state regulation from fields of law "occupied" by federal programs. Where state law constitutes a competing administrative regime, it is often appropriate to employ preemption as an "all or nothing"

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19. In discussing the relevance of these "background assumptions," I primarily rely on the work of Professor Richard H. Fallon, Jr. *See generally* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); *see also* Professor Sunstein's discussion of "background principles," *supra* note 18.

20. Hart and Wechsler explained that the relative authority and jurisdiction of state and federal courts must be explored as "an aspect of the distribution of power between the states and the federal government. Federal jurisdiction, as [this] subject is usually called, would surely be a sterile topic were it not explored in this perspective." Henry M. Hart, Jr. & Herbert Wechsler, *Preface to the First Edition* of PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM at xi (1953). Preemption, which determines whether courts will apply state or federal law, must also be explored as a significant element in the division of authority in our federal system.

21. *See, e.g.*, the discussion accompanying *infra* notes 80-100.

22. *See, e.g., infra* note 72 and accompanying text.

23. An American Bar Association report synthesizes much of the criticism by writing: "Implied preemption doctrines coexist uneasily with Supreme Court preemption cases requiring clear legislative intent." Kenneth Starr et al., *The Law Of Preemption: A Report of the Appellate Judges Conference*, 1991 A.B.A. REP. 55 [hereinafter *Law of Preemption*].

24. "When [preemption cases] presenting similar issues are decided unanimously, yet with opposite results, there is a flaw either in the rule or its application." Wolfson, *supra* note 14 (referring to Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461 (1984); Hayfield N. R.R. v. Chicago & N.W. Transp. Co., 467 U.S 622 (1984)).

25. Fallon, *supra* note 19, at 1124.

choice between federal and state regulation.[26] By contrast, where state private law is concerned it is often more consistent with our federalism[27] for federal courts to incorporate principles of state private law into federal law through the creation of federal common law, rather than preempting state law.[28] This article demonstrates that federal common law may provide a middle ground between preempting state private law (in instances where it might interfere with federal objectives) or leaving state law undisturbed (even though it might interfere with federal objectives).

The most prevalent criticisms of any proposal emphasizing the common law[29] authority of federal courts are either that it usurps policy-making authority that properly belongs to the states (a federalism based criticism) or the authority of other branches of the federal government (a separation-of-

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26. Furthermore, some areas of public policy are inherently federal and state law should be excluded or assumed to be preempted within these fields. *See* discussion *infra* Part IV.A.1. Examples of these fields include international relations, federal Indian policy, interstate controversies, and maritime law.

27. *See supra* note 12 and the materials cited therein for a discussion of the place of private law in our federal structure.

28. This principle is especially applicable in circumstances where federal preemption might otherwise preclude the assertion of private rights that are traditionally defined by state law. Private causes of action are based on the longstanding principle in Anglo-American jurisprudence that a person injured by the illegal conduct of another can bring a lawsuit against the person who caused that harm. *See, e.g.*, Ezra R. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914). The federalization of some fields of law, however, has resulted in the preemption of such state defined rights. *See* discussion *infra* Part IV.A.2. For example, in *Cipollone v. Liggett Group, Inc.*, 500 U.S. 504 (1992), the Supreme Court found a number of state private tort claims to be preempted. Even assuming that some applications of these state actions might interfere with some federal objectives, the Court's "all or nothing" approach threatens to leave some areas without "private law" even though there is no evidence that Congress ever intended (or even considered) this result. This case is addressed further *infra* notes 253-72 and accompanying text.

29. In a 1985 article, Professor Field used the term federal common law "to refer to any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional." Field, *supra* note 15, at 890. Accompanying this sentence in Professor Field's article is a footnote pointing out that state courts are able to "create" federal common law to the same extent as federal courts whenever they possess concurrent jurisdiction with federal courts. *Id.* at n.30. When a state court decision is based on federal law, rather than an adequate and independent state law ground, the United States Supreme Court possesses the authority to review those portions of the opinion based on federal law. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). As a result, the Supreme Court may review state court decisions that seek to create, expand, or apply principles of federal common law. Of course this definition provides more of a context for determining what constitutes federal common law rather than an objective test. This follows from the fact that the definition still leaves open the question of what constitutes a "clear" suggestion of federal law. Nevertheless, Professor Field's definition allows for the possibility that federal common law is legitimate. Another commentator states that "the central difficulty in any account of federal common law [is defining when] legitimate textual interpretation stop[s] and illegitimate judicial 'lawmaking' begin[s]." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 23 (1985). Comparing these statements demonstrates that the authority of a federal court to go beyond what it understood as "statutory interpretation" has not been resolved. Generally, criticisms of federal common law are based on the premise that federal courts have intruded in an area properly reserved to another branch of the federal government or within the authority of the individual states. *See generally id.* As discussed throughout this article, neither federalism nor separation-of-powers concerns are implicated when federal common law is employed to "reform" state law instead of preempting state private law that Congress did not intend to preempt. *See infra* Part III.D.1 (federalism); *infra* Part III.D.2 (separation of powers).

powers based criticism). This article anticipates and attempts to respond to such criticisms.

II. FEDERAL PREEMPTION

A. *The Relevance of Background Assumptions to Preemption Jurisprudence*

Pursuant to the Supremacy Clause of the U.S. Constitution, federal law constitutes the "supreme law of the land."[30] This provides courts with a uniform rule to apply to putative conflicts between state and federal laws.[31] It does not, however, provide standards for determining whether state law is preempted by federal law.

Preemption is not the only context where courts are left with the task of defining the relative spheres of federal and state authority without explicit textual guidance. Ambiguity is inherent in the American political system as a result of the federal structure of the Constitution, which recognizes the political authority of both the federal government and state governments[32] without explicitly defining the division of authority between the two.[33] Courts, especially federal courts, are generally the institution that must determine whether federal authority has been exercised in a manner that displaces state authority.[34] Courts are frequently unable to resolve these disputes by relying solely on direct or explicit evidence of whether the relevant federal actors

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30. The Supremacy Clause reads:

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

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

31. The Supremacy Clause specifically binds courts, both state and federal, to apply federal law rather than contrary state laws. The Constitutional Convention discussed and rejected several proposals that would have provided Congress with the responsibility to determine which state laws were contrary to federal policies. *See infra* note 122 and materials cited therein.

32. Indian tribes, of course, constitute a third domestic sovereign entity recognized by, but predating, the U.S. Constitution. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831), describes the constitutional status of Indian tribes as "domestic dependent nations." The scope of this article is the preemption of state law by federal law. For that reason, this article does not address the political relationship between Indian tribes and the federal government. For a cogent discussion of the lessons that the relationship between Indian tribes and the federal government may have for our federal structure, see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989). The field of federal Indian law is, as the name implies, a uniquely federalized field where state law has little, if any, relevance. This aspect of the field of federal Indian law and its implications for state law operating in this field is discussed at *infra* notes 147 and 185.

33. The Constitution is said to establish "a series of balanced but often ambiguous power relationships between the branches of the [federal] government and between those branches and their sovereign constituency. The term federalism has been characteristically used to describe this solution, but the term has difficulties." G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 17 (1988). This ambiguity has provided a means to expand and contract state and federal authority in response to the exigent needs of each era of United States history.

34. To be sure, with respect to questions of preemption as well as other forms of statutory and constitutional interpretation, any ruling by the courts may be overridden by the subsequent actions of the elected branches of the federal government or by constitutional amendment. Nevertheless, courts must determine whether to interpret existing law as displacing state authority.

intended to displace state law. Instead, they have come to rely on certain "background assumptions" or understandings of how the government is functioning or is intended to function.[35]

In a 1988 article, Professor Richard H. Fallon, Jr. surveyed the field of judicial federalism, analyzing the assumptions that judges and commentators employ to resolve the questions caused by the ambiguity in our federal structure.[36] He demonstrates that two competing models of federalism provide the basis for resolving the ambiguity inherent in our federalism: one favoring the power of the national (federal) government—the nationalist model—and the other seeking to preserve state authority in their sphere as separate sovereigns—the federalist model. As a result:

> When a Federalist vision of the original [Constitutional] text and history provides the interpretative framework . . . states emerge as sovereign entities against which federal courts should exercise only limited powers. . . . In cases of doubt the Court commonly reasons that Congress would have intended to respect state interests associated with the performance of traditional sovereign functions . . . .[37]

By contrast, "[a] Nationalist model of judicial federalism furnishes a plausible set of assumptions to guide court decisions . . . [and] its power is attested in leading Supreme Court cases that reason from its premises that state sovereignty interests must yield to the vindication of federal rights . . . ."[38] Courts employ the assumptions underlying these models to determine whether federal actors "intended" to supersede state authority or sovereignty.[39]

For example, the Eleventh Amendment[40] can be read narrowly to preclude only those suits against states based on party status.[41] It has also

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35. For a general discussion of such background assumptions see Fallon, *supra* note 19.

36. Many of the "classic" questions in the field of federal court jurisprudence or judicial federalism are considered in Fallon, *supra* note 19, and addressed more comprehensively in HART & WECHSLER, *supra* note 13. Some of these issues include: whether Congress has the authority to waive the sovereign immunity of states; whether 42 U.S.C. § 1983 actions constitute an exception to the Anti-Injunction Act, 28 U.S.C. § 2283; whether state judicial forums must be available to litigate federal questions; and the extent to which the Eleventh Amendment constitutes a bar to suits against states and their officials.

37. Fallon, *supra* note 19, at 1143-44.

38. *Id.* at 1145.

39. Some of the competing assumptions underlying the federalist and nationalist models include: whether the sovereign prerogatives retained by the states generally take precedence over the assertion of federal policies and whether state and federal courts are generally fungible or whether federal courts have a distinct role and responsibility to protect federal rights and policies. *Id.* at 1151-61.

40. The Eleventh Amendment's text reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

41. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (Brennan, J., dissenting) (arguing that the Eleventh Amendment bars only those suits based on state-diversity of citizenship and not those based on federal question jurisdiction). The case credited with creating the "shock of surprise" that resulted in the Eleventh Amendment's adoption is *Chisholm v. Georgia*, 43 U.S. (1 Dall.) 234, 260 (1793). Indeed, nearly all of the cases interpreting the Eleventh Amendment before the Civil War were based on diversity jurisdiction. This is not surprising in light of the fact that the general subject matter jurisdiction of federal courts was not established until 1875. HART & WECHSLER, *supra* note 13, at 1159-60. It is worth noting that in his dissent in *Chisholm*,

been interpreted to preclude federal courts from hearing almost any suit in which an unconsenting state is a party, including those suits based on federal question jurisdiction.[42] Professor Fallon points out that "[n]early all commentators who have studied this agree that the historical evidence is mixed and that the textual language could support either conclusion."[43] According to Professor Fallon, courts and commentators are able to choose between competing interpretations of ambiguous constitutional and statutory provisions by analyzing these questions in terms of their background assumptions of how our government functions or was intended to function.[44] As he explains, "it is accepted practice to test the plausibility of conclusions, and thus indirectly the persuasiveness of evidence itself, by their fit with stable theories or assumptions about the surrounding legal universe."[45] Thus, where courts and commentators analyze the Eleventh Amendment with the (federalist) presumption that state immunity may only be overcome by a Constitutional provision that unmistakably negates such immunity, its text is insufficient to overcome that presumption.[46] By those who assume that the Constitution was written or amended to allow for a strong national government, however, that same text is read to allow suits against states in all instances except those explicitly precluded.[47] Because the Constitution's text does not resolve the question,[48] proponents of either interpretation rely on "background assumptions" to demonstrate the basis for and veracity of their positions. Although this allows courts to resolve the ambiguous questions inherent in our federalism, it has not yielded consistent or predictable results, creating "destabilizing swings between the Nationalist and Federalist extremes."[49]

Justice Iredell "conceded that the outcome might differ in a suit arising under federal law." *Id.* at 1159 (internal references omitted).

42. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (holding that the Eleventh Amendment prohibits Congress from waiving state sovereign immunity, even in a field of law reserved to the federal government). The Eleventh Amendment has not been interpreted to preclude suits by one state against another or suits brought by the United States. HART & WECHSLER, *supra* note 13, at 1166.

43. Fallon, *supra* note 19, at 1147; *see also infra* note 48.

44. Professor Fallon explains that "[b]ecause bits of historical evidence cannot be assessed except against a broader background, much of the power of the Federalist and Nationalistic models lies in their capacity to provide a general theory of the historical nature of judicial federalism." Fallon, *supra* note 19, at 1148.

45. *Id.* at 1147. "[M]any federal courts issues are vague or point in conflicting directions. In such cases, it is virtually impossible to test the persuasiveness of competing evidence, arguments, and interpretations without at least an informal understanding of the generally prevailing [federalist and nationalist] systemic norms." *Id.* at 1157.

46. *Seminole Tribe*, 116 S. Ct. at 1125-28, 1131-32.

47. *See, e.g., Seminole Tribe*, 116 S. Ct. at 1133-45 (Stevens, J., dissenting); *Id.* at 1145-85 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting); *Scanlon*, 473 U.S. at 247; *see also* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

48. As Dean Nichol, Jr. explains, "[t]he content of the Eleventh Amendment limitation of judicial authority cannot be ascertained by either logic or examination of the constitutional text." Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987).

49. Fallon, *supra* note 19, at 1224. Recall Professor Sunstein's statement that "[d]isagreements about meaning often turn not on statutory terms 'themselves,' but instead on the appropriate interpretive principles." Sunstein, *Interpreting Statutes*, *supra* note 6, at 411-12.

Nevertheless, background assumptions are necessary because courts must apply statutes and the Constitution to matters that their authors did not or could not consider.[50] Yet, just as courts and commentators call upon Congress to provide greater detail in its enactments to reduce the necessity of such judicial "judgment calls,"[51] it is entirely appropriate that courts should explicate their background assumptions. This will provide greater clarity to this field, and greater guidance to practitioners and legislators—both federal and state—seeking to predict the outcome of preemption cases or influence the drafting of legislation.

The lack of explicit constitutional standards regarding the inconsistencies between state and federal law,[52] as well as Congressional inability to explicitly address all potential conflicts,[53] means that the same or "functionally indistinguishable"[54] background assumptions are relevant in the

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50. One example where specific applications of a federal rule on state authority were not considered by its legislative drafters is 42 U.S.C. § 1983 (1994). Also known as Section One of the Civil Rights Act of 1871 or the Ku Klux Klan Act, § 1983 establishes a cause of action in federal court for plaintiffs asserting that their federally recognized rights were denied under color of local law. *See generally* Nichol, *supra* note 48. Dean Nichol explains that § 1983's legislative history reveals ample evidence that Congress enacted this provision to provide federal judges with "an extremely intrusive tool" for ensuring that state officials, including state courts, did not interfere with or actively suppress federal rights. *Id.* at 985. Yet the range of interests recognized as federal rights when the statute was enacted was exceedingly narrow. With the incorporation of much of the Bill of Rights as federal rights applicable to state action, the range of constitutional and other federal rights is now so broad that it could conceivably provide federal courts with "complete supervision over state courts" *Id.* at 987. Dean Nichol explains that "[i]f the section is applied with the full intrusive force that its drafters envisioned, complications that the framers would perhaps have rejected, or at least did not contemplate, arise." *Id.* As a result, courts are faced with a dilemma. It would usurp legislative authority for courts to ignore the plain language of the statute and pick and choose which rights they wish to protect. Yet "construing [§ 1983] in line with the framers' intent could threaten a dual judicial system." *Id.* at 985. Background assumptions allow courts to avoid this dilemma by providing a means of applying statutes to new circumstances, without producing absurd results that might interfere with the fundamental assumptions shared by the statute's authors and contemporary society. Thus, the statute can be applied to protect an expanded range of federal interests, yet its implementation is tempered by a recognition—or application of the background principle—that its authors did not "intend" to eliminate or obviate the existence of separate state judicial systems. Analyzing this issue based on these background assumptions harmonizes the seemingly contradictory results reached in *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (finding that traditional notions of comity and federalism generally preclude federal courts from enjoining proceedings in state court, even where federal rights protected by § 1983 are at issue), and *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972) (holding that § 1983 might, in some circumstances, allow federal courts to enjoin state proceedings notwithstanding the historic and statutory prohibition against enjoining state court actions).

51. *See infra* notes 55-56 and accompanying text.

52. *See supra* note 30 (text of the Supremacy Clause). To be sure, the Supremacy Clause may be read along with other provisions of the Constitution to guide judicial analysis of preemption. For example, certain fields of law have apparently been federalized by the Constitution's explicit commitment of these fields to one or more branches of the federal government. In the fields of federal Indian law, disputes between states, and, to some extent, foreign policy, state laws are not often incorporated as federal rules of decision and are rarely found to operate of their own force in these fields. *See infra* Part IV.A.1. In most instances, however, courts are left with little textual guidance from either the Constitution or federal statutes on what it means to be "bound" by the Constitution, laws, and treaties of the United States.

53. *See, e.g., supra* note 50; *infra* note 270 and accompanying text.

54. Paul Wolfson employs this phrase in his argument that "delicate balancing" provides more distinction than difference from "field preemption." *See supra* note 14. A similar observation

field of federal preemption. Courts compensate for insufficient evidence of congressional "intent" by applying these background assumptions.[55] These principles are often subsumed within the rubric of canons of construction, presumptions in favor of either state or federal authority, or descriptions of how our federal structure functions or is intended to function.[56] Because contemporary preemption analysis generally ignores the possibility of incorporating state private law into federalized fields, courts generally approach preemption as an "all or nothing" choice of either preserving or preempting state law. This approach means that preemption is susceptible to destabilizing swings as federalist or nationalist thinking gains primacy.

To be sure, with respect to all ambiguous questions of federalism, there are courts and commentators who argue that their position is the only plausible reading of the relevant text or the only interpretation that is consistent with our federal structure. For example, some argue that state law should only be preempted by federal enactments in instances where Congress both provides evidence that it actually considered and explicitly directed this result.[57] While this position is marked by widespread contemporary acceptance and is advanced by noted judges and commentators,[58] it is not, as some imply, the only principled approach to federal preemption. In fact, it represents only one end of a continuum of valid interpretations of the Supremacy Clause. At the other end of the continuum are those who argue that the Supremacy Clause requires the preemption of any state law that might interfere with federal policies.[59] Indeed, background assumptions represent such a critical part of judicial consideration of preemption questions that even where Congress *does* explicitly address preemption, judges tend to implement Congressional "intent" in a manner consistent with prevailing judicial views.[60]

Over time, trends in preemption jurisprudence emerge as the implicit assumptions applied to other constitutionally ambiguous matters influence preemption analysis. By analyzing these trends, this article demonstrates that

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applies to the background assumption employed in the preemption and the "classical" questions of federal preemption jurisprudence listed in *supra* note 36.

55. This observation is demonstrated by the dramatic changes in preemption jurisprudence discussed *infra* at Part II.B.

56. Professor Fallon writes that "[i]f the [federalist and nationalist] models have one function that is more important than the others, it is that of reflecting recurring rhetorical structures; the models capture the rhetoric of many federal courts debates." Fallon, *supra* note 19, at 1150. For discussions addressing how these assumptions are interjected (often subtly) into judicial reasoning and argument, see, e.g., Sunstein, *Interpreting Statutes*, *supra* note 6; *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). The author of this note points out that "judicial imagery and rhetoric are forms of argument that seek to persuade their 'listeners' of the legitimacy of particular uses of power by evoking implicit assumptions about the constitutional order." *Id.* at 894 n.17 (citing R. PARKER, POLITICAL VISION IN CONSTITUTIONAL ARGUMENT (Feb. 1979) (unpublished manuscript)).

57. *See, e.g., Law of Preemption*, *supra* note 23, at 55. *But see infra* note 122 and the materials cited therein.

58. *Law of Preemption*, *supra* note 23, at 55. *But see* sources cited *infra* note 122.

59. *See, e.g., infra* notes 80-100 and accompanying text. As discussed further *infra* notes 122-23, the Constitutional Convention left the courts, *not* Congress, with the authority to determine which state laws were compatible with federal programs.

60. *See, e.g., infra* notes 253-72 and accompanying text (discussing Cipollone v. Liggett Group, Inc., 500 U.S. 504 (1992)).

judicial philosophy concerning the appropriate balance of power between the branches of the federal government and state governments is a significant (if implicit) factor in shaping the extent of federal preemption of state law. Gratuitous references to "congressional intent" within preemption decisions downplay the importance of judicial discretion.[61]

Exposing the extent of judicial discretion within the preemption context is relevant to this article's inquiry for several reasons. First, it demonstrates that any formulation of preemption analysis rests upon implicit assumptions of how the government is intended to function, rather than on the explicit text of either statutes or the Constitution. Second, it tends to rebut the assertion that federal preemption is the most deferential means of integrating state law within federalized fields.[62] Because federal preemption can rarely be resolved by textual references alone, it is necessary to engage in a more instrumental consideration of how courts should address questions of preemption in our federalism.[63] This article does this and ultimately demonstrates that the postNew Deal reliance on federal preemption, at the expense of federal common law, is inconsistent with the place of private rights in our federal system.

B. *Federal Preemption: From Conflict to Field Occupation*

The Supreme Court has expanded and contracted federal preemption in order to accommodate philosophical developments in federalism.[64] For example, until the New Deal, the federal government generally concentrated its efforts in those few areas where its authority was explicitly conferred by the Constitution.[65] Since states were the primary policy-makers, courts structured preemption jurisprudence to prevent federal law from interfering with state laws. *The Law Of Preemption: A Report of the Appellate Judges Conference American Bar Association* provides a helpful overview of the early history of Supremacy Clause jurisprudence. It states that "the early cases

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61. *See supra* note 17 (referencing comment by Solicitor General Cox).

62. For an example of federal preemption eviscerating state-based rights, see *infra* notes 247-50 and accompanying text. Some courts and commentators assert that federal preemption constitutes a relatively benign mechanism for addressing the extent to which state law retains its relevance within federalized fields. A thorough review of the history of preemption reveals, by contrast, that it has been employed as an important judicial means to control, direct, or influence the balance of power between states and the federal government, often to the detriment of state law. In some instances, federal common law may narrow the scope of state private law that is preempted.

63. In this respect, this article responds to Professor Fallon's call for "mode[s] of thought and discourse that more adequately capture the complexity and richness of American federalism and that check the destabilizing swings between the Nationalist and Federalist extremes." Fallon, *supra* note 19, at 1224.

64. *See, e.g.*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereinafter *The Preemption Doctrine*] (arguing that the Burger Court shifted its preemption analysis to allow for greater state participation in otherwise federalized fields); *see also* Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311, 312 (1988) ("A careful analysis of the current cases offers strong evidence that the trend of the law is increasingly moving away from preemption.").

65. *See, e.g.*, JAMES WILLARD HURST, LAW AND SOCIAL CHANGE IN THE UNITED STATES 97-105 (1977).

strongly suggest a Court solicitous toward state power; they contain a considerable body of comment to the effect that an actual, manifest collision between federal and state statutes, such as that in *Gibbons v. Ogden*, was required in order for the laws of the state to be displaced."[66] Courts also prevented federal legislation from interfering with state common law by applying the principle that statutes were to be interpreted in order to minimally disrupt common law principles.[67] The simultaneous application of both of these limitations resulted in a potent constraint on federal authority.

A survey of preemption cases from the first part of this century reveals that the idea of "field occupation" developed concurrently with and in aid of federal regulatory authority. In the early twentieth century, when the Court determined whether a federal law was to be construed as having a broader or narrower preemptive impact, it almost uniformly decided that federal law preempted only a narrow range of state laws. For example, in *Savage v. Jones*,[68] the Court addressed the scope of a federal food and drug purity act. The federal act only required packages to disclose the presence of certain substances, including morphine, opium, and cocaine. An Indiana statute required complete disclosure of the product's contents. A manufacturer sought to prove that the federal statute defined its disclosure requirement to the exclusion of the more comprehensive Indiana requirement. The Court flatly rejected the argument that the federal law should be construed as the sole source of public regulation on the topic: "The intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and occupy a limited field."[69]

A number of considerations weigh in favor of the analysis employed in *Savage*. First, it is solicitous of state authority, comporting with the view that states are the primary source of law, especially laws that concern the "police power."[70] Furthermore, restricting the preemptive effect of federal legislation creates more accurate "feedback" mechanisms to Congress, which has the authority to remedy an incorrect decision by a court.[71] This follows from the

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66. *The Law of Preemption, supra* note 23, at 13; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (finding that a New York statute granting a monopoly to the ferries of one owner "collided" with federal law authorizing a competitor to enter the state's waters).

67. HURST, *supra* note 6, at 186-87.

68. 225 U.S. 501 (1912).

69. *Savage*, 225 U.S. at 533.

70. The notion that state laws enacted as part of a state's authority and responsibility to protect the health and welfare of its citizens should only be displaced where there is a clear indication that Congress intended this result still retains at least rhetorical application. *See, e.g.*, Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 717 (1985) (referring to the "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause"). Nevertheless, this principle has not been consistently applied. *See, e.g., infra* notes 80-100 and cases cited therein.

71. As one commentator noted:

> This is a wise distribution of power. The Congress cannot foresee in advance all the possible interaction between state and federal law in future situations. The courts can deal with the problems as actual controversies develop. The Congress retains the power to reverse the judicial determination if it proves contrary to the legislative will.

Cox, *supra* note 17, at 809.

fact that Congress would be more likely to notice and correct a ruling that incorrectly preempted a smaller field than a ruling that preempted a broader field than Congress intended. In the former case, state law would interfere with the Congressional plan, bringing the anomaly to Congress's attention. In the latter case, states would be inconvenienced by the absence of regulation and would be faced with convincing Congress that the situation was worthy of its corrective attention. Finally, because states were (at least until the New Deal) the primary sources of public policy in the United States, it was assumed that they would act first to address any interstices between federal and state regulation. Thus, the Court would not wish to define preemption jurisprudence in a way that would preclude states (the primary policy-makers) from responding to new circumstances or issues that were not addressed by federal legislation. Courts assumed that any gaps in the federal legislative scheme were the domain of state lawmakers. In order to implement this objective, courts required a conflict between state and federal enactments before state law was preempted.[72]

A change in federal preemption resulted as Congress began to broaden the range of areas regulated by the federal government, a process that can generally be traced to the Progressive Era, but which was carried out in earnest as a part of the New Deal.[73] Congressional delegation of extensive regulatory and policy-making authority to federal regulators reversed the presumption that federal activity was constrained to narrow, easily defined ranges that left unaddressed issues to state lawmakers. Courts could instead assume that Congress would err on the side of providing adequate regulatory "space" for these agencies to function, even if this might remove state authority without federal authority immediately fulfilling the functions formerly provided by state law.[74] Given the number of state laws and unique circumstances where they might interfere with federal programs, Congress could at best only provide general guidance regarding the way it intended federal and state law to interact.[75] Courts could search in vain for explicit

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72. *Law Of Preemption*, *supra* note 23.

73. Professor Richard Hofstadter explains:

> In the years 1933-38 the New Deal sponsored a series of legislative changes that made the enactments of the Progressive era seem timid by comparison, changes that, in their totality, carried the politics and administration of the United States farther from the conditions of 1914 than those had been from the conditions of 1880.

RICHARD HOFSTADTER, THE AGE OF REFORM 300 (1955). Changes in judicial philosophy allowed for this dramatic increase in federal administrative authority. *See generally* Sunstein, *Interpreting Statutes*, *supra* note 6.

74. *See, e.g.*, *infra* notes 80-100 and accompanying text.

75. Kenneth L. Hirsh, *Toward a New View of Federal Preemption*, 1972 LAW F. 515, 543 (1972). The limits on congressional analysis of which state laws are subject to preemption by federal law are discussed *infra* at text accompanying note 270. One dynamic worth highlighting at this point concerns instances where federal legislation precedes the development of private law in a field. Obviously this makes federal legislative pronouncements about the extent of preemption highly speculative. Nevertheless, even in these instances, some courts and commentators fault *Congress* for failing to adequately address the scope of preemption "intended" by its legislation. Such an interpretation fails to recognize that the Supremacy Clause makes courts, not Congress, the entity responsible for determining which laws have preemptive effect. This interpretation of the Supremacy Clause is addressed at *infra* notes 122-23.

congressional guidance regarding the point where state laws impinge on federal objectives. Congress might also allow federal regulators to determine the rate at which they would begin to regulate different areas within a field of law. This left administrators with some ability to define both the rate and extent of federal preemption. Thus, while Congress would federalize a field, the Court might look to the agency for help in defining either the extent of the field federalized by Congress or the extent that federal regulation currently occupies that field.[76] Rather than continually returning to the question of whether state or federal regulators should prevail, courts began to assume that if Congress established a regulatory regime, it intended to preempt all competing state regulation.[77]

As federal regulatory authority gained primacy, courts could assume that federal administrators, rather than state courts, could react most quickly to fill gaps within the field. Hence, one incentive for structuring preemption analysis in favor of state lawmakers was removed.[78] At the same time, the notion that narrow preemption rulings would act as a feedback mechanism to Congress grew less tenable because Congress dramatically increased the number of fields competing for its attention.[79] These changes in institutional interaction and purpose changed the "background assumptions" supporting an approach to preemption that was solicitous of state law. As courts began to apply different assumptions to their analysis of preemption questions, the entire approach to preemption changed.

The shift in preemption jurisprudence towards a model favoring the application of federal authority, even at the expense of state laws, is apparent in *Napier v. Atlantic Coast Line Co.*[80] Relying on the broad grant of authority conferred upon the Interstate Commerce Commission (ICC), the *Napier* Court essentially came to the opposite conclusion of the Court in *Savage*. In *Savage*, the court concluded that the federal law established only the minimum level of regulation or the regulatory "floor." As a result, a state could demand compliance with additional requirements, thereby defining a higher "ceiling"

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76. *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346 (1933). The Court addressed an alleged conflict between a federal quarantine law and New York state inspection requirement. New York law required certification by an official of the exporting state that the herd of origin was free from specified disease. The federal law allowed the Secretary of Agriculture to establish quarantine districts. The Court found that the alleged conflict between the laws to be "groundless." In addition, the Court stated that "[m]uch weight is to be given to the practical interpretation of the act by the federal department through its acquiescence in the enforcement of state measures." *Id.* at 351; *see also Hillsborough County*, 471 U.S. at 713 ("We have repeatedly held that state laws can be preempted by federal regulations as well as federal statutes.") (citations omitted). For a criticism of this principle, see Wolfson, *supra* note 14, at 110. Wolfson writes that "[p]reemption is not a technical matter in which administrative agencies have particular expertise. If an agency cannot provide a reasonable explanation for the necessity of preemption, the agency's decision should be vacated." *Id.*

77. *See infra* notes 80-100 and accompanying text.

78. This and other factors supporting the rise of federal administrative authority are discussed at *infra* notes 112-18 and accompanying text.

79. The "congressional veto" constituted one method for allowing Congress to respond to federal administrative authority. *Cf.* INS v. Chadha, 462 U.S. 919 (1983) (determining that some applications of the legislative veto were unconstitutional).

80. 272 U.S. 605 (1926).

of regulation without interfering with federal objectives.[81] In *Napier*, federal law was found to be the sole source of public law in the subject field—essentially both the "floor" and the "ceiling" of regulation. Justice Brandeis first framed the question before the Court by stating: "[t]he main question . . . is whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation."[82] He then rejected the requirement that a conflict must exist in order for federal laws to preempt state law. "It may be assumed . . . that there is no physical conflict between the devices required by the state and those specifically prescribed by Congress or the [ICC]."[83] The basis for preemption was not, therefore, an incompatibility between state and federal regulations, which had been the test for determining whether state law was preempted. Simultaneous compliance with a federal regulatory "floor" and a state "ceiling" was possible. Justice Brandeis explained:

> *We hold that state legislation is precluded, because the [Act], as we construe it, was intended to occupy the field.* The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose.[84]

Without doubt, what is being preserved by the preemption of state law in *Napier* is not only the operation of federal law, per se, but the authority of federal administrators to exercise the authority granted to them by the relevant federal statute.[85]

The reformulated preemption analysis that favored federal law did not immediately interfere with private ordering based on common law principles because the Supreme Court was initially concerned with areas of law that were not heavily influenced by common law or with cases that did not involve a conflict between federal regulation and state common law.[86] As a result, the Court did not need to address the fact that invalidating state law would leave an area of private conduct without private law principles to guide conduct.[87]

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81. Contemporary applications of the "floor, not ceiling" dichotomy are addressed in Wolfson, *supra* note 14, at 83-88.

82. *Napier*, 272 U.S. at 607.

83. *Id.* at 610-11.

84. *Id.* at 613 (emphasis added).

85. Indeed, in the last paragraph of the opinion, Justice Brandeis emphasized this point by stating that "[i]f the protection now afforded by the [ICC's] rules is deemed inadequate, application for relief must be made to it." *Id.*

86. As discussed at *supra* note 75, in a number of cases federal statutory regulation preceded any common law work-product.

87. In some areas, especially interstate commerce, Congress would codify a common law rule in order to provide national uniformity. This process established national uniformity through the use of common law rules and processes. Thus, it did not remove private law from a field, but merely provided a single federally mandated private law rule. *See, e.g.*, Charleston & W. Carolina Ry. Co. v. Varnville Furniture, 237 U.S. 597 (1915) (recognizing that federal law imposed liability for goods damaged in interstate commerce on the initial carrier). The desire to achieve such uniformity in common law rules was one basis for the Supreme Court's decision in *Swift v. Tyson*, 237 U.S. (1 Pet.) 597 (1842), which provided that federal courts were not required to follow the "general" common law of states courts. This case and the decision overruling it are discussed *infra*

Often the state regulatory regimes were themselves quite new and the Court was only concerned with whether state or federal administrators would have regulatory dominion over a particular area. For example, in *H.P. Welch v. New Hampshire*,[88] the Court addressed competing federal and state registration schemes intended to limit the number of hours truck drivers could work.[89] The Court was not concerned with the fact that finding state law preempted would leave this issue unregulated until federal regulation was in effect. "The sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation . . . ."[90] These cases did not involve a conflict with state common law, which would have been raised if, for example, the case involved a tort claim against a truck driver and his defense included an assertion that federal law defined the extent of his duty to the exclusion of state negligence principles. Such a case would have required the Court to address the extent to which the federal regime preempted state private law principles.[91]

The ascendancy of this solicitous approach towards federal regulatory authority is clear in the Supreme Court's decision in *Cloverleaf Butter Co. v. Patterson*.[92] The Court acknowledged that the case before it did not present an irreconcilable conflict between state and federal policies. Indeed, the federal and state agencies were cooperating in their efforts to ensure the purity of renovated butter.[93] Nevertheless, the Court looked beyond the specific facts before it in order to preserve the regulatory authority of the federal government within this sphere. The Court justified this approach by describing the objective that preemption jurisprudence must fulfill in the modern regulatory era:

> Our duty to deal with contradictory functions of state and nation on any occasion . . . calls for the utmost effort to avoid conclusions which interfere with the governmental operations of either. *Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority.* Clashes may and should be minimized by mutual tolerance but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies.[94]

Part III.C.

88. 306 U.S. 79 (1939).

89. *Welch*, 306 U.S. at 83.

90. *Id.* at 84.

91. *See infra* notes 279-83 (discussing Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)).

92. 315 U.S. 148 (1942).

93. *Cloverleaf Butter Co.*, 315 U.S. at 169.

94. *Id.* (emphasis added). For another example of the extent to which state law was to give way to federal authority, see Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (recognizing that a state law regulating grain elevators was preempted even though the state regulatory regime was more comprehensive). *But cf.* Rice v. Board of Trade, 331 U.S. 247 (1947) (companion case to *Santa Fe Elevator Corp.*) (holding that Congress did not preclude state regulation which supplements the federal scheme and that any claim of supersedure was premature until the state adop-

It is important to note that in *Mintz*,[95] *Napier*,[96] *Welch*,[97] *Patterson*,[98] and other seminal preemption rulings such as *Rice v. Santa Fe Elevator Corp.*,[99] the Court was addressing the relative authority of competing federal and state *administrative* regimes. There is much to recommend such an approach when defining regulatory spheres of influence.[100] The same, or similarly broad approaches to preemption were, however, also applied to state private law within federalized fields. Part of the explanation and justification for the use of preemption doctrines developed in the regulatory context to address the preemption of state private law can be traced to the New Deal policy of replacing state common law with federal administrative authority.

III. THE RISE OF FEDERAL REGULATION AND THE PREEMPTION OF STATE PRIVATE LAW

A. *Common Law and the Modern Administrative State*

The creation of the federal regulatory state may be characterized, in large measure, as an attempt to undermine the regulatory regime based on state common law.[101] Opponents of the private law legal regime combined philosophical and practical criticisms of common law rules and methodology.

1. Philosophical Criticisms of Private Law

Common law judging was associated with the "oracular" theory of judging, which traces its origins to America's colonial era and "the predominant jurisprudential assumption that judges merely 'found' the law, mechanically applying existing rules to new situations. This assumption fostered an image of judges as oracles who could discover the law's technical mysteries but who could not influence the content of the law itself."[102]

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ted specific rules).

95. Discussed *supra* note 76.

96. Discussed *supra* notes 80-85 and accompanying text.

97. Discussed *supra* notes 88-91 and accompanying text.

98. Discussed *supra* notes 92-94 and accompanying text.

99. Discussed *supra* note 94.

100. *See supra* notes 73-79 and accompanying text.

101. "For the New Deal reformers . . . the common law was hardly neutral or prepolitical, but instead reflected a set of explicit regulatory decisions." SUNSTEIN, *supra* note 2, at 20. Opponents of state common law challenged its stranglehold on public policy, its conservatism, and its failure to address a number of areas of policy. *Id.*

102. WHITE, *supra* note 33, at 7-8. Professor Sunstein explains:

> Seeing the common law status quo as prelegal and neutral, judges (and many others) did not recognize its principles as a part of a regulatory system at all, but regarded them instead as the state of nature. Ideas of this sort underlay a number of constitutional decisions which saw departures from common law principles as constitutionally suspect.

SUNSTEIN, *supra* note 2, at 19. Professor White points out that although this approach threatened to "divorce 'law' from community values," Chief Justice Marshall "developed a technique of decision-making that retained the oracular style but grounded decisions on appeals to first principles of American civilization." WHITE, *supra* note 33, at 9. The oracular theory in its "purer" form retained a significant relevance. It enjoyed a special prevalence under the direction of Justice Stephen Field. "With Field and those who shared his perspectives . . . came an apparent de-em-

Although the idea that judges somehow "found" and applied rules of natural law has always had detractors,[103] the early twentieth century saw the rise of legal realism,[104] which was exceptionally successful in challenging the notion that common law rules of decision were somehow "neutral" or prepolitical.[105]

Legal realists showed that common law rules were often subtly but purposefully constructed to achieve certain policy objectives.[106] This observation challenged the notion that common law rules should be insulated from political review.[107] Legal realists pointed out that all rules of law implicate public interests, even if they only provided the legal rules and basis for state policing of private agreements.[108] This perspective legitimized attempts by the legislative branches of government, both federal and state, to reformulate or supplant common law rules.[109]

2. Substantive Criticisms of Private Law

The substantive criticisms of the common law regime challenged the content of common law rules. Furthermore, the opponents of the existing legal regime argued that enforcing legal rights or administrating complex matters

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phasis on policy considerations and a professed return to immutable guiding axioms of the law, axioms that the judges merely applied to the facts before him to reach a sound result." *Id.* at 107.

103. The tension between natural law and positive law can be traced to the divergent premises underlying the Declaration of Independence, with its notion of inherent rights, and the constitutional notion that political power derives from explicit choices made by representative institutions. Chief Justice Marshall is largely credited (or criticized) with interjecting the notion that the judicial branch of the federal government possesses the authority and responsibility to ground its decisions in "first principles" which may not always be found in explicit provisions of positive law. *See, e.g., supra* note 12.

104. Professor Friedman explains that legal realism was

> ultimately associated with a group of writers in the 1930's, notably Jerome Frank and Karl Llewellyn. Realism was, in fact, less a philosophy than an attitude. It rejected the mind-set of judges and scholars of the late nineteenth century who had emphasized legal logic and purity of concept . . . . Realist judges and writers were openly instrumental; they asked: what use is this doctrine or rule?

FRIEDMAN, *supra* note 4, at 688.

105. *See infra* note 137 and accompanying text. One basis for the preeminent position of common law was the view that it occupied a unique and important place in the constitutional order. Common law "was thought to be both distinct and insulated from the public law system of electoral representation and legislation." Stewart & Sunstein, *supra* note 9, at 1232; *see also supra* note 12.

106. As Professor Hurst explains, economics constituted the predominant philosophical underpinning for most of the common law work product of state courts. *See generally* JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM (1956) [hereinafter HURST, CONDITIONS OF FREEDOM]. It would be facile to characterize the economic considerations underlying eighteenth, nineteenth, and early twentieth century common law as *laissez faire*. As he points out, "[w]here legal regulation or compulsion might promote greater release of individual or group energies, we had no hesitancy in making affirmative use of law." *Id.* at 7. Nevertheless, the free market was a significant, if not the primary, component of this law.

107. *See supra* note 102.

108. Professor Hurst explains that much of the legislation during the early twentieth century sought to improve the administration of private rights defined by state courts, rather than modifying the substance of the rights themselves. To Professor Hurst, this "represented a broader recognition that there was in many of these private controversies a good deal more of the public interest than the nineteenth century had realized." HURST, *supra* note 6, at 72.

109. *See infra* Part III.A.2.

through two-party lawsuits was an inefficient and inadequate method for resolving the controversies that arose in a modern industrial democracy. Professors Stewart and Sunstein address this argument in a 1982 article.[110] They point out that "[w]hen the Republic was created, private law defined a system of private economic ordering, regulated by the courts."[111] Their article provides a helpful summary of some of the most significant justifications for moving from a legal regime based on common law regulation to a system that emphasizes federal administrative authority. They explain that "the rise of an urban industrial economy has, for several reasons, undermined the capacity of the common law system to vindicate . . . rights."[112] For example,

> [c]ommon law rules of exchange, designed for face-to-face transactions, are increasingly inadequate when applied to mass markets dominated by large firms. Such markets may create acute disparities in information and bargaining power.
>
> Second, modern industrial society taxes the common law's ability to define private entitlements. Direct transgressions proscribed by the common law of trespass give way to complex and collective harms, such as pollution. The content of common law entitlements must be redefined, but the task of redefinition is often beyond the capacity of judges involved in case-by-case decisionmaking.
>
> Third, new types of harms typically affect large numbers of individuals simultaneously; the impact is large in the aggregate but small for any individual. Because the costs of litigation are likely to exceed any individual's expected recovery, private damage actions no longer deter socially undesirable actions or provide compensation for violations of entitlements. The alternative—the prophylactic deployment of injunctive relief—presents courts with discouraging managerial complexities.
>
> Fourth, it is difficult to ensure uniform treatment of similarly situated individuals through decentralized private litigation. Such uniformity became important in the late nineteenth century, when monopolies such as railroads discriminated among consumers, and is important today because of heightened concern with race and sex discrimination.[113]

Even those who did not support the wholesale replacement of state common law with federal regulation recognized that existing institutions could not address many of the economic, social, and political conditions in a modern industrial state.[114] "The failure of the common law to effectively protect entit-

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110. *See generally* Stewart & Sunstein, *supra* note 9.

111. *Id.* at 1232.

112. *Id.* at 1235.

113. *Id.* at 1235-36.

114. *See, e.g.*, ARTHUR M. SCHLESINGER JR., THE CRISIS OF THE OLD ORDER (1957) (chronicling the rise of the New Deal). In his autobiography, Theodore Roosevelt explains such a development in his understanding of the role of courts in an industrial society. In his capacity as a member of the New York State Legislature, Mr. Roosevelt investigated the conditions surrounding

lements created a morally based, politically effective demand for the creation of regulatory agencies to safeguard personal security and dignity under industrial conditions."[115]

B. *The Rise of the Federal Administrative State*

The federal administrative state forged in response to these concerns did not conform with Madisonian notions that legislative, executive, and judicial functions should be separated among three branches of government[116] and between state and federal authority.[117] Federal administrators were provided with quasi-legislative authority to develop policies and quasi-judicial authority to apply these policies to specific cases. As a result, authority that had been confined largely to state judiciaries, and less often to federal and state legislatures, was concentrated in a single federal administrative entity.[118]

There were, however, limits to the transformation of governmental institutions initiated by the New Deal. As noted above, even in many federalized fields of law, states retain the authority to establish much of the private law that defines the rights and obligations of individuals.[119] While this ensures that state policymakers will retain their place as an important component of our federalism,[120] it does not resolve the question of which

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the manufacture of cigars in tenement houses. Although he was initially opposed to legislation banning such manufacturing, he reversed his position after he was exposed to the working and living conditions of those who produce such cigars. The New York Court of Appeals subsequently declared the law unconstitutional.

> It was this case which first waked me to a dim and partial understanding of the fact that the courts were not necessarily the best judges of what should be done to better social and industrial conditions. The judges who rendered this decision were well meaning men. They knew nothing whatever of tenement-house conditions; they new nothing whatever of the needs, or of the life and labor, of three-fourths of their fellow-citizens in great cities. They new legalism, but not life.

THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 81 (Charles Scribner's Sons, The Outlook Company 1926) (1913).

115. Stewart & Sunstein, *supra* note 9, at 1236.

116. This vision of separation of powers is generally associated with James Madison's writing and advocacy on behalf of the Constitution in the debate over its ratification. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

117. *See, e.g.*, THE FEDERALIST NO. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961).

118. As Professors Stewart and Sunstein point out, allowing judges to review the decisions reached by administrators or supervise (for example through mandate or injunction) the activities of federal agencies undermines many of the results that were to be achieved through these entities. Stewart & Sunstein, *supra* note 9. Nevertheless, they point out that it is contrary to many of the principles underlying our federalist system to rely exclusively on bureaucratic decisions for the assertion and protection of important or fundamental individual rights. As they explain, the creation and expansion of "private correctives" must be balanced to achieve the benefits of both modern administration and historic notions of individual rights. *Id.*

119. *See supra* note 13 and accompanying text. Furthermore, as discussed *infra* notes 175-80 and accompanying text, courts employed the principles of private rights to ensure that individuals were not totally at the mercy of federal bureaucracies for the enforcement of important personal liberties and rights.

120. For a discussion of the continued relevance of federalism, see Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985) [hereinafter *Federalism and Rights*].

state laws are preempted and which are preserved. Although courts can often determine whether competing state regulatory regimes interfere with federal regulation,[121] Congress can, at best, provide only general guidance about the extent that private law might interfere with federal objectives.[122]

As the volume and breadth of federal administrative authority grew, the Supreme Court was left to decide whether to create bodies of federal common law, allow state law to exist within federalized fields of law, or preempt state law within federalized fields. Often, the Supreme Court opted to broadly preempt state law, sometimes from entire fields of law.[123] The absence of greater use of federal common law within federalized fields of law is perplexing.[124] To be sure, in comparison with federal administrative entities, common law courts (especially state courts) were found to be inadequate mechanisms for regulating conduct and the economy. While this comparison

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121. *See, e.g.*, text accompanying *infra* notes 229-37 (discussing state labor relations laws directed at the same ends as federal labor laws); 253-72 and accompanying text (discussing federal acts preemption of state "direct" regulation of cigarette warning labels).

122. *See supra* notes 71-75, *infra* note 270, and accompanying text. Indeed, the Constitutional Convention considered and explicitly rejected the idea of providing *Congress* with the authority to determine which state laws were compatible with federal programs. Instead, the Supremacy Clause, leaves *courts* with the task of developing a methodology for determining which state laws are incompatible with federal law. Various formulations of the Supremacy Clause that would have provided Congress with the authority to pass on state laws were considered and rejected. *See, e.g.*, *Law of Preemption*, *supra* note 23, at 5-8. Generally, these proposals were considered too broad if they provided Congress with the authority "to negative all [state] laws which to them shall appear improper." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 162 (Max Farrand ed., rev. ed. 1937) (1911) (quoting a proposal proffered by Charles Pickney and James Madison). Conversely, they were considered problematic and subject to abuse if the power was only extended to "such laws only as will encroach on the national government." *Id.* at 169. Entrusting courts rather than Congress with the authority to determine whether state law is preempted is significant for two reasons. First, the Constitution left state courts, which were much more numerous, with the primary opportunity to resolve questions of preemption. Second, in the late eighteenth century, the executive and legislative branches of the federal government were seen as the greatest threat to state authority. As noted above, some members of the Constitutional Convention believed that Congress might abuse the power to preempt state laws by employing it to resolve minute policy disputes. Placing this authority in the hands of judges offered the best opportunity to resolve preemption questions in a forum that was less likely to be in direct competition with state policymakers. It also left questions of preemption unresolved until the litigation of actual matters that Congress may have been tempted to proactively resolve in its favor if it possessed the authority to declare state law invalid. These factors make it clear that the Supremacy Clause was intended to balance the need to make federal law supreme with a desire to constrain congressional authority to preempt state law. For these reasons, an approach to preemption that seeks to empower courts to preserve state law is more consistent with the history and text of the Supremacy Clause than proposals that seek to make preemption solely a question of Congressional intent. A variant of this argument is made by Wolfson, *supra* note 14. *See infra* note 123. The text of the Supremacy Clause is set out *supra* note 30.

123. As one commentator points out, this effectively provides Congress with the ability to declare an entire field of law federalized. *See* Wolfson, *supra* note 14. This constitutes an expansive congressional authority that the Constitutional Convention explicitly chose not to confer upon Congress. "The [proposed] congressional veto would have permitted Congress to strike down, after the fact, particular laws passed by the states. [Modern p]reemption permits Congress to block off whole area of legislation and say to the states, 'Here you shall not enter.'" *Id.* at 90.

124. As Professors Stewart and Sunstein explain, at one point during this century, the rise of federal common law seemed assured. Yet, "[t]he 'mid-twentieth century type of federal common law' celebrated by Judge Friendly seems rapidly headed for oblivion." Stewart & Sunstein, *supra* note 9, at 1223. Judge Friendly's views concerning federal common law are discussed in the next section.

explains the rise of federal administrative authority, it does not fully explain why federal preemption, rather than federal common law, was employed to integrate state private law within federalized fields of law.[125]

This choice can only be understood in light of changes in the background assumptions concerning the inherent value of common law and its place in our constitutional structure along with a reassessment of the authority of federal courts to participate in the formulation of such common law. The next sections explain how these developments coincided with the rise of the federal administrative state and profoundly affected the development of federal common law in federalized fields of law.

C. *The Re-evaluation of Federal Common Law*

This section does not seek to comprehensively address the role of common law in our federal system. When faced with a potential conflict between federal statutes and state private law, however, federal courts will generally analyze the matter solely to determine whether the private law is preempted. Seeking to preserve private law by creating federal common law is rare. The absence of federal common law may be traced to two sources: (1) the rise of federal administrative authority, which sought to eliminate the "system of public law built directly on private law principles" and (2) prevailing "federalist" interpretation of *Erie v. Tompkins*,[126] which found federal common law to be constitutionally questionable use of federal judicial authority. This section addresses both of these factors and explains why they should not preclude the use of federal common law as a means of integrating private law within federalized fields of law.

As professor Field points out, the Supreme Court's decision in *Erie* is "widely understood as the case first setting out our modern understanding of the proper scope of federal common law."[127] This makes *Erie* the appropriate starting point for analyzing the relationship between common law and federal preemption.

In *Erie*, the Supreme Court reconsidered and reversed its 1842 decision *Swift v. Tyson*.[128] The Court in *Swift* had ruled that neither the Rules of Decision Act[129] nor federal deference to state courts required federal courts

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125. Both federal common law and federal preemption can be structured to recognize that federal administrators have the primary responsibility and authority to establish policy. The primary difference between these two options concerns the background assumptions concerning relevance of private law in our federalism. *See infra* Part III.C.

126. 304 U.S. 64 (1938).

127. Field, *supra* note 15, at 902.

128. 41 U.S. (1 Pet.) 1 (1842).

129. The Rules of Decision Act provides that "[t]he laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply." Federal Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (current version at 28 U.S.C. § 1652 (1994)). Professor Field points out that "[t]his text is the version of the act as it read at the time of *Erie*. The phrase 'trials at common law' was changed in 1948 to 'civil actions.'" Field, *supra* note 15, at 902 n.93 (citing Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 944).

to follow the "general" private law defined by state courts.[130] *Swift*, therefore, allowed federal courts to define principles of "general" private law even if they differed from those applied by local tribunals where the federal court sat.[131] Of course the magnitude of their common law work-product was limited by the narrow range of federal court jurisdiction,[132] congressional authority to define federal court jurisdiction,[133] and a host of self-imposed restraints,[134] including the Supreme Court's eventual reluctance to address matters of common law.[135] Nevertheless, the *Swift* Court did not find a basis in federal statutes, constitutional mandate, or policy considerations that required federal courts to apply the "general" common law rules derived by their state counterparts.[136]

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130. *Swift* divided state law into the categories of "general" and "local" law, and held that federal courts were obliged to follow and apply all state statutes and "local" laws. *Swift*, 41 U.S. at 18-19. In matters of "general" law, however, federal courts were not required to apply those rules of decision announced by state courts in the jurisdiction where they sat. *Id.* *Swift*'s author, Justice Story, apparently believed that the scope of this "general" federal common law would be very narrow. *See, e.g.*, Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 762-64 (1941). The distinction between local and general law proved quite elusive, and even nearly 100 years later, the rule of *Swift* was susceptible to the criticism that courts had still not developed "a satisfactory line of demarcation between the province of general law and that of local law." *Erie*, 304 U.S. at 74.

131. Allowing federal courts to chart their own course in this manner raised the obvious criticism that a party could not be aware of what rules of law would be applied to her conduct until she knew whether she was sued in federal or state court. Professor Field explains that Justice Story

> [a]pparently . . . assumed that state courts generally would follow federal decisional law announced by federal courts . . . . [He] was not suggesting that states be required to follow federal decisional law; he was relying on the persuasive force of federal decisions on common law issues. Part of his assumption may have rested upon a conception, later the subject of a famous criticism by [Justice] Holmes, of common law as one system of rules, "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."

Field, *supra* note 15, at 900-01 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 278 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

132. Even when federal courts enjoyed broad authority to announce principles of federal common law, the Constitution limited their jurisdiction to cases "arising under" federal law or cases involving parties of diverse state citizenship. HART & WECHSLER, *supra* note 13, at 13-18. Furthermore, attempts were made to preclude the "manufacture" diversity of citizenship in order to create the basis for federal court jurisdiction. *Id.* at 1688-95.

133. For a discussion of congressional authority to define the jurisdiction of federal courts, see generally MARTIN H. REDISH, TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-52 (2d ed. 1990).

134. For example, federal courts continued to assiduously follow and apply each state's property law doctrines. As the Supreme Court wrote in *Oregon v. Corvallis Sand & Gravel*, "even when federal common law was in its heyday under the teachings of [*Swift*] an exception was carved out for local law of real property." 429 U.S. 363, 379 (1977) (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973)).

135. Field, *supra* note 15, at 901.

136. The Court's ruling in *Swift* was informed and guided by the notion that there was no difference between state and federal courts with respect to their authority and duty to define such common law. Thus, the *Swift* Court referred to "state tribunals . . . called upon to perform the like functions as ourselves." *Swift*, 41 U.S. at 18. The Court stated that federal courts must be free to announce common law principles, at least in the context of what it referred to as "the general principles and doctrines of commercial jurisprudence." *Id.* As Professor Field explains, allowing federal courts to develop common law was viewed by some as a means of establishing national uniformity in common law rules, especially those addressing commercial matters:

Swift was largely a product of the "oracular" theory of judging and the belief that the common law was a body of neutral principles that facilitated, without defining, public and private conduct.[137] This perception of law was an application of the nineteenth century notion that the existence of an independent judiciary was an inherent part of our constitutional order and that judges merely deciphered immutable legal principles to apply them to specific cases.[138] From this perspective, common law rules lacked the imprimatur of positive law. As discussed above, legal realists challenged the notion that common law rules constituted inherent, transcendent, or immutable principles.[139] As Professor Amar explains, "the [legal] realists had shown that the common law of tort had to be made, not found, and . . . the Progressives and New Dealers had demonstrated that the particular choices made by federal judges in common law tort cases were politically controversial . . . ."[140]

Erie embraced one of legal realism's cardinal principles: common law rules *are* positive law, just like state statutes. By itself, this may have provideda sufficient basis for the *Erie* Court to overturn *Swift*.[141] Yet *Erie* did not

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> When Justice Story, writing for the Supreme Court in [*Swift v. Tyson*], first announced this system, he apparently thought it would achieve uniformity and that the system he rejected— [federal courts] following state decisional law in diversity cases—created too much variation by state. In practice, however, *Swift* did not result in uniformity. As *Erie* discussed, a principal criticism of the *Swift* system was that under it two different sets of rules governed primary behavior.

Field, *supra* note 15, at 900.

137. *See supra* notes 102-05. As Professor Sunstein writes, these rules were considered "purely facilitative—rather than constitutive—of private arrangements." SUNSTEIN, *supra* note 2, at 18.

138. *See supra* notes 3, 12. Professor Richard E. Ellis provides helpful insights into the origins of this perception of the place of courts in the government of the United States when he writes:

> Coming as it did during the formative era of American law, the moderate triumph on the state level in the struggle over judicial reform had far-reaching consequences. It meant, just as it had on the national level, the establishment in many states of judiciaries which were both bipartisan and nonpartisan.

RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 249 (1971).

139. *See supra* notes 102-09 and accompanying text.

140. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 695 (1989) (reviewing HART & WECHSLER, *supra* note 13).

141. For the reasons discussed at *supra* notes 87 and 130-31, the rule of *Swift* had been seriously questioned by the time *Erie* was decided. Indeed, when the Court decided *Erie*, federal courts were already reducing the number of legal issues in which they failed to follow state decisional law. Judge Clark, for example, referred to the *Swift* rule as "an ancient doctrine, already tending towards decay and death." Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 295-96 (1946). Also, Justice Brandeis relied on Professor Charles Warren's research concerning a former draft of the text of the Rules of Decision Act. Professor Warren pointed out that the original directive was for courts to follow "the Statute law of the several States in force for the time being and their unwritten and common law now in use, whether by adoption from the common law of England, the ancient statutes of the same, or otherwise." Henry J. Friendly, *In Praise of* Erie*—of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389 (1964) (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88 (1923)). By contrast, the final version used the phrase "[t]he laws of the several States." *Id.* As Judge Friendly said: "Warren argued that the abbreviation was only stylistic." Taken as a whole, the growing erosion of the *Swift* doctrine, the rise of legal realism, and Professor Warren's research may have provided a sufficient basis for overturning *Swift*. There are reasons to believe that the Court did not feel comfortable

stop at redefining the term "laws" as it was employed by the Rules of Decision Act. *Erie* also addressed the federal government's role in the creation of private law. More accurately, it is necessary to separate what *Erie* "says" from what it has been taken to mean. Just as ambiguous phrases in the Constitution provide a Rorschach test of an observer's views on federalism,[142] the *Erie* decision may be interpreted from either a nationalist or federalist perspective. From a federalist perspective, *Erie* was an attempt by the Supreme Court to preclude the federal judiciary from addressing matters constitutionally reserved to states.[143] Furthermore, federalists would argue that *Erie* accomplished this objective by establishing a general prohibition on the creation of federal common law, which would be overcome only upon evidence that Congress intended or directed federal courts to create common law.[144]

From a nationalist perspective, *Erie* recognizes that although private law is positive law, it generally addresses matters that can easily be left to states.[145] Further, it does no more than eradicate *Swift*'s artificial division between local and general common law.[146] To bolster this claim, advocates of this perspective point out that *Erie* does not even consider what areas may

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basing its ruling solely on a reinterpretation of the Rules Act.

> [S]tatutory reinterpretation was vulnerable on other grounds. The policy reasons the Court saw for favoring the change were susceptible to an argument that *Swift*'s statutory interpretation was so established by the time of *Erie* that it had become part of the statute through the passage of time; any change based on statute should therefore come from Congress, not the courts.

Field, *supra* note 15, at 904 (citing Friendly, *supra*, at 390-91). This may explain why the *Erie* Court felt compelled to consider the constitutional implications of *Swift*'s interpretation of the Rules of Decision Act and then base at least part of its ruling on those implications.

142. *See supra* notes 17-25 and accompanying text (discussing this phenomenon).

143. Much of *Erie*'s treatment of the constitutional basis for its ruling evidences a very narrow characterization of federal authority to establish private law, by either federal courts or Congress. For example, the *Erie* Court stated that under *Swift*, "federal courts assumed . . . the power to declare rules of decision which Congress was confessedly without power to enact as statutes." *Erie*, 304 U.S. at 72. *Erie* also states: "Congress has no power to declare substantive rules of common law applicable in a state whether they be . . . commercial law or a part of the law of torts." *Id.* at 78.

144. For cases applying the federalist approach to common law, see *supra* note 134 and *infra* note 161.

145. Federal court jurisdiction in *Erie* was based on diversity of citizenship. *Erie*, 304 U.S. at 71. It was not concerned with "matters governed by the Federal Constitution or by acts of Congress." *Id.* at 78. Indeed, one commentator wrote in 1941: "It is undoubtedly the fact that even before this decision was rendered, the federal courts generally tried to discover and apply the common law of some particular state rather than the common law of all of the states at once. In most cases they did not see fit to assert or apply [Justice] Story's [*Swift*] doctrine." Corbin, *supra* note 130, at 764.

146. Viewed from this light, Justice Brandeis's famous statement, "[t]here is no *general* federal common law," means nothing more than that there is no distinction between local law that federal courts must follow pursuant to the Rules of Decision Act versus general private law that federal courts may fashion. Simply eliminating this distinction does not begin to consider the perimeters of federal court authority to establish federal common law based on some federal interest. Recall that the Rules of Decision Act directs federal courts to follow state law "except where the Constitution, treaties, or statutes of the United States otherwise require or provide." The federalist interpretation of *Erie* is susceptible to the criticism that it reads too much into a decision which does not begin to consider the breadth of this important exception. *See* Field, *supra* note 15.

be of sufficient national concern to justify the creation of federal common law.[147]

The federalist interpretation of *Erie* has come to dominate jurisprudence.[148] Nevertheless, the nationalist perspective enjoys a number of advocates who rely on a significant quantity of evidence favoring a narrower interpretation of *Erie*. Judge Henry Friendly is one of the most articulate proponents of the nationalist perspective. Judge Friendly points out that the *Erie* Court clearly assumed that federal courts were limited in the number of areas where they would establish common law.[149] However, *Erie* never sought to define those limits; certainly *Erie* did not intend to establish the sweeping limit on federal common law that the case has come to stand for.[150] The conventional federalist interpretation of *Erie* is a straightjacket limiting the ability of federal courts to create federal common law, even withinfederalized fields of law. As a result, federal courts rely primarily on preemption to resolve almost all putative conflicts between private law and federal statutes.[151]

The absence of federal common law is not, however, due solely to the dominance of the federalist interpretation of *Erie*. Advocates of greater federal authority often viewed the common law as an impediment to their objectives.[152] Rather than wait for common law to develop as they would

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147. For example, on the day it ruled in *Erie*, the Supreme Court also handed down a decision pursuant to its original jurisdiction, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), where it applied principles of federal common law to an interstate dispute. This demonstrates the widespread acceptance, that some areas of law, such as interstate disputes, are inherently federal and state law has no place within such fields except as incorporated rules of decision. These federal "enclaves" include the enforcement of contracts with the federal government, *see, e.g.*, Boyle v. United Tech. Corp., 487 U.S. 500 (1988); international relations, *see infra* notes 187-203 and accompanying text; and federal Indian law, *see, e.g.*, Johnson v. McIntosh, 21 U.S. (1 Wheat.) 543 (1823). Professor Charles F. Wilkinson describes the Supreme Court's decision in *Johnson v. McIntosh*, as "true" federal common law. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 142 n.29 (1987). He also argues that in the field of Indian law, "the federal laws often hold out so little guidance that courts have been forced to look to such diverse sources of authority that they might as well be making common law." *Id.* at 12. The enclaves approach to the authority of federal courts to create federal common law is discussed and criticized in Field, *supra* note 15, at 911-15. Similarly, the field of implied rights of action for the violation of some federal rights has been largely unaffected by the federalist interpretation of *Erie*. The federalization of such fields is generally, but not exclusively, constitutional in origin. *Id.*

148. "The 'mid-twentieth century type of federal common law' celebrated by Judge Friendly seems rapidly headed for oblivion." Stewart & Sunstein, *supra* note 9, at 1123 (citations omitted).

149. As Judge Friendly points out, "*Erie* must be appraised . . . in the familiar setting of a Congress of limited powers, with considerable areas of law-making reserved to the states." Friendly, *supra* note 141, at 393-94.

150. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . . There is no general federal common law." *Erie*, 304 U.S. at 78. Professor Field persuasively argues that this portion of *Erie*

> is highly ambiguous, and even inconsistent, in the scope it suggests for federal common law. In large part it suggests that the courts lacked power to act simply because their action went *beyond* Congress's power. There is some suggestion, though, that the judiciary lacks power to make federal common law generally. No subsequent case has explicitly addressed the tension between these two standards, or otherwise delineated the appropriate limits of federal common law.

Field, *supra* note 15, at 905 (emphasis in original).

151. *See infra* notes 229-52 and accompanying text.

152. *See, e.g., supra* note 101.

like, they have sought to establish statutory regimes to displace what they perceive as conservative and slowly developing common law. Often, the same proponents of preemption then seek to employ common law to expand the range of the legislation they favored. In many instances, however, their initial success in superseding common law successfully "salts the field" and they are prevented from employing common law to achieve their objectives. For example, environmentalists were frustrated by attempts to employ common law processes to protect the quality of natural resources.[153] They turned to the legislative arena and obtained statutes implementing their concerns. If they become dissatisfied with the pace of the administrative implementation of their regulatory programs, they turned to common law litigation,[154] often only to find their adversaries employing federal preemption to defeat their claims.[155]

On a larger scale, this is the dynamic that resulted when the New Deal and the *Erie* doctrine limited the sphere of federal common law. The proponents of the New Deal were initially ecstatic when private law was replaced by the federal administrative state.[156] Like Mr. Roper in the colloquy that opens this article, the New Dealers assumed that the federal administrative state would obviate the need for private law, at least in federalized fields of law. Soon, however, it became obvious that both federal administrative authority and federal common law-making would be necessary to achieve all of their objectives. By that time it was often, but not always, too late.[157] In this respect, preemption proves to be a double-edged sword: it can eliminate troublesome pre-existing common law doctrines and rapidly thaw the sometimes glacial process of establishing public policy through private law. Coupled with the federalist interpretation of *Erie*, however, it may also preclude judicial development of statutory themes.

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153. *See, e.g.*, Belsky, *supra* note 5.

154. *See* David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883 (1989) (arguing that private tort actions are not inconsistent with federal and state environmental statutes).

155. *See id.*; *see also* Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981) (holding that the 1972 Clean Water Act displaces state common law). This is not the only dynamic that results in prohibitions on federal common law. Often opponents of private law simply seize on the federalist interpretation of *Erie* and field preemption doctrines to preclude judicial work-product. *See* Stewart & Sunstein, *supra* note 9, at 145.

156. They opposed the entire common law system as a narrow, conservative means of influencing conduct, largely by protecting individual property rights and relying on market forces. *See, e.g.*, *supra* notes 8 (discussing the shortcomings of common law) and 114 and accompanying text (discussing the perspectives and beliefs of the New Dealers). Given the common law's association with *laissez faire*, *see supra* note 106, there was no apparent contradiction in making private law the domain of state institutions (even to the point of explicitly stating that Congress was without authority to establish private law) and simultaneously ratifying the New Deal's expansion of federal authority. Stated another way, New Dealers saw the common law as a legal system that served a narrow range of (wealth creation) objectives largely without direct regulation. By contrast, the New Deal reformers sought to accomplish a completely different set of (social welfare) objectives, and they had no problem providing federal entities with regulatory authority to impose these objectives. *See generally* Stewart & Sunstein, *supra* note 9; *supra* notes 101-13 and accompanying text.

157. In some instances, proponents of federal legislation were able to establish federal common law within the fields to act in concert with federal legislation. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

The absence of federal common law in federalized fields may be traced to overzealous attempts to establish federal legislation as the preeminent source of public law coupled with the prevalence of an imprecise and doctrinaire-ridden federalist interpretation of *Erie*. Neither of these factors provides a legitimate basis for excluding private law from federalized fields of law, especially where federal legislation is primarily created to establish public law objectives. The second half of this article explores fields of law federalized by Congress and demonstrates why private law should generally be integrated into these fields. Before advocating the expansion of the common law powers of federal courts, it is necessary to directly address the conventional view that is contrary to the constitutional values of federalism and separation of powers.

D. *Limits on Federal Common Law and the Presence of Private Law in Federalized Fields of Law*

Erie's legacy includes two background principles concerning federal common law that are especially applicable to the choice between federal common law and preemption as a means of integrating private law in federalized fields of law. The first of these principles concerns whether solicitude to state lawmakers requires federal judges to leave (or appear to leave) questions of private law to state courts. The second concerns the question of whether common law has an inherent place in our constitutional structure.

1. *Erie*, Federal Common Law, and Federalism

Following *Erie*'s lead, the Supreme Court's consideration of federal common law authority is sensitive to the possibility that federal common law-making may be adverse to state authority.[158] There is, of course, a basis for such concerns.[159] This article points out, however, that in instances where a court addresses the preemption of state private law, it should also consider the possibility of incorporating state private law into a federal common law that does not interfere with federal legislation. This fine-tuning in the exercise of federal judicial authority can occur without allowing federal courts to engage in what Judge Friendly referred to as a "federal [court] poaching on state preserves."[160]

Indeed, federal courts may enjoy broad common law-making authority in federalized fields without challenging even the current Supreme Court's restrictive characterization of federal common law authority[161] and without

158. An exception exists in fields have historically characterized as federalized. *See supra* note 147 for a discussion of some of these fields.

159. *See infra* note 166 and accompanying text.

160. Friendly, *supra* note 141, at 407. Judge Friendly referred to the *Swift* rule, discussed *supra* notes 128-40, which allowed federal courts to create common law rules in areas of law traditionally understood to be within the competence of state courts.

161. The Supreme Court's restrictive view towards the creation of federal common law is evidenced by the following cases: Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560

disagreeing with the federalist interpretation of *Erie*. It is, however, necessary to question whether restricting the authority of federal courts to define common law results in greater state participation in the process of defining the rules of decision employed by federal courts.

Erie was predicated on the assumption that most fields of law would remain free from the influence of federal legislation.[162] As discussed above, until the New Deal, judicial limitations and self-restraints kept federal legislation from interfering with state common law ordering.[163] To employ Judge Friendly's analogy, although pre-New Deal Congresses did not federalize "state preserves," *Swift* allowed federal courts to engage in selective "poaching." The New Deal and *Erie* effected a dramatic reversal of this situation. The *Erie* decision removed federal judges as a source of legal rules that routinely displaced state common law, while the New Deal began the federalization of many fields of laws that were historically reserved to states.

The *Erie* Court, however, failed to anticipate the growth of federal law as the predominant source of law in the United States. Because courts must rely on a unique or significant federal interest before creating federal common law,[164] they may easily find that state private law is preempted, but they are routinely unable to employ common law processes to create federal private law that does not threaten federal objectives.

Allowing federal courts to develop federal common law in those instances where state law would otherwise be preempted does not, by definition, damage the sphere of state decisionmaking that Erie is interpreted as protecting.[165] Professor Field explains that it is generally assumed that federal common law is adverse to state interests:

> The supposition on which broad federal common lawmaking powers are detrimental to the scope of state lawmaking authority is that federal courts may make law more easily, and 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*

(1979). For a discussion of several other methods the Supreme Court currently employs to restrict the ability of federal courts to vindicate rights, along with a criticism of this trend, see Hon. Stephen Reinhardt, *Limiting Access to the Federal Courts: Round up the Usual Victims*, 6 WHITTIER L. REV. 967 (1984).

162. As Judge Friendly points out, "*Erie* must be appraised . . . in the familiar setting of a Congress of limited powers, with considerable areas of law-making reserved to the states . . . ." Friendly, *supra* note 141, at 393-94. Judge Friendly assumed that pursuant to *Erie*, "state courts must conform to federal decisions in areas where Congress . . . has manifested, *be it ever so lightly*, an intention to that end." *Id.* at 407. (emphasis added). Clearly this is not the case. The "light tread of Congress" may result in the preemption of state law, but rarely does it result in the creation of federal common law.

163. *See supra* note 6 and accompanying text.

164. *See supra* notes 124, 161.

165. Similarly, as discussed in the next subsection, such federal lawmaking by courts is not necessarily contrary to congressional authority, except in those rare instances where Congress's failure to provide a specific rule was the result of its decision that a federal rule was not necessary. *See* Field, *supra* note 15, at 925.

> *therefore every exercise of federal common lawmaking power takes away power from the states.*[166]

In an accompanying footnote Professor Field points out that "[s]tate power is not reduced, however, if there would otherwise be federal preemption."[167] In those instances where state law would be preempted, federal common law represents an option that can preserve principles of private law that would otherwise be preempted.

Private law defines many of the obligations and rights of individuals in our society.[168] Nevertheless, the principles of field preemption created to accommodate the rise of federal administrative authority result in the preemption of entire fields of state law whether or not Congress considered this result.[169] Often Congressional "intent" to preempt state law is only "found" by operation to the "background principles" discussed above.[170] As a result, in many federalized fields, important principles of state common law are preempted by the combined force of background principles and the assumption that federal common law only advances federal interests. By contrast, allowing federal courts to incorporate state private law would allow these principles to continue to have force within federalized fields.

2. *Erie*, Federal Common Law, and Separation of Powers

The place of common law in our constitutional structure can be addressed in terms of its implications for separation of powers. To be sure, there is no indication that the *Erie* Court considered whether its decision would implicate the status of federal courts in the constitutional structure.[171] Nevertheless, *Erie*'s ruling that federal courts did not possess the authority to create general federal common law coincided with rise of the federal administrative state (with its obvious implications for judicial authority). This created the possibility that federal courts could literally be relegated to the status of a "less than equal" branch of the federal government.[172]

More that just nostalgic adherence to Madisonian political theory would be threatened if federal courts did not exist as a coequal branch of government. The notion that individuals possess personal human rights and

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166. Field, *supra* note 15, at 925-26.

167. *Id.* at 926 n.201. As discussed further at *infra* note 304, some areas of law have become so federalized that federal courts will allow no state private law within the field. In these cases, courts have created exceptions to the well-pleaded complaint rule to allow defendants to remove proceedings from state to federal court based on the defense of "complete" preemption. Certainly in these cases the creation of federal common law based on state private law principles does not reduce state authority.

168. *See, e.g., supra* note 12.

169. *See supra* notes 73-100 and accompanying text.

170. *See supra* notes 49-61 and accompanying text; *see also supra* note 17.

171. Indeed, for a number of years after *Erie* was decided, commentators were only concerned with the questions of federalism it raised. "Intent on meeting the *Erie* charge, Judge Friendly did not adequately address the equally serious intramural question—the authority of federal courts in relation to that of Congress." Stewart & Sunstein, *supra* note 9, at 1224.

172. "The grant of extensive lawmaking authority to administrative bodies deprived the courts of much of their established dominion, granted vast responsibilities to bureaucratic entities not anticipated in the Constitution, and undermined the separation of powers." *Id.* at 1233.

interests that can not be abrogated by the government or by private individuals without the opportunity for private judicial redress is an important philosophical component of our federalism.[173] This belief is at least as important as the other "background principles" that lie at the heart of much of the jurisprudence concerning preemption, federal common law, and other constitutionally ambiguous matters.[174] Furthermore, the existence of a judiciary with the authority to define, develop, and protect these interests is an important component of our federalism.

Professors Stewart and Sunstein argue that courts, especially federal courts, were able to preserve their place within the post-New Deal Constitutional order by creating or expanding the following remedies: private rights of action (actions against third parties for violating statutory rules); private rights of initiation (actions against agencies of the federal government for failing to exercise the full range of their authority); "new" property rights hearings (procedural protections for recipients of social programs); and private rights of defense (actions against federal agencies for overreaching their constitutional and/or statutory authority). They explain that each of these "second order" remedies "raises the same basic question of the ability and authority of courts to engraft private correctives onto a statutory system of public administration."[175]

The primary motivation, then, for creating these second order remedies—and consequently, the focus for their justification—is the need to preserve the values inherent in separation of powers among the branches of the federal government.[176] To be sure, these remedies are deeply rooted in important Anglo-American notions of law, constitutionalism, and equity. For example, the personal nature of some of these rights requires that the individual must not be completely at the mercy of bureaucratic decisions over whether and how these rights will be asserted and protected. To do otherwise, the professors point out, would be contrary not only to (sometimes implicit) notions of constitutional order, but also the basic premises of Anglo-American law. As a result, one significant factor in determining whether private redress to courts will exist concerns the particular status or type of private interest that is implicated. For example, Stewart and Sunstein note:

> When litigants seek to protect important personal liberties, such as freedom from discrimination, courts often create both initiation rights and rights of action. By contrast, when an agency has been granted broad discretion in an area such as regulation of rates and competitive practices, courts are likely to deny both private remedies.[177]

Nevertheless, "institutional considerations" are the focus of judicial approach in deciding whether to participate in policymaking through one of the second order remedies.[178] As a result, Stewart and Sunstein write that "basic

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173. *See supra* note 12; *infra* note 181.
174. The nature of this ambiguity is discussed *supra* notes 32-39 and accompanying text.
175. Stewart & Sunstein, *supra* note 9, at 1198.
176. This observation is explored in greater detail *infra* Part IV.C.
177. Stewart & Sunstein, *supra* note 9, at 1217-18.
178. *See id.* These "institutional considerations" include:

conceptions of judicial role and institutional purpose . . . *played the central role* in the development of alternative systems of public and private enforcement."[179] Thus, although federal courts continue to recognize, allow, and occasionally encourage private parties to bring lawsuits that concern policy areas addressed by federal regulatory programs, it would be inaccurate to characterize this as an attempt by federal courts to replace or integrate state law that has been (or would be) preempted by federal programs. Instead, these second order remedies are more accurately characterized as attempts by the federal judiciary to counter-balance congressional and federal administrative authority.

This article is more concerned with private law within federalized fields of law than second order remedies created to maintain the status of the judicial branch of government. (Although in the case of private rights of action it may be impossible to define an exact dividing line.) Indeed, much of the Constitutional overtones raised by second order remedies is irrelevant to the discussion of private law within federalized fields. Professor Field points out the creation of federal common law "cuts down on congressional power only if congressional failure to act represents a congressional judgment that no federal lawmaking should exist."[180]

IV. CONTRASTING MODELS OF INTERACTION BETWEEN FEDERAL COMMON LAW, FEDERAL PREEMPTION, AND STATE LAW

Since the rise of the federal administrative state, courts have applied three mechanisms for integrating private law into federalized fields of law: field preemption, allowing state law to "operate of its own force," and federalizing state private law principles. The second half of this article considers each of these approaches based on the criteria of separation of powers, federalism, and the "background assumptions" they implicate.

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the limited analytic and factfinding capacities of courts, the need for consistency and coordination in enforcement, and the comparatively greater political accountability of agencies. Courts have also given varying weights to certain regulatory goals: effective implementation of administrative programs, compensation of those injured by statutory violations, and the need to adjust regulatory objectives in light of implementation problems and changing public attitudes. The variations among judicial decisions during any given period might be explained by variations in the particular regulatory programs involved and in the particular beneficiary interests asserted. The differences in judicial approach over time might be understood as a response to shifting judicial perceptions of the weight to be accorded institutional considerations on the one hand and regulatory objectives on the other.

Id. at 1218.

179. *Id.* at 1220 (emphasis added). In the creation of some private causes of action within federalized fields of law, courts considered whether it would be more appropriate to allow state or federal courts to define the rights of action. *See infra* notes 299-305 and accompanying text. Unfortunately this approach has not resulted in a recognition that federal courts must be the source of federal common law in some instances.

180. Field, *supra* note 15, at 925.

A. *Finding a Field of Law Federalized to the Exclusion of State Law: Field Preemption*

For a number of reasons, federal courts may choose to find that a legal question is federalized to the exclusion of state law and opt not to create federal common law to address issues left unresolved in the statutory scheme. Such a decision may be tailored narrowly, to address only a specific legal question, or it may encompass a broad field. In some instances, removing state law from a broad field of law has a constitutional basis. Such decisions are best viewed in light of the "negative" purposes of the U.S. Constitution. The view that the Constitution creates a number of "positive" directives to the federal government to address matters of public policy and social concern stands in marked contrast with some of the initial perceptions and purposes behind the Constitution's drafting and adoption.[181] An important first principle for the Constitution was the removal of state interference with interstate commerce, foreign relations, relations with Indian nations, private contracts, and related (generally) commercial concerns, without necessarily creating an active federal involvement in any of these areas.[182] The body of law known as the "dormant commerce clause,"[183] along with a number of Indian law doctrines, are the most long-standing manifestations of this principle.[184] In such fields of law, the Constitution provides the basis for the preemption of state law, whether or not Congress has chosen to legislate.[185] Further, in these areas, the argument that state law has a great deal to contribute often loses much of its force.[186] For this reason, there is

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181. One legal historian notes that the U.S. Constitution may be seen as a triumph of those who wished to divest state governments, which were more susceptible to popular control, of authority that could hinder commercial development: "The vulnerability of the state governments to popular control was a principal motive behind the movement for a strong national government . . . . The adoption of the Constitution, with its numerous restraints upon the political and economic activities of the states, was an important victory of the American commercial community." *ELLIS, supra* note 138, at 270-71.

182. SUNSTEIN, *supra* note 2, at 17. In a 1967 article, Professor Hill argued that there are at least four areas where state law is preempted by the force of the Constitution: interstate controversies, admiralty cases, cases involving a proprietary interest of the United States, and international law. Hill points out that congressional action is not required to federalize these areas of law to the exclusion of state law. *See generally* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

183. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (holding Iowa statute barring use of trucks longer than 60 feet on interstate highways violative of the Commerce Clause).

184. In the field of federal Indian law, the inherent sovereignty of tribal governments also acts to preempt state law. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515 (1832).

185. The interests of federalism make the Supreme Court decidedly reluctant to find fields of law inherently federalized. For example, in his dissent in *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987), Justice Powell argued that as a result of the Property Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 2, preemption should apply with special force on public lands. *California Coastal Comm'n*, 480 U.S. at 604 (Powell, J., concurring in part and dissenting in part). Instead, the Supreme Court applied "traditional" preemption analysis to conflicts between federal and state law concerning the public lands. *See id.* at 594. For a defense of this approach with respect to public lands other than tribal lands, 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, 153, 164 (1982) (arguing that state law should not be presumptively preempted on federal public lands, as it should be on federal tribal lands).

186. *See, e.g.*, the discussion of the presence of state law in the field of foreign affairs *infra*

substantially less of a need for federal common law to incorporate state private law and there may be no basis for state law operating of its own force.

By contrast, because of the importance of common law in providing background principles, where there is no constitutional basis for such a decision, such a barrier to state law should only be used sparingly, even within the context of relatively comprehensive federal statutory schemes.

1. "Field Preemption" in the Constitutional Context

The Court's decision in *Hines v. Davidowitz*[187] provides a starting point for this discussion. This case concerned a challenge to a Pennsylvania law requiring aliens to register with the state and establishing penalties for failing to do so.[188] The Court's decision is not grounded in either conflict or field occupation preemption.[189] Congress had evidenced no intent to occupy this field.[190] The Court pointed to a number of compelling reasons to limit federal regulation of this field to the existing federal regime. Not the least of these reasons concerned the many reciprocal agreements with other countries promising that any of their citizens "residing in our territory shall not be singled out for the imposition of discriminatory burdens."[191] The Court did not address how Pennsylvania's law impinged on any particular agreement or series of agreements. If the Court had decided this case on such "conflict" grounds, it would have faced a plethora of challenges to state alien registration laws.[192] State laws struck down for their conflict would be rewritten and challenged until the state produced a law that could pass the standard developed by the Supreme Court. This would certainly have absorbed a large

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notes 187-203 and accompanying text.

187. 312 U.S. 52 (1941).

188. *Hines*, 312 U.S. at 59-60.

189. Indeed, after reviewing all of the tests employed to analyze preemption, the Court declined to specify which it was applying. Instead, it wrote that "[i]n the final analysis, there can be no one crystal clear test distinctly marked [preemption] formula." *Id.* at 67.

190. Justice Stone pointed out in his dissent "that Congress was not unaware that some nineteen states have statutes or ordinances requiring some form of registration for aliens, seven of them dating from [World War I]." *Id.* at 79 (Stone, J., dissenting).

191. *Id.* at 69.

192. At several places in its opinion, the Court refers to constitutionally questionable bills dealing with alien registration which Congress chose not to enact. *See, e.g., id.* at 71. The Court was clearly pleased that Congress chose to adopt what it termed a "middle path" and troubled that state legislatures might fail to be similarly circumspect. By preempting state law from this field, the Court spared federal courts from having to review the work of state legislatures that would fail to adopt what the Court considered the appropriate "middle path." As a former elected official, the opinion's author, Justice Hugo Black, was undoubtedly familiar with the pressure on state legislators to stray from this path. *Id.*

amount of judicial time.[193] In an area where state laws have little to contribute, such an approach is appropriate.

Hines completely swept state law from any involvement in the field of alien registration.[194] The Court held out no hope that even narrowly drafted state laws would be exempt from this ruling. This result is entirely appropriate because there is no need for state law to operate of its own force in this field, nor is there any need for federal law to incorporate private law principles within this field. To be sure, if there were some need for distinct common law principles concerning the subject matter of this field—resident aliens—it would be appropriate for federal courts to create such common law, perhaps borrowing from state private law principles. In the absence of the need for a unique federal common law in this field, broad federal preemption is appropriate in order to remove state law and to leave the entire field to the interaction between Congress and federal courts.[195]

In *Pennsylvania v. Nelson*[196] the Court was faced with another situation where failing to federalize a field of law would produce an avalanche of conflicting state laws that federal courts would have to sort through to determine how they could fit within a field where state law has little to contribute in terms of background principles.[197] Specifically, *Nelson* concerned one of the many state sedition laws that grew out of the period of national hysteria commonly referred to as the "McCarthy Era." In its decision to prevent states from enforcing laws that prohibited sedition against the federal government, the Court pointed out:

> Forty-two States plus Alaska and Hawaii have statutes which in some form prohibit advocacy of the violent overthrow of established government. These statutes are entitled anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws, etc. Although all of them are primarily directed against the overthrow of the United States Government, they are in no sense uniform. . . . Some of these Acts

193. The Supreme Court is appropriately concerned with the question of whether its decisions will resolve legal questions in a manner that leaves lower courts with principles amenable to consistent application or whether they will require lower courts to continually revisit state compliance with federal standards. For example, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court held that the Fourth Amendment requires a judicial magistrate to "promptly" determine whether probable cause existed when an individual is arrested without a warrant. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court adopted a rule that assumes that such determinations comply with *Gerstein* if they occur within 48 hours. In defense of this standard the Court wrote, "[u]nfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable cause determinations must be 'prompt.' This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices . . . ." *McLaughlin*, 500 U.S. at 55-56.

194. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 225 (1982).

195. Federal court participation in this field is necessary because federal courts may review federal policies to ensure that they conform with due process and other constitutional considerations.

196. 350 U.S. 497 (1956).

197. The decision's failure to fit within existing preemption jurisprudence was immediately apparent, leaving commentators with the task of attempting to define the source, scope, and justification for the Court's decision. *See, e.g.*, Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 209 (1959).

> are studiously drawn and purport to protect fundamental rights by appropriate definitions, standards of proof and orderly procedures in keeping . . . . Others are vague and are almost wholly without such safeguards. . . . Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter . . . [administrative inconsistency and] the added conflict engendered by different criteria of substantive offenses.[198]

It is difficult to characterize this decision as an implementation of congressional will. Congress was aware of the volume of existing sedition laws. It chose to leave these laws intact.[199] Nevertheless, the decision may be easily defended with reference to the same separation of powers, federalism, and institutional dialogue arguments that justify the decision in *Davidowitz*.

There is widespread support for the notion that preemption analysis should favor the unimpeded application of federal law within those fields of law that are specifically committed to the federal government by the Constitution.[200] Indeed, even commentators who argue that the Supreme Court has been too "eager" in its assistance of congressional domination of the policymaking process,[201] argue that the current approach to preemption "has prompted courts to give *too little* preemptive effect to the most important federal interests"[202] Furthermore, the notion that some matters of public policy are uniquely federal comports with the historical notion that the federal government has limited powers and the concomitant view that all other areas of public policy are reserved to the states.[203]

2. "Field Preemption" of State Private Law by Federal Statutes

As described in the first half of this article, the preemption analysis accompanying the rise of federal administrative authority allowed courts to remove competing state *regulatory* regimes from those fields federalized by congressional programs.[204] Federal courts were also faced with state common law within these federalized fields. By revealing the regulatory nature of state common law, the legal realists provided one basis for the removal of state common law.[205] Yet common law serves a number of purposes in addition to its regulatory role.[206] As a result, it is rarely appropriate to completely

198. Pennsylvania v. Nelson, 350 U.S. 497, 508-09 (1956).

199. "Congress has not, in any of its statutes relating to sedition, specifically barred the exercise of state power to punish the same Acts under state law." *Id.* at 512 (Reed, J., dissenting).

200. *See generally* Hill, *supra* note 182.

201. Wolfson, *supra* note 14, at 112.

202. *Id.* at 103 (referring to *DeCanas v. Bica*, 424 U.S. 351 (1976), which upheld a state law forbidding the employment of illegal aliens).

203. While this principle was unanimously recognized in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), there was significant disagreement among the members of the Court over the role of the federal judiciary in preserving the sovereign rights of states. *Id.* at 580 (O'Connor, J., dissenting).

204. *See supra* Part II.B.

205. *See supra* note 141 and accompanying text.

206. For example, Professor Steven Smith persuasively argues that private tort law not only compensates victims, deters certain conduct, and punishes tortfeasors, but also serves to "reaffirm[] those [social] norms that make rational society possible." Steven D. Smith, *The Critics and*

eliminate common law from federalized fields, even where federal statutes are relatively comprehensive.[207]

Where Congress does not consider or explicitly address questions of private law within federal statutory schemes, courts are unable to trace preemption decisions to congressional intent.[208] Evidence of congressional intent is, of course, not necessary where there is a direct conflict between state and federal laws.[209] Such "direct" conflict, however, is most common where state legislation creates a competing regulatory regime. When courts are presented with the hypothetical or attenuated impact of state common law on federal policies, they must often rely on their own background assumptions to determine whether there is an adequate basis for preemption.[210]

The application of background assumptions to preemption analysis and similar constitutionally ambiguous matters is an inherent and, at least for that reason, a legitimate exercise of judicial authority.[211] Dramatic swings in preemption analysis occur, however, when these assumptions are applied within the context of choosing between allowing state law to "operate of its own force" or completely preempting state private law principles. Jurists that tend to favor state authority allow state law to operate of its own force, notwithstanding the impact of this law on federal policies.[212] By contrast, courts that favor federal authority preempt state law based on the mere possibility that it will interfere with federal objectives.[213] As a result of this dynamic, general trends in preemption analysis are discernable, but do not provide principled guidance for practitioners, courts, commentators, or Congress.[214] By choosing between preemption and allowing state law to operate of its own force, preemption decisions often go too far—when they preempt state laws based on a mere possibility that they might interfere with federal policies—or not far enough—where they allow some interference with federal objectives. Even where state private law seeks to regulate conduct, there is still a basis for preserving state common law to the extent that some aspects of

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the "Crisis": A Reassessment of Current Conceptions of Tort Law, 72 CORNELL L. REV. 765, 781 (1987). In this respect, Professor Smith shows that tort law not only punishes tortfeasors, but it also allows society to close ranks with and support those who are harmed when social norms are violated.

207. "Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *Pruneyard*, 447 U.S. at 93-94 (Marshall, J., concurring).

208. *See supra* note 17.

209. The Supremacy Clause has historically been interpreted as preempting at least those state laws that directly conflict with federal statutes. *See, e.g., supra* note 66 and accompanying text.

210. The influence of background assumptions in the preemption context is demonstrated by the Supreme Court's inconsistent treatment of state laws limiting the driving privileges of federally discharged bankrupts who have not compensated the victims of their tortuous conduct. *Compare* Kesler v. Department of Public Safety, Fin. Responsibility Div., 369 U.S. 153 (1962) (finding that operation of the state's financial responsibility law is *not* preempted by federal bankruptcy act) *with* Perez v. Campbell, 402 U.S. 637 (1971) (finding operation of the state's financial responsibility law preempted by federal bankruptcy act).

211. For a discussion of the pervasive influence of background principles, see *supra* notes 32-61 and accompanying text.

212. *See, e.g., infra* note 240 and accompanying text.

213. *See, e.g., supra* note 94 and accompanying text.

214. *See, e.g., supra* note 24.

the law may be separated and preserved. For example, one of the most important functions served by state common law—which is rarely addressed by federal regulatory regimes—concerns the compensation of victims of torts committed by the entities regulated by federal law.[215]

The Supreme Court generally employs federal preemption to determine whether and to what extent state private law may exist within federalized fields.[216] Also, the Court often seeks to rely on congressional intent to determine whether state law is preempted. The resulting jurisprudence often fails to implement congressional intent because there is rarely any "intent" to implement.[217] Where the Court does find that state law is preempted, the result is often at odds with the long-standing principle that courts will provide a remedy to redress wrongs and for asserting legal rights.[218] Finally, where state law is allowed to "operate of its own force," there is often a question of the extent to which state law may be applied independent of federal objectives. This subsection addresses preemption decisions that preempt too great an area through the use of field preemption or related doctrines. The following subsection looks at instances where courts appear to allow state laws to operate of their own force in federalized fields. Part IV.C. then provides examples of instances where private law has been federalized.

The National Labor Relations Act (NLRA) is a case study in the characterization of New Deal legislation as an attempt to replace common law ordering with federal regulatory authority.[219]

> The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency was the perceived incapacity of common law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict . . . .[220]

Without question, Congress federalized the field. Congress did not address the place of private law within this federalized field.[221] The NLRA establishes a procedure for the negotiation of contracts between union and management representatives. In order to ensure the consistent interpretation of such contracts, eliminate common law doctrines that would frustrate federal objectives, and based on the putative intent of Congress, the Supreme Court directed courts to create a federal common law for the interpretation of these

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215. This is true of the federal programs discussed *infra* notes 293-94 and accompanying text.

216. *See, e.g., infra* notes 229-72 (discussing unfair labor practices and cigarette warning labels).

217. *See supra* note 17 (quoting Solicitor General Cox).

218. *See supra* notes 12 and 180 and accompanying text (discussing the principle that private law will provide such remedies).

219. *See supra* note 101 and accompanying text.

220. Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971).

221. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). As Justice Frankfurter wrote with respect to federally defined unfair labor practices, "[m]any of these problems probably could have not been . . . foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined." *Id.* at 240.

contracts.[222] State courts possess concurrent jurisdiction to interpret and enforce these contracts.[223] They must apply the same federal common law of federal labor relations created by federal courts.[224]

The NLRA precludes the use of "unfair labor practices" by unions to increase membership or by management to prevent the creation or expansion of unions.[225] Many principles of state private law were found to address matters within the fields of unfair labor practices. In some instances, state laws were fashioned to address the same concerns that induced Congress to prohibit unfair labor practices.[226] Even where these state laws sought to accomplish the same objective as their federal counterparts, they were often preempted from the field because they constituted competing regulatory regimes. In other instances, individuals sought judicial enforcement of private rights to either advance their cause in a labor dispute or in an attempt to assert the private interests protected by private law doctrines. Where states constructed analogous regulatory regimes, courts could easily employ the preemption principles developed to ensure that state regulation would not interfere with federal primacy.[227] Cases involving private law have proved more problematic.

Instances where individuals assert private rights within federalized fields are problematic because private law generally serves both a regulatory or public law purpose as well classical private law objectives.[228] When a court's approach to this quandary goes no further than determining whether state law should be preempted, it essentially chooses between retaining the private law principles inherent in state law, notwithstanding the impact they may have on federal regulation, *or* preempting state law and thereby eliminating private law principles that Congress may have never intended or considered disrupting. To be sure, in instances where there is a direct conflict between state and federal laws, reference to congressional intent is unnecessary. Where the impact is more attenuated, however, this approach requires courts to either err on the side of preserving state law or federal authority. Such a choice will certainly be resolved with reference to the background assumptions discussed above.

Rather than approaching this choice purely as a question of preemption, courts could determine which elements of private law are appropriately preempted and which can be retained without interfering with federal objectives or how state private law could be applied with sensitivity to federal objectives. The result would be a distinct federal common law applying private law in a manner sensitive to federal labor policy.

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222. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

223. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962).

224. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

225. 29 U.S.C. § 158 (1994). The original LMRA prohibited unfair labor practices by the management of businesses engaged in interstate commerce. The Act was amended in 1947 to prohibit specified practices of labor unions. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-196 (1994)).

226. *See, e.g.*, the state statute under consideration *infra* notes 229-37.

227. *See id.*

228. *See* Smith, *supra* note 206, at 779-83.

Rather than utilizing a common law methodology, the Supreme Court employed preemption to determine whether certain categories of state law would be preempted within the field. This meant that some claims based on state private law were precluded because of the mere possibility that state law might interfere with federal objectives. By contrast, relying on federal common law provided an alternative that would have preserved such claims without unduly interfering with federal objectives.

Garner v. Teamsters[229] and *San Diego Building Trades Council v. Garmon* [hereinafter *Garmon II*][230] are lodestar cases on the integration of state private law within federalized fields. In these cases the Supreme Court chose to employ field preemption rather than federal common law methods for integrating state law. In *Garner*, the Supreme Court recognized that valuable reasons exist for distinguishing between public and private law. The Court considered whether this distinction could be the basis for preserving some state law within federalized fields. At issue was whether state laws and institutions could address matters that might constitute "unfair labor practices." The Court noted that the legislative discussion of the NLRA emphasized the Board's responsibility to "act[] in the public interest and not in vindication of purely private rights . . . ." The Court conceded that public rights are "so distinct and dissimilar from the private right that federal occupancy of one field does not bar the state from continuing to exercise its conventional equity powers over the other."[231] Yet the Court stated:

> such distinction between public and private law is less sharp and significant in this country, where one system of law courts applies both, than in the Continental practice which administers public law through a system of courts separate from that which deals with private law questions. Perhaps in this country the most usual differentiation is between the legal rights or duties enforced through the administrative process and those left to enforcement on private initiative in the law courts.[232]

The *Garner* Court recognizes that there is no obvious functional or institutional distinction between public and private law. Often a single private law principle simultaneously serves both public purposes by, for example, encouraging the use of resources, and private objectives, such as protecting a single individual's claim to those resources.[233]

Because state law often serves both private and public law objectives, courts should be sensitive to the possibility that private law aspects may be salvaged, even if regulatory aspects must be preempted. Under a common law approach, a court would employ this analysis to determine which regulatory elements of state law are preempted by the federal scheme and which private

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229. 346 U.S. 485 (1953).
230. 359 U.S. 236 (1959) [hereinafter *Garmon II*].
231. *See Garner*, 346 U.S. at 492-93.
232. *Id.* at 495-96 (citing W. FRIEDMANN, LEGAL THEORY 345 (2d ed. 1949) and RIGHT HON. SIR FREDERICK POLLOCK, BART., A FIRST BOOK OF JURISPRUDENCE 95-98 (6th ed. 1929)).
233. *See* HURST, CONDITIONS OF FREEDOM, *supra* note 106.

law elements can be retained. In *Garner*, however, "neither the statutory language nor the opinion of the [state] Supreme Court warranted a conclusion that the [state] statute protected private rights"[234] The state statute plainly constituted a competing state regulatory regime and not a private law measure.

The state law at issue in *Garner* raised no question of how state private law principles were to be integrated within a federalized field.[235] Nevertheless, the *Garner* Court waxed philosophical on the proper relationship between state private law and federal public law,[236] writing that the NLRA, like other federal law, "has largely developed and expanded as public law" and that such public law was created to "substitut[e] federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right . . . [even in instances where an] Act did not expressly abolish the pre-existing private rights."[237]

Six years later, in *Garmon II*,[238] the Supreme Court continued wrestling with the question of what methods and principles were appropriately employed to determine the proper spheres of federal and state authority in this field. In a thoughtful opinion, Justice Felix Frankfurter acknowledged that those areas "withdrawn from state power are not susceptible of delimitation by fixed metes and bounds."[239] The Court's approach, however, was *not* to address state private law as if it contained elements of both private and public law. Instead, the Court treated all state law as public law and divided the field of unfair labor practices between those areas that could be addressed by both state and federal law and those regulated solely by federal law. As a result, in those areas where state law was allowed to operate, its regulatory objectives were given force notwithstanding any inconsistency with federal policies. Conversely, state law was preempted even where it might not interfere with federal law, simply because the area was deemed to be exclusively federal. State law was excluded even though its private law functions might have been integrated into the field with or without modification.

From its very inception, the problems with this "all or nothing" approach were apparent. First, the Supreme Court left states free to apply tort law within the field of unfair labor practices "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order."[240]

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234. *Garner*, 346 U.S. at 497.

235. *See id.* at 487-91. Furthermore, the Court assumed that the NLRB possessed jurisdiction over the controversy and that the NLRB would exercise that jurisdiction if it were properly invoked. The need to integrate state law was not present in that case for any reason. *Id.*

236. *See id.* at 496-99. Indeed, the Court's decision in *Garner* contains a number of axiomatic statements regarding the preemption of private causes of action that *interfere* with federal programs. There is, of course, no question that state laws must give way when they conflict with federal policies. *Id.*

237. *Id.* at 496-97 (referring to the Interstate Commerce Act). This statement recognizes that questions of preemption can not be resolved solely upon express congressional statements. Instead, recourse must be made to the background principles previously discussed. *See supra* Part II.A.

238. 359 U.S. 236 (1959).

239. *Garmon II*, 359 U.S. at 240.

240. *Id.* at 247. The Court justified this ruling "because the compelling state interest, in the

Having completely opened the gates to these suits, however, the Court precluded suits based upon any other common law doctrine. The Court readily conceded that this approach would often prove overly-broad. "It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority."[241] Significantly, the Court also conceded that there was no statutory basis for allowing all of one type of (tort) claim, while preempting all other private law causes of action. Four members of the Court wrote separately to point out that it was more appropriate to allow private law claims for actions that Congress deemed "unprotected" and to preempt only those involving protected actions as defined by the NLRA.[242]

In *Garmon II* the Supreme Court characterized most state causes of action for damages as preempted forms of regulation.[243] In *Garmon II*, the Court chose not to distinguish between those elements of state common law that could be retained by common law methods and those that had to be preempted. Instead, the Court determined that state and federal laws concerning the same conduct, even for different purposes, presented too much risk of conflict.[244] As a result, even those elements of state common law that might have been integrated into the federal scheme were preempted. The Court wrote that its "governing consideration is that to allow States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."[245]

In the context of unfair labor practices, the Court asserted that in the absence of explicit congressional guidance concerning preemption, some rule capable of relatively simple application was required. In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*,[246] Justice Harlan addressed the choices available to the Court.

> The precise extent to which state law must be displaced to achieve those unifying ends sought by the national legislature has never been determined by the Congress. This has, quite frankly, left the Court with few available options. We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions, obviously much of this is left to the States. Nor can we proceed on a case-by-case basis to determine whether each particular final judicial

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scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Id.* Similarly, the Supreme Court has evinced a reluctance to recognize that state criminal law is preempted. *See, e.g.*, Goldstein v. California, 412 U.S. 546 (1973) (holding that the state "record piracy" law was not preempted by federal copyright law); California v. Zook, 336 U.S. 725 (1949) (holding that a state criminal law was not preempted by the existence of federal law, even though the federal law defined its penalty as the "maximum" and the state statute provided for a more severe penalty).

241. *Garmon II*, 359 U.S. at 247.

242. *Id.* at 250-51 (Harlan, Clark, Whittaker, and Stewart, J.J., concurring).

243. *See id.* at 239 (characterizing the Court's decision as such a choice).

244. *Id.* at 242-43.

245. *Id.* at 246.

246. 403 U.S. 274 (1971).

> pronouncement does or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This court is illequipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.[247]

In application, Justice Harlan's approach was to assume that any legal question that might address a concern within this area of federal labor law would be contrary to federal labor policy. As a result, much of the state law that might "touch or concern" labor relations was indeed preempted. For example, *Lockridge* concerned a former union member's claim against a union for revoking his membership in a manner that violated the express terms of the union's bylaws. His claim was based on state contract and tort law. It was possible for a court to recognize Mr. Lockridge's claim based on state tort law without interfering with federal labor relations law.[248] State law was preempted without a clear showing that it posed such a threat to federal objectives or an attempt to apply common law processes to preserve the basic private law interest at stake. Furthermore, there is much evidence to contradict Justice Harlan's view that preemption-based jurisprudence is easier to apply than the other option addressed by the Court's decision: a "federalized judicial system."[249] Three leading figures in federal labor law write that "[n]o legal issue in the field of collective bargaining has been presented to the Supreme Court more frequently in the past thirty years than that of preemption of state law, and perhaps no other legal issue has been left in quite as much confusion."[250]

One explanation for the Court's failure to give greater weight to the possibility that federal common law could be employed to preserve state private law was a preoccupation with the need to minimize state interference with new federal regulatory entities. This was certainly the justification most commonly employed by the Court.[251] Another explanation lies in the assumption, frequently traced to *Erie*, that by precluding federal courts from creating federal common law, state courts will enjoy a greater scope of authority.[252] Yet these principles do not inexorably lead to the conclusion that broad field preemption, rather than the creation of federal common law, should be a predominant mechanism for the integration of state law in federalized fields of law. As noted above, federal common law is not necessarily antagonistic to federal administrative authority. Also, where state law is

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247. *Lockridge*, 403 U.S. at 289-90.

248. *See id.* at 321-22 (White, J., dissenting) (quoting 29 U.S.C. § 413 to illustrate Congress's instruction that "[n]othing contained in this title shall limit the rights and remedies of any member of a labor organization under State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization"). Justice White noted that, "far from preempting state law, one of the major thrusts of the LMRDA was to enforce state rights and remedies." *Id.* at 323.

249. *Id.* at 288.

250. ARCHIBALD COX ET AL., LABOR LAW 895 (10th ed. 1986).

251. *See, e.g., Garmon II*, 359 U.S. at 241-44.

252. *See supra* notes 158-70 and accompanying text.

preempted, the creation of federal common law does not intrude into an area where state law would otherwise apply. Nevertheless, the *Garmon II* characterization of state common law as nothing more than a means of state regulation still prevails.

Cipollone v. Liggett Group, Inc.[253] is a recent example of the Supreme Court's attempt to "integrate" state private law within a federalized field using preemption. The case involves state common law tort claims against a cigarette manufacturer brought by the estate of a woman who died of lung cancer.[254] The Supreme Court addressed the question of whether and to what extent the plaintiff's claims were preempted by federal laws enacted in 1965 and 1969 to address cigarette warning labels and advertising. Specifically, the Federal Cigarette Labeling and Advertising Act of 1965 ("The 1965 Act") "mandated warnings on cigarette packages, but barred the [Federal Trade Commission's] requirement of such warnings in cigarette advertising."[255] The Public Health Cigarette Smoking Act of 1969 ("The 1969 Act") "strengthened the warning label, in part by requiring a statement that cigarette smoking 'is dangerous' rather than it 'may be hazardous.' Second, the 1969 Act banned cigarette advertising in 'any medium of electronic communication subject to [FCC] jurisdiction.'"[256]

The defendant asserted that the plaintiff's tort claims based on the state common law principles of failure to warn, violation of an express warranty, fraudulent misrepresentation, and conspiracy to defraud, were all preempted by the 1965 and 1969 Acts, which sought, among other things, to "protect[] the national economy from the burden imposed by diverse, nonuniform and confusing cigarette, labeling and advertising regulations."[257] Even though both statutes explicitly address preemption, the Supreme Court failed to produce a majority opinion with respect to the preemption of state common law by the 1969 Act.[258]

The entire Court agreed that both federal Acts preempt "direct" state regulation of cigarette advertising and warning labels.[259] Seven members of

253. 500 U.S. 504 (1992).

254. *Cipollone*, 500 U.S. at 509 (noting that Mrs. Cipollone, the original plaintiff, died during the litigation).

255. *Id.* at 514 (citing the Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 5, 79 Stat. 282 (1965)).

256. *Id.* at 515 (citing the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5(b), 84 Stat. 87 (1969)).

257. *Id.* at 519 (citing the 1965 Act's statement of purpose).

258. *Id.* at 507. Those portions of Justice Stevens's opinion holding that the 1965 Act did not preempt state tort law were joined by Rehnquist, White, Blackmun, O'Connor, Kennedy, and Souter. *See id.* at 508-31. However, Justices Blackmun, Kennedy, and Souter dissented from the plurality holding that the 1969 Act preempted some principles of state common law. *See id.* at 531-44. Justices Scalia and Thomas dissented entirely. In their view, both the 1965 and 1969 Acts preempted the state common law claims at issue. *See id.* at 544-56.

259. *See id.* at 508-56. Two Justices found this objective in both the 1965 and 1969 Acts *and* found that it applied to both "direct" state regulatory law and to state common law; four Justices found this with respect to both Acts as they applied to "direct" state regulation and the 1969 Act as it applied to specific principles of state common law; and three Justices found this with respect to both Acts as applied to "direct" state regulation, but that neither Act preempted the state common law principles under review in the suit.

the Court agreed that the following provision in the 1965 Act worked no preemption of the plaintiff's state common law claims: "No statement relating to smoking and health or other than the statement required by . . . this Act, shall be required on any cigarette package [and n]o statement relating to smoking and health shall be required in the advertising of any cigarettes . . . labeled in conformity with the provisions of this Act."[260] In addressing whether the application of state common law should be preempted as a form of state "regulation," the Court wrote:

> [T]hese provisions merely prohibit state and federal rule-making bodies from mandating particular cautionary statements . . . [and] this reading is appropriate for several reasons. First, . . . we must construe these provisions in light of the presumption against pre-emption of state police power regulations. . . . Second, the warning required in [the 1965 Act] . . . does not by its own effect foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically pre-empt a regulatory field. Third, there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damage actions.[261]

The seven Justices who agreed that neither this language nor the operation of the 1965 Act necessitated the preemption of state common law split fourthree on the question of whether the 1969 Act sufficiently broadened the preemptive effect of federal law to result in the preemption of the state common law doctrines in question. The plurality of four justices wrote that "the [1969 Act] bars not simply 'statements' but rather 'requirement[s] or prohibition[s] . . . imposed under state law . . . [and also] reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes."[262] As a result, the plurality found that the plaintiff's claims with respect to failure to warn (arising out of notice of health consequences) and fraudulent misrepresentation (arising out of alleged attempts to neutralize the federal warnings) were preempted, whereas those claims based on failure to warn (arising out of testing, research, and sales), express warranty, fraudulent misrepresentation (arising out of alleged failure to act on medical and scientific information), and alleged conspiracy to defraud were not preempted.

The four-three split focused on whether the 1969 Act preempted certain state private causes of action. Relying on *Garmon II*, the plurality noted that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[263] Based on this characterization of private law, the plurality determined that all state common law claims accruing after the effective date of the 1969 Act were preempted if

260. *Id.* at 514.
261. *Id.* at 518.
262. *Id.* at 520.
263. *Id.* at 521 (quoting *Garmon II*, 359 U.S. at 247).

they concerned a "requirement or prohibition . . . with respect to . . . advertising or promotion [of cigarettes]"[264]

Recognizing that Congress wishes to prevent inconsistent regulation does not mean that all state law must be preempted. Indeed, the plurality recognized that private law implicates not only the question of how people will be warned, but whether the individuals who have been warned will be compensated when they incur a loss.[265] With respect to the 1969 Act, however, the plurality approach sweeps the compensatory element of private tort law from the field without allowing for the possibility that a claim can be made out under state law without raising the "ceiling" of federal regulation or changing the conduct of potentially liable parties.[266]

Nothing in the 1969 Act indicates that Congress was concerned with the compensatory function of state tort law. Therefore, ascribing a particular intent to Congress in this regard is incorrect.[267] The plurality in *Cipollone* determined that preemption was appropriate pursuant to the 1969 Act by applying background principles which "err on the side of" preserving federal law.[268] Because this opinion simply relies on the background assumptions applied by certain members of the Court to a general preemption clause, it provides little guidance, if any, to courts trying to apply its analysis to the tort laws of other states or to other preemption questions.[269]

It is not surprising that courts will often have little explicit congressional language to guide them as they decide how to integrate private law into federalized fields of law. As one commentator notes:

> When Congress does focus attention on the relation of its acts to state laws dealing with the same subject matter, it looks to certain existing

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264. *Id.* at 524 (quoting the 1969 Act).

265. The plurality recognized this when it wrote, "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." *Cipollone*, 500 U.S. at 518 (citing the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, § 5(b), 100 Stat. 30 (codified at 15 U.S.C. §§ 4401-4408 (1994))). Furthermore, as Justice Blackmun pointed out, "the question whether common-law damages actions exert a regulatory effect on manufacturers analogous to positive enactments—an assumption crucial to the Court's conclusion . . . is significantly more complicated than the Court's brief quotation from [*Garmon II*] would suggest." *Id.* at 543 (Blackmun, J., concurring in part and dissenting in part).

266. As Justice Blackmun pointed out in his concurring and dissenting opinion, the plurality treatment of the Smokeless Tobacco Act of 1986 demonstrates that these positions are not at all incompatible. *Id.* at 543.

267. The plurality asserted that its consideration of preemption could be resolved solely based on the congressional intent concerning preemption as explicitly expressed in the 1965 and 1969 Acts. *Id.*

268. I reach this conclusion because both the plurality and the two Justices who joined Justice Blackmun's concurrence and dissent found that the preemptive scope of the 1965 and 1969 Acts could be ascertained by their express language. Obviously background principles and legal predispositions were applied to reach these opposite results while purporting to rely solely on the same provisions.

269. Despite their significant differences with respect to the preemption questions raised by the 1965 and 1969 Acts, the concurring and dissenting opinions agreed on the difficulties lower courts will face in their attempts to follow the plurality's opinion. Justice Scalia wrote: "Like Justice Blackmun, 'I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision.'" *Cipollone*, 500 U.S. at 555 (quoting Blackmun's dissent at 543-44).

> state laws. It is grotesquely unrealistic to suppose that Congress, in expressing a general intent to save or to preempt state laws, actively considered all possible state enactments touching the field of the federal law. Indeed, Congress probably expressed such an intent without a comprehensive survey of existing state laws tangentially affecting the field of federal law, and for good reason. Many potential relationships between state and federal laws are unforeseeable at the time the federal act was adopted. The speculative nature of attempting to anticipate conflicts and difficulties in the prospective operation of a proposed law has long been recognized by the Court as a reason for avoiding advisory opinions; the same problems of speculation confront Congress in providing for preemption of state laws.[270]

The *Cipollone* case shows the flaws inherent in the position that courts should rely solely on "congressional intent" as the basis for analyzing preemption. The Court ignores the fact that when the 1965 and 1969 Acts became federal law, private law claims against cigarette manufacturers could not succeed.[271] In this situation, determining the preemptive scope *intended* by Congress is an entirely contrived exercise. This is not to say that Congress should not address the question of preemption. Congress has an obvious incentive to make its views on preemption as clear as possible: this is the best means available to it to ensure that courts approach questions of preemption with some knowledge of what Congress intended at the time federal law was enacted.[272] When the 1969 Act was enacted, successful suits against tobacco companies were more than twenty years and a number of developments in tort law in the future. Because courts will address questions of preemption that were unforeseeable when federal law was adopted, courts must rely on background assumptions. By limiting their choices to preempting a common law principle completely or allowing it to operate within the federalized field, however, courts often err on the side of eliminating important principles of common law from such fields, based primarily on the force of background principles, rather than a principled consideration of whether elements of state private law should be retained within the federal scheme. This approach to preemption gives greater credence to the "background assumptions" a judge brings to a case than her reasoned consideration of whether some aspects of state law can be retained within the federalized field.

To be sure, there are those who defend the current "dichotomy" approach to preemption. Its defenders might argue that allowing courts to define unique

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270. Hirsch, *Toward a New View of Federal Preemption*, 1972 LAW F. 515, 543 (1972).

271. "During the 'first wave' of tobacco litigation [1950s and 1960s], the defendants usually prevailed because courts and juries felt that the link between smoking and disease was not so solidly established that the defendants should have known of the danger. Defendants used assumption of risk as a secondary defense." Note, Cipollone v. Ligett Group, Inc.; *Supreme Court Takes Middle Ground in Cigarette Litigation*, 67 TUL. L. REV. 787, 802 (1993). Indeed, courts imposed both of these theories in the same cases, despite the conflict in absolving cigarette manufacturers because the dangers of smoking were unknown and simultaneously imposing partial responsibility on smokers because they assumed the risks inherent in smoking. *Id.* at 799.

272. If a Congress does not act with sufficient clarity, the best it can hope for is that subsequent Congresses will enact new laws to implement its intent.

federal common law within federalized fields would expand the powers of federal courts, often at the expense of state lawmakers. As discussed above, this argument has little force in instances where state law would otherwise be preempted.[273] A review of preemption decisions, however, reveals instances where a court assumed that it was confronted with a choice between preempting state law or allowing it to operate within the federalized field.[274] In some of these instances, the court chose to leave state law undisturbed.[275] There is force to the argument that the Court may not have allowed state law to remain undisturbed if it believed that it possessed the option of creating federal common law. Some might argue that this margin of cases justifies the restrictive approach toward federal common law because it provides the greatest opportunity for state private law to provide the rule of decision applied by either federal or state courts. The next section explores situations where it appears that state law is allowed to "operate of its own force."

B. *The Illusion of State Law "Operating of its Own Force" in Highly Federalized Fields of Law*

Federal common law provides one means for preserving the general thrust of state private laws within highly federalized fields of law. One response to this proposal is the argument that it is more deferential to states to allow state law to operate "of its own force" within federalized fields. The Burger Court preemption decisions of the early 1970s often recognized that state laws within federalized fields should not be presumed to interfere with federal programs.[276] Some suggested that these decisions constitute a "mid-course" correction in preemption jurisprudence or an attempt to restore "balance" to preemption analysis that is too solicitous to federal interests.[277]

Understandably, the preservation of state law in federalized fields is more common when the "preserved" state law is private law, such as a private cause of action, rather than a form of state regulation.[278] It would, however, be incorrect to assert that state law operates without regard to federal objectives in federalized fields. Such state law is to a greater or lessor degree federalized

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273. *See supra* note 167 and accompanying text.

274. I agree with Professor Field's view that the current "restraint" on the creation of federal common law is self-imposed. *Cf. supra* note 146. Thus, courts are precluded from making common law based largely on whether they believe a common law rule is necessary and appropriate and whether they believe that their decision might be overturned.

275. *See, e.g.*, the cases discussed *infra* note 276.

276. *See, e.g.*, DeCanas v. Bica, 424 U.S. 351 (1976) (denying facial challenge to state law making it illegal to hire illegal aliens); New York Dept. of Soc. Servs. v. Dublino, 413 U.S. 405, 413, 417, 422 (1973) (finding no preemption of a state statute terminating federal public assistance of "employable" persons). This trend is discussed in *The Law of Preemption*, *supra* note 23.

277. *See, e.g.*, Robert S. Catz & Howard B. Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977) (noting that recent decisions of the Supreme Court regarding problems of federal preemption have sought to balance state and federal interests); *The Law of Preemption*, *supra* note 23.

278. *Compare* the cases cited *supra* note 276, *with* Ray v. Atlantic Richfield, 435 U.S. 151 (1978) (finding that state regulation of oil tanker construction preempted), *and* Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (finding state regulation of airport traffic preempted).

because it is retained only up to the point where it interferes with federal objectives. Therefore, courts must apply this private law with sensitivity to federal policies. Some might argue that if this state law "operates of its own force," it is modified to serve (or at least not interfere with) federal programs. In some instances, this is carried so far that it is not clear whether state law is operating of its own force or has been integrated into federal law.

In *Silkwood v. Kerr-McGee Corp.*,[279] the Supreme Court considered whether federal laws regulating the nuclear energy industry preempted a tort claim by the estate of a nuclear energy worker who was exposed to nuclear materials. As the Court noted, the legislative history of the pertinent federal legislation contained "ample evidence that Congress had no intention of forbidding the State to provide such remedies."[280] The Court also wrote that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[281] While this approach is arguably deferential to state law, it would not be accurate to describe the preserved state laws as "operating of their own force." The Court also stated:

> We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law. We perceive no such conflict or frustration in the circumstances *of this case*.[282]

State law therefore still retains force in this highly federalized field, but only to the extent that it stays within unspecified parameters. As a result, a court applying state tort law is put on notice that application of its laws in a manner that "would frustrate the objectives of federal law" will result in an invalidation of its decision. Certainly this is preferable to preempting state law based on the *possibility* that it will interfere with federal objectives. At the same time, it goes too far to characterize such law as "operating of its own force." Such state law must be applied with a sensitivity to federal objectives. For that reason, a state court (or federal court in a diversity case) will presumably develop specialized principles of law to be applied in this field. To be sure, such covert federalization of state law adopts much of the substance of this article's proposal. There are several advantages to a policy of explicitly identifying the "uniquely federalized" aspects of such state private law. Most importantly, it will ensure that modified private law principles are not mistaken for private law principles developed without regard to federal

279. 464 U.S. 238 (1984).
280. *Silkwood*, 464 U.S. at 251.
281. *Id.* (citing United Constr. Workers v. Laburnum Corp., 347 U.S. 656, 663-64 (1954)).
282. *Id.* at 256 (emphasis added).

objectives. In short, even though *Silkwood* leaves states free to apply their own law to these cases, they (or federal courts applying such state law) must create a specialized type of law in such federalized fields in order to prevent interference with federal objectives.

In fields of law heavily influenced by federal laws, whatever state law courts allow to remain will inevitably become federalized. Indeed, it is sometimes difficult to determine whether state law is fulfilling an independent purpose or only fulfilling federal purposes. "When the Supreme Court decides to let state law operate [of its own force], it often does not indicate whether state law is operating of its own force or because it adequately serves federal purposes."[283]

C. *Federalizing State Law through the Creation of Private Causes of Action*

To the extent that the current approach to preemption precludes state common law from addressing questions of private law within federalized fields, federal courts must be free to fashion common law, or the field of law will be devoid of private law. Through the creation of private causes of action, federal courts eliminate many of the tensions that result from preemption that prevents state private law from filling gaps within federal regulatory programs. Specifically, the Warren and early Burger Courts' jurisprudence on the question of whether federal courts should recognize "implied rights of action"[284] based on federal statutes, effectively federalized principles of private law that are generally embodied in state common law, thereby preventing gaps in federalized fields of law, without endangering federal regulatory regimes.[285] However, the Supreme Court has generally created these private rights of action as supplements to either federal administrative action or to causes of action explicitly established by the federal statute.[286] As such, these rights of action were easily challenged on separation-of-powers grounds, based upon arguments that they usurped congressional authority.[287]

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283. Field, *supra* note 15, at n.397 (citing Miree v. DeKalb County, 433 U.S. 25 (1977); United States v. Yazell, 382 U.S. 341, 356-57 (1966)).

284. This term is described at *supra* notes 175, 177.

285. The treatment of implied rights of action in HART & WECHSLER demonstrates that the implication of private rights of action is, at least initially, a choice that requires consideration of whether state law can be integrated into the federal regime, or whether a uniquely federal remedy is necessary:

> When Congress imposes a duty, it may say nothing about sanctions or remedies in the event of violation; it may provide criminal sanctions but be silent as to the availability of civil remedies; or it may specify particular administrative or judicial remedies and say nothing about others. In each of these instances, the federal courts may be asked to determine (a) whether, and to what extent, *state* remedies are available to redress violations, and (b) whether, and to what extent, the courts should recognize a *federal* remedy not expressly authorized by the governing statute.

HART & WECHSLER, *supra* note 13, at 943-44.

286. *See supra* Part III.D.2.

287. Professors Stewart and Sunstein point out that "courts reacted to perceived inadequacies in agency enforcement efforts by creating private rights of action . . . . The [current Supreme] Court's restrictive approach to private rights of action makes it far less likely that such rights will be recognized." Stewart & Sunstein, *supra* note 9, at 1217.

This article argues that private causes of action should be viewed as the necessary means of maintaining private law within federalized fields of law. Courts should, of course, refuse to create private causes of action when private enforcement of these rights would disrupt federal statutory objectives.[288] This article is less concerned with the place of federal common law in our federalism than with the place of private law within federalized fields of law.[289] Because federal common law is generally approached as a conflict between judicial and other federal branches or between federal and state authority, the preservation of private law is rarely addressed.

Analysis of modern federal private rights of action generally begin with the Supreme Court's decision in *J.I. Case Co. v. Borak*.[290] In *Borak*, the Court addressed the question of whether a private cause of action can be brought by investors alleging injury resulting from a violation of fair dealing standards established by federal securities laws. Quoting *Sola Electric v. Jefferson Electric Co.*,[291] the Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.[292]

As discussed above, one of the justifications for creating a federal administrative state was the need to protect public and disparate "private" interests that appeared unsuitable for resolution within the context of private lawsuits.[293] These federal programs generally consisted of the creation of both federal standards and administrative entities charged with the enforcement and development of these standards. Yet some courts and commentators were concerned with implications of this development on the continued relevance of an independent judiciary. As discussed above, many of the "second order remedies" constitute one judicial response to this circumstance.[294]

Nothing in its decision demonstrates that the *Borak* Court was concerned with the need to incorporate principles of state private law within the federal securities regulatory regime. The Court was concerned with the need to provide a uniform tort action against violators, and it feared that such actions might not exist if the implication of such actions was left to the each state's laws.[295] Private rights of action were not inferred in *Borak* in order to

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288. Professors Stewart and Sunstein discuss various circumstances in which these "private correctives" or "second order remedies" interfere with orderly administration by federal agencies. *Id.*

289. *Id.* See also Field, *supra* note 15, for a thoughtful discussion of the place of federal common law in our federalism.

290. 377 U.S. 426, 431-32, 434 (1964).

291. 317 U.S. 173, 176 (1942).

292. *Borak*, 377 U.S. at 433.

293. *See supra* Part III.A.

294. *See supra* notes 175-77 and accompanying text.

295. The Court wrote that:

> If federal jurisdiction were limited to the granting of declaratory relief, victims of deceptive proxy statements would be obliged to go into state courts for remedial relief. And if

incorporate principles of state private law. The Court wished to provide federal courts with a mechanism to participate in federal securities regulation. As one commentator writes, "*Borak* treats plaintiffs not as victims so much as 'private attorneys general' to whom damages are paid as a reward for bringing lawsuits that serve the public purpose of deterring securities violations."[296]

The *Borak* Court saw private lawsuits as a useful mechanism for supplementing the enforcement of federal securities laws.[297] Viewed from this perspective, the private cause of action implied in *Borak* is susceptible to the argument that Congress, rather than the Court, should have determined the extent to which private enforcement activities were necessary to effectuate the purposes of federal securities regulation or the companion argument that "this melding of private enforcement and public goals may be ill-suited to the regulatory scheme of the securities acts."[298] Both of these arguments could be easily overcome if the Court had based its decision on the need to preserve private law within a federalized field of law. The Court could have pointed out that as a result of the federalization of the field of securities regulation, it was unlikely that standards of conduct defined by state law could withstand preemption scrutiny. By creating a federal common law for this field, however, federal courts could draw on state law principles to define private causes of action that integrate state law without interfering with federal objectives.

The Supreme Court's decision in *Cort v. Ash*[299] provided the basis for the approach to federal common law advocated by this article. This case determined whether a stockholder could prosecute a derivative action against a corporation's directors for their alleged violation of federal election campaign finance laws. Three of the four criteria the Court described for determining whether a private cause of action should be inferred are unremarkable principles that have long been a part of judicial consideration of whether a statutory violation creates the basis for private relief. These three criteria allow for courts to consider legislative intent and to consider whether a private cause of action will interfere with the legislative program:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the defendant? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?[300]

The fourth criterion announced by the Court is not, by itself, a threat to the idea that federal causes of action should be created in highly federalized

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the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated.

Borak, 377 U.S. at 434-35.

296. Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 557 (1981).

297. *Id.*

298. *Id.*

299. 422 U.S. 66, 69 (1975).

300. *Cort*, 422 U.S. at 78.

fields of law. The Court wrote that a relevant consideration is whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law."[301] In *Cort*, there seemed to be little reason to infer a cause of action based on the federal law. As the Court wrote, "except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."[302] *Cort's* author, Justice Brennan, points out that the case implicates few (if any) federal concerns. As a result, an appropriate action could be brought in state court based on state law principles without concern that the state law would interfere with federal policy.

Justice Brennan recognized, however, that in those fields heavily influenced by federal law it might be inappropriate to allow states to determine whether a private cause of action should exist and what standard of conduct it should enforce. For example, in areas of greater federalization, such as the right of union members to bring private causes of action based on the campaign finance statute, the Court noted that the federal interest and influence in labor law might necessitate the creation of a federal cause of action.[303] In light of the fact that a state cause of action against labor union officials for the same conduct alleged in *Cort* might easily interfere with a federal labor policy, it is entirely appropriate that these questions should be resolved as a question of federal law.

The decision in *Cort* set the stage for an approach to preemption which recognized that in federalized fields of law, federal courts should create private rights of action that are consistent with federal policies. State private law would, by itself, often be preempted by federal law, leaving the field of law without any private law.[304] By contrast, in some instances, such as the facts of *Cort*, states could be free to apply their own private law without fear that it would be found to stand as an obstacle to federal policies.

Justice Brennan's invitation to base the creation of a private cause of action on federalism grounds (i.e. preserving state law)—rather than on a desire by federal courts to overcome limitations on federal administrative authority—was ignored. Instead, the definition of private causes of action was swept up in a judicial "counter-reformation" as the members of the Court

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301. *Id.* at 78.
302. *Id.* at 84.
303. *Id.* at 82 n.13.
304. Indeed, some fields of law have become so federalized that an exception to the "well-pleaded complaint rule" allows defendants to obtain removal to federal court to hear their preemption defense. As the Court explained in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987): "One corollary of the well-pleaded complaint rule . . . is that Congress may so completely pre-empt a particular area that any civil complaint raising this selected group of claims is necessarily federal in character." *Id.* at 63-64. Until *Metropolitan Life*, this exception to the well-pleaded complaint rule was only applied in the context of labor law and the treaty interests of Indian tribes. *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 n.8 (1987). Since *Metropolitan Life*, federal courts have expanded the range of areas where they find "complete preemption." These include areas of federal banking law, M. Nahas & Co. v. First Nat'l Bank, 930 F.2d 608, 612 (8th Cir. 1991), and contracts involving Indian gaming, *see, e.g.*, Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 545-46 (8th Cir. 1996).

working to limit some elements of federal judicial authority successfully portrayed these remedies as an affront to both separation of powers and federalism. This development was itself an element of an approach to judicial authority that characterized courts as simply the implementors of policy decisions made by the drafters of legislation and the Constitution.[305]

Beginning with Justice Powell's dissent in *Cannon v. University of Chicago*,[306] many members of the Supreme Court began asserting that congressional intent, as demonstrated by the explicit statutory language, should generally determine whether a private cause of action should be implied by federal courts.[307] Such an approach would have little effect in instances like *Cort*, where state private law will not interfere with the federal regime. In those cases, relief to vindicate private rights can be had in state courts.[308] Where a state law private claim is implicated, a tension results: the federal regulatory regime may not have been constructed to address the full range of private rights that may have been violated, yet the need to prevent interference with federal law may result in the preemption of any state private causes of action. The creation of federal common law resolves this problem: state private law is prevented from interfering with federal objectives because it is federalized.

V. CONCLUSION

A number of commentators argue that courts should refrain from preempting state law in the absence of any indication that Congress "intended" such a result.[309] Proponents of this position assert that it will result in greater

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305. One commentator explains:

> The Court now invokes a literalist reading of statutory terms as a surrogate for actual legislative intent. Thus, statutory words themselves are said to "announce [] Congress' considered judgment," to "embod[y]" a chosen legislative "compromise," to strike a "balance" between "opposing policy arguments." The Court, then, will not expand literal words in the process of interpretation, for doing so would amount to "rewriting rules" enacted by Congress. Hence what Congress enacts is precisely what Congress intends. Through this congruence of literalism and legislative intent, "strict adherence" to the statute's chosen words has now become the new touchstone of statutory interpretation.

Note, *Intent, Clear Statements, and the Common Law*, *supra* note 56, at 894-95 (internal citations omitted).

306. 441 U.S. 677 (1979). Powell wrote that

> [t]he 'four factor' analysis of [*Cort*] is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.

Id. at 731 (Powell, J., dissenting).

307. *See, e.g.*, Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979).

308. Of course, where the jurisdiction of a federal court can be invoked based on diversity of citizenship or through the assertion of the state claim through pendant jurisdiction, such claims can be brought in federal court and, pursuant to *Erie*, as discussed above, state law will apply. *See generally supra* Part III.C. *See also supra* note 132 (discussing the general constitutional requirements for federal jurisdiction).

309. *See, e.g.*, Wolfson, *supra* note 14, at 71; *see also Law of Preemption*, *supra* note 23, at 55 ("In our federal system, Congress has a duty to address clearly whether a federal enactment has displaced state law."). The Supreme Court's current infatuation with the idea that all questions relating to a statute's application can be resolved by references to its explicit text is explored in the materials cited *supra* notes 12, 17-19.

certainty in preemption analysis. Yet the Supremacy Clause directs courts, not Congress, to implement its mandate.[310] Also, it is difficult to imagine that courts would uniformly apply this principle within the context of private law.[311] Indeed, even where Congress does explicitly address the preemption of private law, judges and justices apply preexisting background principles to such "saving" or "preemption" clauses to obtain the same results that they would probably reach if Congress had not addressed the matter in the first place.[312] This position is itself the product of certain assumptions concerning federalism, separation of powers, and whether private law should be allowed to disturb purely private ordering. While these assumptions are legitimate, alternative assumptions are at least equally so. And these alternative assumptions do not lead to the conclusion that federal preemption should only result from express statements. This article argues that courts should instead consider whether any improvements can be made in the legitimate approaches to federal preemption.

Thus background principles are applied which find state law preempted and which do not allow for the creation of federal common law. Various formulations of preemption analysis accompany these trends. Both of the most recent trends tend to favor the preemption of state law, although for very different reasons. During and immediately after the New Deal, preemption of state private law served to enhance federal authority by preempting competing state judicial actions. The most recent trend tends to find state law preempted in order to limit judicial interference with private economic ordering through judicial development of federal statutes.

Notwithstanding the importance of private law to our federalism, scant attention has been paid to the question of how private law principles can be preserved within federalized fields. This article points out that the creation of federal common law represents one option for "balancing" out the swings that occur as divergent background principles are applied to determine whether Congress "intended" to preempt state law. This is not to say that this proposal is not without its own background assumptions. For example, it assumes that private law is an important part of our federalism. It assumes that states should have the preeminent right to define private law principles. Nevertheless, it assumes that Congress is not able, nor is it required, to

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310. The text of the Supremacy Clause is set out *supra* note 30 and a brief synopsis of its history is set out *supra* note 122. Although the Constitutional Convention specified that congressional work-product would take precedence over state laws, it left courts with the responsibility for implementing this element of federalism. *See supra* note 122. Courts are required to exercise their responsibility under the Supremacy Clause whether Congress "intended" to preempt state law. Courts abdicate their constitutional responsibility if they rely solely on "congressional intent" to determine whether state law should be preempted.

311. In a number of fields, the Supreme Court or Congress established such a "clear statement" rule, only to subsequently have federal courts create exceptions. For example, the Anti-Injunction Act prohibits federal courts from granting injunctions except as "expressly authorized." 28 U.S.C. § 2283 (1994). In *Mitchum v. Foster*, however, the Supreme Court determined that the federal civil rights statute, 42 U.S.C. § 1983 (1994), constitutes such an exception even though § 1983 does not expressly refer to the Anti-Injunction Act. 407 U.S. 225 (1972).

312. The discussion of *Cipollone v. Ligett Group*, *supra* notes 253-72 and accompanying text, demonstrates this observation.

delineate all state laws that will be preempted by its legislative work product. As a result, courts will often be called on to determine whether federal statutes should be *interpreted* to preempt state laws. Requiring state courts to choose between preempting state law or allowing state law to operate of its own force will, in some instances, result in (at least the appearance of) state law being applied in federalized fields. Sometimes this result would not occur if courts had the opportunity to create a unique common law for the federalized field. Nevertheless, even where state law appears to "operate of its own force," it is covertly federalized. For this reason, it is preferable for courts to explicitly state whether state law is actually serving federal purposes. Finally, this proposal assumes that it is preferable for courts to preempt only those portions of state law that interfere with federal objectives. These objectives and assumptions are compatible with the creation of federal common law to integrate state private law within federalized fields of law.