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# The Lawmaking Power of the Federal Courts

Larry Kramer\*

My only previous encounter with the subject of federal common law was casual: before beginning a clerkship with Henry Friendly, I made it a point to read his academic writings, including the deservedly famous *In Praise of Erie*.<sup>1</sup> My preliminary thoughts on the subject therefore began where the Judge's left off, which is to say with the idea that federal common law represents a "centripetal tool incalculably useful to our federal system" and that, while we may have not yet achieved the best of all possible worlds with respect to the relationship between state and federal law, "the combination of *Erie* with *Clearfield* and *Lincoln Mills* has brought us to a far, far better one than we have ever known before."<sup>2</sup> At first, I just assumed that this must be correct. Judge Friendly was seldom wrong about such matters, particularly when consideration of a problem led him to a judgment contrary to his naturally conservative tendencies respecting federal jurisdiction.

Imagine my surprise, then, to discover that Judge Friendly's belief in a sweeping power to make federal common law is any-

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\* Professor of Law, University of Michigan Law School. Presented to the Federal Courts Section at the 1992 Meeting of the American Association of Law Schools. Having never written a word about federal common law, I was somewhat surprised when Don Doernberg invited me to join this panel (though it did cross my mind that he may have asked me precisely because I have never written on the subject). I agreed to participate for the same reason I have never written on federal common law, which is that I have never really thought about the problem much. And since I have often thought that I should think about it, the occasion provided a good excuse. I am grateful to participants for their comments. I am also grateful to Craig Allison, Akhil Amar, Lee Bollinger, Erwin Chemerinsky, Steven Croley, Heidi Feldman, Barry Friedman, Steve Gilles, Don Herzog, James Hopenfeld, Jeffrey Lehman, Lawrence Lessig, Angela Luera, Daniel Meltzer, Tom Merrill, Geoffrey Miller, Richard Pildes, Richard Posner, and Terrance Sandalow for reading and commenting on an earlier draft.

1. Henry J. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964), reprinted in H. J. FRIENDLY, BENCHMARKS 155 (1967).

2. FRIENDLY, *supra* note 1, at 194-95.

thing but uncontroversial. While he has a few fellow travelers — including Martha Field on this panel<sup>3</sup> — the journals are filled with articles questioning the legitimacy of even very conventional forms of federal common law. Martin Redish mounts the most extreme attack, arguing that the whole notion of lawmaking by federal judges is contrary to the principles on which the nation was founded.<sup>4</sup> To be sure, Redish relies primarily on the Rules of Decision Act,<sup>5</sup> but the gist of his critique is that basic policy choices must be made by politically accountable actors,<sup>6</sup> and federal common law violates that prescription even without a specific statutory prohibition. Tom Merrill, George Brown, and Don Doernberg take less extreme positions, but still treat federal common law as something questionable that ought to be circumscribed more narrowly than Judge Friendly believed or than has been true in practice.<sup>7</sup>

These arguments puzzled me. Could a practice so well established and so apparently useful really be illegitimate? On the

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3. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986). Louise Weinberg has also written in defense of an even broader federal common lawmaking power. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

4. See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 29-46 (1991). (Much of the chapter on federal common law was published earlier in Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989)).

5. According to Redish, the Act's plain language prohibits federal judge-made law. REDISH, *supra* note 4, at 30. Other commentators disagree, finding the statute (especially its obscure reference at the end to cases "where they apply") anything but plain. Indeed, the consensus seems to be that the Rules of Decision Act does not limit federal common law. See, e.g., Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 364-77 (1980); Weinberg, *supra* note 3, at 818-19. This apparently is also the view of the Supreme Court, which has studiously ignored the Act in its common law decisions. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Consequently, while debating how to read the Rules of Decision Act might be interesting, I do not propose to do so in this paper, but will instead limit myself to exploring the scope of the federal courts' constitutional powers to make common law.

6. REDISH, *supra* note 4, at 9-10.

7. See George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Adjudication — A (New) Erie Problem?*, 12 PACE L. REV. 229 (1992); George D. Brown, *Of Activism and Erie — The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984); Donald L. Doernberg, *Judicial Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759; Thomas Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327 (1992); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

other hand, how does one justify letting federal courts make law? Here I found myself less than completely satisfied with proponents of federal common law. Professors Field and Weinberg have made worthy contributions, but their articles rely on the fact that federal courts already engage in the practice without explaining why this has normative significance or should be permitted. Yet if longstanding practice alone justifies judicial lawmaking, *Erie* itself was wrongly decided, for one thing about the *Swift* doctrine that nobody doubted was that it was well established.

Accordingly, in these brief comments I propose to consider the arguments for and against recognizing a broad constitutional power to make federal common law. There is, of course, a lot more to debate than whether the Constitution permits federal courts to make common law. After all, having a power does not require using it. (Congress has never come close to exercising all of its power under the Constitution.) So it does not automatically follow that federal courts should fashion federal common law whenever they can. But that raises questions of expediency and good policy — questions to be worked out in particular contexts and through give and take with the other branches of government. Here I wish only to describe and defend a fairly broad (though not limitless) conception of the lawmaking power of the federal courts, and in this way, hopefully, to refocus debate on the policy questions.

### I. The Benefits of Common Lawmaking

The first thing we need to consider is why giving courts the power to make common law might be a good thing. To begin, then, put aside questions of federal versus state law and consider a more fundamental question: why let courts make common law at all? Governance on a large scale requires establishing institutions to administer law and justice. The people create a government and give it sovereignty, by which I mean simply the power to make and enforce laws.<sup>8</sup> In conferring this power, the

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8. Talk about "the people" establishing a government is neither historically nor descriptively accurate, even in the United States. It is, rather, a rhetorical device that captures our understanding of popular control as the basis for governmental legitimacy. I follow the convention here because nothing in this brief description turns on the details

people must choose areas over which their government shall have authority. It is possible to give government unrestricted power to make rules respecting any and all spheres of life. However, it is also possible to limit the areas in which government can act, preserving some matters for governance by private or non-governmental institutions. In addition, the people must allocate whatever authority they give their government among its various departments. Indeed, establishing clear lines of authority is essential if government is to function properly and work for the citizenry rather than waste its time bickering about who is authorized to do what.<sup>9</sup> (This aspect of separation of powers is often overlooked because of our excessive focus on separation as a means of preventing undue concentrations of power.)

In democratic societies, formal authority to make law is typically vested in representative bodies whose members are chosen by some form of popular mandate. In the abstract, it might be nice for every citizen to participate directly in every decision affecting his or her life. But problems of size and the desire to spend time on productive activities other than politics make this sort of true democracy infeasible. The representative legislature is thus an indispensable feature of modern democratic governments.

Courts, in contrast, are not usually thought of as having been established for the purpose of representational lawmaking. Rather, judges are responsible for overseeing the particularized administration of justice in individual cases. In part, this is for reasons of efficiency. Moving adjudication out of the legislature frees popularly elected representatives to concentrate on developing general rules without having to worry about every particular case.<sup>10</sup> But independent adjudication also has a fairness rationale — namely, that justice is better served if those who

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required for a more complete account of how governments are actually established.

9. See Jon Elster, *Introduction*, CONSTITUTIONALISM AND DEMOCRACY 8-14 (John Elster & Rune Slagstad, eds. 1988); Stephen Holmes, *Gag Rules or the Politics of Omission*, *id.* at 19-58.

10. See, e.g., *The Superior Court Diary of William Samuel Johnson 1772-1773*, 4 AMERICAN LEGAL RECORDS (John T. Farrell, ed., 1975); EVERETT C. GOODWIN, *THE MAGISTRACY REDISCOVERED: THE DEVELOPMENT OF A SPECIFIC INDEPENDENT PROCESS OF ADJUDICATION IN CONNECTICUT, 1636-1818*, STUDIES IN AMERICAN HISTORY AND CULTURE, No. 24, 1981.

make the laws do not also control their application to particular individuals.

This is, of course, an extremely simplistic account of how governmental authority is allocated. I have left the executive function out altogether, and the full range of considerations that went into structuring our state and federal governments was immensely more complicated than my description. For present purposes, however, this simple story focuses attention on the relevant concern: lawmaking in a democracy is supposed to be done by politically accountable, representative institutions, whereas courts operate on principles other than political accountability. That being so, why let courts make law? Why isn't the whole notion of common law undemocratic and hence improper?

Before proceeding further, let me clarify what I mean by "common law." Following other writers,<sup>11</sup> my definition is a broad one: the common law includes any rule articulated by a court that is not easily found on the face of an applicable statute. This definition is designed to include exercises of judicial creativity and is made deliberately broad to minimize the unavoidable line-drawing problems that arise as interpretation shades imperceptibly into judicial lawmaking.

Two qualifications should be noted. First, my definition of common law excludes constitutional questions. Other commentators have suggested that there is no difference between constitutional and non-constitutional common lawmaking.<sup>12</sup> Like statutory law, the text of the Constitution provides relatively clear answers to some questions, but leaves many others unanswered. One can certainly view the process of answering these questions as making common law, since it requires articulating rules not found on the face of the text. But constitutional questions raise unique concerns that may provide additional or alternative justifications for judicial lawmaking. The Constitution establishes the government's limits, defining which subjects are amenable to legislative decisionmaking and which are off-limits to popular majorities. Some institution must be responsible for articulating

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11. See, e.g., Brown, *supra* note 7, at 230-31; Field, *supra* note 3, at 890; Merrill, *Common Law Powers*, *supra* note 7, at 3-7; Weinberg, *supra* note 3, at 807.

12. See, e.g., Field, *supra* note 3, at 890; Merrill, *Common Law Powers*, *supra* note 7, at 5-6; Weinberg, *supra* note 3, at 807.

and securing these limits, and there are reasons for assigning this function to courts that do not apply to matters unquestionably within legislative discretion.<sup>13</sup> In order to avoid this particular debate, which would take us far afield, I want to concentrate on "ordinary" lawmaking within the limits established by the Constitution.

Second, I want to recognize Tom Merrill's useful distinction within the category of common law rules between "judicial lawmaking under the authority of enacted law" and lawmaking based on a "judicial prerogative."<sup>14</sup> As I understand it, the difference turns on whether the court finds the source of its judicially-created rule in a statute or in its own inherent power to make law. The policy requirement of *Monell v. Department of Social Services*,<sup>15</sup> for example, illustrates judicial lawmaking under the authority of enacted law. The rule is judicially created, inasmuch as nothing on the face of 42 U.S.C. § 1983 suggests that municipal liability is limited to acts taken pursuant to official policy. The Court attributes this requirement to statutory policies found in the legislative history and explains its decision as the best reading of what Congress would have wanted.<sup>16</sup> In contrast, the military contractor defense recognized in *Boyle v. United Technologies Corp.*<sup>17</sup> represents an exercise of judicial prerogative. For while the Court created the defense to facilitate statutorily defined federal procurement policies, it based the decision entirely on its own assessment of policy; what Congress thought or would have wanted simply was not relevant.

It is often difficult to distinguish between exercises of judicial prerogative and judicial lawmaking under the authority of

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13. See, for example, Alexander Bickel's classic justification of judicial review in *THE LEAST DANGEROUS BRANCH* 24-27 (1962).

14. Merrill, *The Judicial Prerogative*, *supra* note 7, at 328.

15. 436 U.S. 658 (1978).

16. While relying primarily on policy arguments drawn from the legislative history, the Court in *Monell* did make a weak stab at finding a textual basis for its holding. Section 1983 imposes liability on defendants who "subject or cause to be subjected" any person to the deprivation of a federally protected right. That language, the Court said, "cannot be easily read to impose liability vicariously." 436 U.S. at 692. The problem is that the same thing may be said about torts committed by municipal officers acting pursuant to official policy. See Larry Kramer & Alan Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 S. CT. REV. 249, 256.

17. 487 U.S. 500 (1988).

enacted law. I include both within the definition of common law because both involve the creation of legal rules by judges. Nonetheless, the distinction highlights a way in which some forms of common lawmaking are more controversial and difficult to justify than others.<sup>18</sup> In particular, as the connection between a judicial rule and some source of statutory authorization becomes more attenuated, the question of legitimacy becomes more problematic. The point is essentially Justice Jackson's from his well-known concurrence in the *Steel Seizure Case*:<sup>19</sup> judicial action is more easily legitimated if the court can rely on the constitutional authority of another branch as well as its own.

With these points in mind, return to the question deferred above: why let courts make common law in a representative democracy? In part, the answer must be that judge-made law is unavoidable. That is, courts must make a certain amount of common law simply because there is no clear line between "making" and "applying" law, between commands that are clear on the face of a statute and those made through an exercise of judgment and creativity. Deciding individual cases thus generates some common law because the process of adjudication necessarily entails articulating rules to elaborate and clarify the meaning and operation of statutory texts.

Nor would we want it otherwise. After all, if one function of independent adjudication is to relieve legislators of having to anticipate and deal with every possible contingency, it hardly makes sense to require courts to return every uncertainty to the legislature. The power to clarify legislation through interstitial lawmaking is thus an implicit but important part of the judicial function.

Of course, coping with statutory ambiguity supports only a limited power to make common law, encompassing Merrill's category of lawmaking under the authority of enacted law but not

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18. The distinction also highlights the fact that more is at stake in the debate over federal common law than whether Congress can delegate lawmaking authority to federal courts. I assume that Congress can give courts as much lawmaking authority as they can give executive agencies (i.e., that the only limit is the nondelegation doctrine). The question of federal common law includes the more interesting and difficult problem of deciding when courts may make law without such a delegation (and without having to rely on legal fictions like finding an "implied" delegation in a jurisdictional grant).

19. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952).



the exercise of an independent judicial prerogative. Yet much common law does not fit this mold. The classic forms of common law, for example — the laws of tort, property, and contract that still occupy most of the first-year curriculum — are made without reliance on statutory authority. What justifies this form of judicial lawmaking?

The justification, in my view, is simply that common law and common lawmaking are exceedingly useful. Legislators have limited time and resources, and the legislature already has difficulty dealing with all the problems that make their way on to its agenda. Legislators cannot possibly monitor every aspect of daily life that could benefit from the enactment of positive law. Recognizing the authority of courts to make law thus improves governance by enlarging the state's lawmaking capacity and increasing citizen access to the lawmaking apparatus. This, by the way, is another benefit of separation of powers that tends to be missed: establishing independent departments with lawmaking responsibility multiplies the "inlets" available to the citizenry and makes government more responsive to the needs of the people.

Furthermore, common law adjudication deals with problems that may otherwise be systematically ignored or overlooked. Unlike legislatures, courts must hear the cases brought before them and thus have less control over their agenda. This in turn makes it more difficult for courts to avoid hard questions, and they therefore provide a useful means for sponsors of unpopular or unusual causes to get their issues onto the political agenda. School desegregation is probably the classic example. Moreover, legislators tend to focus on relatively high profile issues (a tendency that is exacerbated by the combination of reelection pressures and the superior resources of organized interests). Courts, in contrast, see matters from a different perspective, that of particular litigants. Someone who believes that he or she has been wronged may sue, and in deciding this lawsuit, the court will sometimes discover a situation in which it is appropriate to fashion a new rule of law. Quite often, these problems are too small or too unfocused to catch the legislative eye. Common law adjudication thus improves the government's lawmaking by addressing problems that may never get on to the legislature's agenda or that appear insignificant from its vantage.

Finally, there may be general benefits, less concrete in nature, from having a legal system that mixes different kinds of laws made by different kinds of lawmakers. Having different lawmakers approach a question from different perspectives may enrich the knowledge of all of them by, for example, suggesting options or possibilities that might otherwise have been missed. The synergies thus generated may improve the overall legal system.

The risk, of course, is that judges will make bad law, and lots of it. In that case, the same constraints that led us to rely on courts in the first place will limit the legislature's capacity to police them. Fortunately, the structure of common law adjudication helps minimize these risks. Common law develops by accretion, and the requirement that judges justify what they do by reference to prior decisions, together with a pervasively conservative professional culture, discourages radical change.<sup>20</sup> Moreover, the decentralized nature of judicial decisionmaking allows new rules to be tested repeatedly, and judges in subsequent cases can (and often do) weed out poorly reasoned or unworkable precedents. This, in turn, reduces the need for legislative oversight to more manageable levels.

The argument, then, is that letting judges make common law provides a distinctly useful supplement to ordinary legislation. Can I prove that this is so, that permitting judge-made law makes the world a better place? No, for the question is empirical rather than theoretical, and we lack the resources to make an objective evaluation. Perhaps the best evidence is experience. It has been almost four centuries since Lord Coke's classic exposition of common law adjudication,<sup>21</sup> and this form of lawmaking continues to flourish, still viewed as enormously beneficial. To me, this represents a pretty solid vote of confidence.

And what about the argument that liberal principles of self-government require representative branches of government to

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20. Most readers can probably think of examples of sharp breaks in the common law. Obviously, the common law sometimes changes abruptly. My point is simply that it is less likely to do so than other forms of lawmaking and, compared to legislation, is in fact rather conservative.

21. See *Calvin's Case*, 7 Co. Rep. 1 (1608). The common law itself, of course, is much older still; Lord Coke was simply its greatest early exponent.

make basic policy choices?<sup>22</sup> The short answer, I suppose, is that we have in fact never confined lawmaking to fully representative bodies. The common law itself is an obvious counterexample, but so too is the fact that large numbers of people are and always have been formally or practically disenfranchised. Indeed, public choice scholarship suggests that even our “representative” bodies are often wildly unrepresentative.<sup>23</sup> Add to that the independent administrative agencies that make so much law today, and the huge advantages that seem to flow from incumbency and access to capital, and the clear contrast between “representative” legislatures and “unrepresentative” judges begins to look rather murky. Unless we ignore these flaws, the criticism made of common lawmaking can just as easily be leveled at the process by which most law, including ordinary legislation, is made.<sup>24</sup>

The point is not that we do not really believe in self-government. Whether we do or not depends on what one means by “self-government.” All I am suggesting is that maybe we should set our sights a little lower in thinking about what representative government requires. It is impossible to have government rule in a nation of this size under a system that requires every individual, or even a majority, to consent to every decision. Call me pragmatist, but a theory that will not be satisfied by any social institution we can realistically construct seems like a bad theory. Instead, as Don Herzog explains, if we examine the idea of self-government as it has unfolded for us historically, we can more plausibly cast the notion of consent of the governed “as a

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22. See REDISH, *supra* note 5, at 4; Merrill, *Common Law Powers*, *supra* note 7, at 24-27.

23. See DANIEL A. FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991); Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).

24. See Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043, 1076-87 (1988). Nor can one defend the legislative process on the ground that it at least is potentially subject to popular control whereas there is no such control over judges. There are in fact numerous ways in which judges are forced to respond to the popular will — from control over the selection process to the pressures of publicity and public criticism. At the same time, a large portion of what the legislature does is effectively immune from popular control. The ballot is only one means of controlling government officials, and an imperfect one at that. All our public institutions are less than completely accountable, or, more accurately, are more or less accountable on different matters at different times.

relation between two corporate actors, the people and the government," in which government's rule is legitimate so long as it is for the most part responsive to the wishes of the people.<sup>25</sup>

On this view, common law adjudication is not necessarily incompatible with liberal self-government. Perhaps, popularly elected legislatures are the most useful social institution for tracking citizen preferences. But there is no reason to restrict ourselves to such institutions, especially if another form is workable and appears advantageous.<sup>26</sup> Consider the process of common law adjudication. Those most directly affected — that is, the parties — get to make their appeals directly to the lawmaker. The judge must respond to these arguments and cannot act capriciously or without reasons. As for the rest of us who may be affected by an opinion, the existence of a legislative override provides an opportunity for popular control (assuming that the opportunity later to ask the court to abandon *stare decisis* does not). So while common law rulemaking is not fully democratic, common law rules are correctible through established representative channels, and that has always seemed sufficient for purposes of self-government.

To sum up, we could delegate all lawmaking power to popularly elected, representative bodies. This would still require a certain amount of common law, inasmuch as any institution charged with applying enacted laws must develop rules to refine them for particular cases. But so limited a power places an enormous burden on the legislature and sacrifices the unique perspective of courts in developing legal rules. Hence, it seems desirable to give courts an affirmative lawmaking role as well.

## II. Federal Common Law: Separation of Powers

With this as background, we can turn to the more particular question of federal common law. Courts in every state but one (Louisiana) have broad common lawmaking powers, and so far as I am aware, no one questions either the legitimacy or the desirability of the practice in that setting. Why, then, should matters be handled differently when it comes to the federal govern-

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25. DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 182-214 (1989).

26. *Id.* at 203-08.

ment and federal courts?

Let me dispose of one frivolous argument against federal common law before turning to the more serious matter of separation of powers. The Supreme Court has occasionally said that the common law powers of the federal courts are limited because, unlike their state counterparts, federal courts are not courts of general jurisdiction.<sup>27</sup> So what? Limiting a court's jurisdiction may reduce the number and kind of cases in which there is an opportunity to make common law, but how does it bear on the existence of the power itself? The Court apparently thinks that the difference in jurisdiction matters because it corresponds to a difference in the nature of federal and state sovereignty — the federal government having only specifically delegated powers in contrast to the general sovereignty of the states.

To being with, the description is not really accurate: state constitutions typically impose significant restrictions on state governments, while the Supreme Court has interpreted the United States Constitution in ways that vastly expand the powers of the federal government.<sup>28</sup> But even if the notion of limited federal powers retains some bite, the argument still rests on a *non sequitur*. Limiting the areas in which a government has sovereignty has no bearing on which government agency can act in those areas. As part of the federal government, any limits on federal power presumably bind the federal courts. But that says nothing about the power of these courts to make common law on all those subjects properly within federal cognizance. Put another way, the limited jurisdiction of the federal courts affects only the proper subject-matter of any federal common law, not the power to make such law in the first place.

The objection that federal common law violates separation of powers is more serious. Briefly stated, the argument goes something like this: theoretically, it may be possible to give courts independent lawmaking authority, but our Constitution does not do so. Rather, our Constitution delegates "All legislative Powers" to the Congress, which is therefore solely responsi-

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27. See, e.g., *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32-34 (1812).

28. See G. STONE, M. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 181-247 (1986).

ble for making policy.<sup>29</sup> To be sure, courts share responsibility for implementing congressional policy, and this raises unavoidable problems of interpretation. But even if these problems make a certain amount of federal common law unavoidable, it should be strictly limited to what is needed to make sense of congressional legislation. The notion that federal courts have lawmaking authority not derived from Congress, however, is contrary to the structure of our federal government.

Like many separation of powers arguments, the claim that federal courts have no independent lawmaking authority cannot be settled by reference to the text of the Constitution — not because texts are always indeterminate or anything quite so post-modern, but because on this particular question the Constitution really is ambiguous. The arguments are familiar.<sup>30</sup> Does “legislative power” mean all lawmaking authority or merely the power to pass statutes? Does the “judicial power” conferred in Article III refer only to the power to render judgments or does it also include the traditional judicial power to make common law? Does the vesting in Congress only of legislative powers “herein granted” in contrast to Article III’s vesting of “the judicial Power” imply a belief in some inherent defined judicial power to make law?<sup>31</sup> Does the vesting of jurisdiction over cases arising under “Laws of the United States” refer only to enacted legislation or does it include common law? Because these thin textual references can easily be read either to condone or to condemn federal common law,<sup>32</sup> the separation of powers argument must rest on other grounds. Most commentators rely on arguments about Supreme Court practice and precedent together with his-

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29. U.S. CONST. art. I., § 1.

30. See, e.g., Merrill, *Judicial Prerogative*, *supra* note 7, at 334-42.

31. A similar argument has sometimes been used to justify an inherent executive lawmaking power. See, e.g., VII THE WORK OF ALEXANDER HAMILTON 80 (1851); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

32. Tom Merrill suggests that federal common law may even violate due process because it contemplates allowing federal judges “to take life, liberty and property in accordance with new rules of decision announced and applied for the first time to the case at hand.” Merrill, *Judicial Prerogative*, *supra* note 7, at 338. For similar reasons, Bentham described the common law as “dog law” — first the dog does something wrong, then you punish it. The obvious difficulty with the suggestion is that it proves way too much: on this view, for example, all state common law is also unconstitutional, at least since the enactment of the Fourteenth Amendment.

torical/theoretical claims about the framers' intent to vest policy decisions in the people's representatives.<sup>33</sup>

I give little weight to what the Supreme Court has said or done in this area, because as I see it, the question we are asking is what *should* the Supreme Court do? Besides, the Court's decisions are inconsistent (to say the least). Tom Merrill chooses cases carefully in constructing an admittedly plausible story about how separation of powers prohibits the exercise of an independent judicial power to make law.<sup>34</sup> Thus, he picks out statements in the *Steel Seizure Case*<sup>35</sup> and the nondelegation cases,<sup>36</sup> and focuses on *United States v. Hudson & Goodwin*,<sup>37</sup> *United States v. Coolidge*,<sup>38</sup> and *Erie* as significant constitutional junctures fixing the doctrine.<sup>39</sup> This is fine as far as it goes, but (as Judge Friendly, Martha Field, and Louise Wein-

33. See, e.g., Merrill, *Common Law Powers*, *supra* note 7, at 482-87; Merrill, *Judicial Prerogative*, *supra* note 7, at 334-36; Brown, *Private Adjudication*, *supra* note 7; Brown, *Of Activism*, *supra* note 7; Doernberg, *supra* note 7.

34. Merrill, *Judicial Prerogative*, *supra* note 7, 333-34, 339-44.

35. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

36. *Schechter Poultry v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

37. 11 U.S. (7 Cranch) 32 (1812).

38. 14 U.S. (1 Wheat.) 415 (1816).

39. Merrill suggests that *Hudson & Goodwin*, *Coolidge*, and *Erie* are analogous to the critical moments in which Bruce Ackerman has argued "normal politics" is transformed into "higher politics" leading "We The People" to adopt new constitutional principles which are ratified by the Supreme Court. See Merrill, *Judicial Prerogative*, *supra* note 7, at 339 (citing BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991)). For what it is worth, I find Ackerman's argument unpersuasive, among other reasons because it treats as sharply discontinuous developments that exist along a gently sloping continuum. Terence Sandalow, *Review*, *Constitutional Comm.* (forthcoming May, 1992). Put that aside, however, because full elaboration would take us far afield, and because, even if I did accept Ackerman's thesis, none of the cases Merrill cites comes close to satisfying his conditions for "higher lawmaking." Ackerman describes a process, exemplified by the New Deal, in which elected lawmakers take action at odds with the existing constitutional regime, leading to a prolonged public debate at the end of which the Court backs down and ratifies a new constitutional order. *Id.* at 266-94. Ackerman was at pains to distinguish the process he was describing from "ordinary" Supreme Court decisions, even important ones like *Erie*. Merrill has misinterpreted Ackerman's carefully elaborated justification for an informal amendment process to include what law professors conventionally think of as "major" cases. But Ackerman is focusing on a subset of cases that represent fundamental and self-conscious shifts in the basic constitutional structure. Moreover, even if cases like *Erie* and *Hudson & Goodwin* could have led to a shift in regimes, the fact is that they have not, for federal common law is all around us today. See *infra* notes 40-44 and accompanying text.

berg have all pointed out<sup>40</sup>) it fails to explain *Clearfield*,<sup>41</sup> *Sabbatino*,<sup>42</sup> *Jensen*,<sup>43</sup> *Boyle*,<sup>44</sup> and numerous other decisions in which the Court has done exactly what Merrill claims the Court has said it cannot do. Merrill admits that the record is "mixed," but dismisses decisions contrary to his position either by relying on a fictitious "implied" delegation or on the less than wholly persuasive ground that the decisions are written in an "apologetic tone" with a "sense of unease . . . verging on guilt."<sup>45</sup> This is too much the lawyer's game for me. In truth, there is something for everyone in the decided cases, and it doesn't take a whole lot of ingenuity to deconstruct any position and show that the exceptions are really the rule and vice versa. We must therefore decide whether federal common law is legitimate on other grounds. After that, we can go back through the cases and figure out which were correctly decided and which were not.

The argument based on the framers' intent requires more elaborate treatment. One problem might be deciding how much weight to give this point. It does not seem too controversial, however, to say that if the framers clearly meant to prohibit (or permit) something, their intent is entitled to at least some weight. At the same time, before we start arguing about how much weight, we should first see whether the framers had an ascertainable position.

There is nothing in either the language or the legislative history of the Constitution addressed specifically to the question of federal common law. The evidence from early practice is mixed, though if anything it tends to preponderate in favor of federal common law. On the one hand, there is *Swift v. Tyson*,<sup>46</sup> which authorized a peculiar form of federal judge-made law (peculiar in that it neither preempted state law nor conferred federal question jurisdiction) in what was then the largest and most im-

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40. See *supra* notes 1-3.

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

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

43. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

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

45. Merrill, *Judicial Prerogative*, *supra* note 7, at 344. For what it is worth, Merrill fails to distinguish *Sabbatino* and other cases involving the foreign relations law of the United States.

46. 41 U.S. (16 Pet.) 1 (1842).



portant class of cases in the federal courts. On the other hand, there are the decisions in *Hudson & Goodwin*<sup>47</sup> and *Coolidge*,<sup>48</sup> both overturning efforts to prosecute federal common law crimes on the ground that only Congress can create criminal offenses. *Hudson & Goodwin* and *Coolidge* fall into a special category, however, inasmuch as both involved common law crimes, and while courts may lack power in the criminal area while still having power to create common law civil actions. Indeed, today this describes the common law powers of state courts as well as federal courts. However that may be, recent scholarship suggests that *Hudson & Goodwin* may be a "sport" whose outcome was determined by the fact that it involved seditious libel and the intense political controversy surrounding such issues at the time.<sup>49</sup> This suggestion is supported by *Coolidge*, which hardly constitutes a ringing endorsement of the holding in *Hudson*.<sup>50</sup> Significantly, Justice Story (the author of *Swift*) wrote a circuit court opinion in *Coolidge* affirming the power of federal courts to recognize common law crimes against the sovereignty of the United States.<sup>51</sup> And there is evidence that even after *Hudson* federal courts continued to exercise many of the prerogatives of common law courts,<sup>52</sup> leading the commentator who has most

47. 11 U.S. (7 Cranch) 32 (1812).

48. 14 U.S. (1 Wheat.) 415 (1816).

49. See Stewart Jay, *Origins of Federal Common Law (pts 1 & 2)*, 133 U. PA. L. REV. 1003, 1231 (1985); Note, *The Sound of Silence: United States v. Hudson & Goodwin The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992).

50. The circuit court allowed the government to indict the defendants for a common law offense, but the government confessed error based on *Hudson* and declined to argue the matter in the Supreme Court. Justices Story, Washington, and Livingston indicated that they were willing to reconsider *Hudson*, but the Attorney-General still refused. The Court therefore issued the following opinion:

Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the attorney-general has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of United States v. Hudson and Goodwin, or draw it into doubt. They will, therefore, certify an opinion to the circuit court in conformity with that decision.

14 U.S. (1 Wheat.) at 416-17.

51. 25 F. Cas 619 (C.C.D. Mass. 1816) (No. 14,857).

52. LEONARD A. LEVY, *Federal Common Law of Crimes*, 2 ENCYCLOPEDIA OF AMERICAN CONSTITUTION 692 (1986).

thoroughly examined the question to conclude that "it was generally conceded that federal courts had what we would term significant common law powers."<sup>53</sup>

In my view, however, the most telling evidence in favor of federal common law is (ironically? paradoxically?) practice in the states. Constitutions in the original thirteen states were ratified by the same generation that ratified the United States Constitution, having been written by many of the same men. Moreover, governments both in these states and in states created after 1789 were based on the same general theory of separation of powers.<sup>54</sup> That being so, doesn't the fact that judge-made common law was, is, and always has been allowed in all these states tell us something? To be sure, in some respects separation of powers has developed differently in the state and federal systems. But absent some clear indication that federal practice is supposed to differ in this particular respect, the virtual unanimity in the states strongly supports the conclusion that common law adjudication is not inconsistent with separation of powers.

Remarkably, the significance of practice in the states has largely been overlooked in discussions of federal common law.<sup>55</sup>

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53. Jay, *supra* note 49, at 1323. I do not mean to suggest that there was a consensus on whether federal courts could make common law. On the contrary, the issue provoked deep division among judges and politicians in the early years of the republic, corresponding generally to established party lines. See, e.g., James O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 248-49 (1992).

54. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 150-61 (1969).

55. This complaint could be made about scholarship on a wide variety of topics, of which the most glaring example may be statutory construction. Contemporary scholars speak in general terms and offer general solutions while in fact dealing only with a narrow set of issues associated with the federal government, as if studying Congress and the Supreme Court provides a basis for drawing general conclusions. State courts and state legislatures are ignored — treated like foreign systems of interest only to comparativists. In the process, relevant information is overlooked and distortions are introduced into the analysis. My favorite example from the federal common law literature is Bickel and Wellington's famous article on the *Lincoln Mills* case. Alexander M. Bickel and Harry W. Wellington, *The Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). The authors attack the Court's decision to create federal common law under §301 of the Taft-Hartley Act on the ground that courts are institutionally inferior to legislatures at developing rules of substantive law. Bickel and Wellington seem totally unself-conscious of the fact that deciding *Lincoln Mills* as they suggest would have meant leaving the cases to be decided under state common law rules developed by state courts. Indeed, the challenge posed to their central argument by the existence and success of state contract law seems never to have crossed their minds.

Tom Merrill considers the argument in his contribution to this symposium, but dismisses it on the ground that state courts exercise this power pursuant to "receiving" statutes enacted after the break from England.<sup>56</sup> These statutes provide that the common law of England applies and shall remain in force until repealed by legislation.<sup>57</sup> Merrill concludes that state common law is thus an example of delegated lawmaking power that "does not call into question the thesis that separation of powers prohibits the exercise of judicial prerogative by federal courts."<sup>58</sup>

Merrill's effort to explain away state common law fails for two reasons. First, while most states enacted receiving statutes, many (including some of the original colonies) did so only after their courts had already assumed that the common law was in force.<sup>59</sup> Moreover, a significant minority of states (including one of the original colonies) found it unnecessary to enact any statute, and courts in these states applied the common law without legislative authorization.<sup>60</sup>

Second, and more important, Merrill's reading of the receiving statutes is anachronistic in that the kind of delegation he assumes is a distinctly modern phenomenon. Receiving statutes were not enacted to authorize judges to adjudicate common law cases, but to remove uncertainty about the rules of decision. As Elizabeth Brown explains, the English legal theory of the time held that settlers in conquered lands did not carry the laws of England with them, and this had been interpreted by the Crown to include the American colonies.<sup>61</sup> This inability to claim all the rights of Englishmen had long troubled the colonists, for whom "the common law" was synonymous with many of the liberties they held most dear. Receiving statutes were therefore enacted to make clear that the particular doctrines embodied in the customary law of England applied in America. In other words, receiving statutes were enacted to establish substantive rules for

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56. Merrill, *Judicial Prerogative*, *supra* note 7, at 346-47.

57. See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798-805 (1951).

58. Merrill, *Judicial Prerogative*, *supra* note 7, at 347.

59. ELIZABETH G. BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836*, 25-26 (1964) (table showing dates of adoption); Hall, *supra* note 57, at 804.

60. Hall, *supra* note 57, at 800, 822.

61. Brown, *supra* note 59, at 1-24.

common law adjudication; the power of courts to engage in such adjudication was never in question.

Although the historical background generally supports the claim that federal judges can make common law, I would not rely on it for too much guidance. One problem is that what it means today to say that judges have common law powers is totally different from what it meant to say this in the 18th and early 19th centuries. Throughout the discussion, I have referred loosely to "judge-made law" and to the power to "make" common law, reflecting the modern understanding of common law as a form of positive law made by judges. The 18th century view was different. The common law was seen in more naturalistic terms, as a body of principles "discovered" through the exercise of reason rather than "made" by the judge.<sup>62</sup>

I do not want to stop there, however, for the notion of common law as something discovered rather than made is more complicated than it sounds or than we sometimes like to make it seem. At the risk of being anachronistic myself, it is hard to believe that colonial lawyers and judges were so non-introspective and naive as to think that adjudication involved nothing more than finding some fully formed, distinct thing. In fact, the 18th century understanding of common law adjudication, while different from our own, was considerably more sophisticated than this. The common law was said to be based on principles derived from "maxims and customs . . . of higher antiquity than memory or history can reach."<sup>63</sup> These principles were not made by judges, but were forged through practice and tradition and "discovered" by the judges who formally articulated them.<sup>64</sup> The

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62. See, e.g., MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 1 (1977); STANLEY N. KATZ, *Introduction to 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VII* (University of Chicago ed. 1979) (1765); Merrill, *Judicial Prerogative*, *supra* note 7, at 335.

63. 1 BLACKSTONE, *supra* note 62, at 67.

64. *Id.* at 69:

But here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depository of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

*Id.* See generally J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30-55 (2d ed. 1987) (discussing the role of custom in the development of the common law); James Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58

task of a common law court was then to mold these principles to the exigencies of the day, to preserve their essence by fitting them to evolving social customs, making “what before was uncertain, and perhaps indifferent” into an identifiable rule.<sup>65</sup> Hence, the common law was not a product of judicial will and imagination, but neither was it a fully determined body of invariant rules, found by the judge in the same way that you or I might find a dictionary definition. It was an evolving set of principles, “out there” in a sense, but nonetheless shaped by judges called upon to apply the principles to particular circumstances. The basic idea is captured nicely in one of Lord Coke’s aphorisms: “Out of the ould fields must spring and grow the new Corne.”<sup>66</sup>

The relationship between the 18th century view of common law and our own is thus more complicated than the simple discovered/made distinction implies. Common law adjudication has an element of creativity in both worlds, but the earlier view sees this creative element as bound closely to the service of exogenously fixed principles. At the risk of sounding glib, common law adjudication in the colonial world looks a lot like the legal process model of statutory and constitutional interpretation — with the “maxims and customs” of ancient England occupying the place of the enacted text.

This suggests a second, and in my view, more significant distinction between our understanding of the common law and that of our forebears. While the colonial conception of common law adjudication recognized a constructive role for judges (albeit one directed by discovered principles), this creativity was exer-

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U. CHI. L. REV. 1321 (1991) (same).

65. *Id.* See also 1 THE WORKS OF JAMES WILSON 353 (McCloskey, ed. 1967):

It is the characteristic of a system of common law, that it be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed. Now, as these circumstances change, and exigencies, and conveniences insensibly change; a proportioned change, in time and in degree must take place in the accommodated system.

*Id.*

66. 1 COKE’S COMMENTARIES, preface (1600). This description of common law thinking is probably too neat, both because the process was messy and complicated in practice and because not all lawyers shared the same understanding of common law. Whitman, *supra* note 64, at 1324-29. Nonetheless, I believe it accurately captures the essence of the period and usefully highlights the significant differences.

cised in a distinctly bounded field. To the 18th century lawyer, the common law referred not to the power of judges to construct rules, but to particular rules designed to implement a specific set of fundamental principles derived from a mingling of custom and reason. Whatever partial or subliminal powers the judge possessed to make law thus were limited to the range of issues reached by the principles of the common law.

Today, in contrast, we speak of common law "powers," referring to the authority of judges to make positive law, and we see these powers in terms as potentially broad as the positive law itself. To be sure, we generally associate "the common law" with particular subjects: tort, contract, property. But that is purely a matter of convention, and the power to "make" common law could be granted in any area. This follows from the way in which Holmes and his realist successors changed our understanding of common law judging. We have come to see that even the fundamental principles of the common law were "made" by judges. And with that insight, the "natural" limits of pre-modern common law disappear, and the potential for making common law becomes as broad as we are willing to let judges go.

This understanding helps clarify some seeming anomalies in the treatment of common law issues in the early years of the republic. The peculiar nature of the common law authorized in *Swift v. Tyson*, for example, fits comfortably in this framework: the law applied in diversity cases did not preempt inconsistent state law or confer federal jurisdiction because it was not "federal law" at all; it was merely the federal judge's interpretation of the principles constituting the distinct field of the common law.<sup>67</sup> *Erie's* real significance is that it represents the Supreme Court's formal declaration that this view of the common law (with all its implications for our understanding of law in general) is dead, a victim of positivism and realism.

Understanding the common law as a field defined by ascertainable principles that are constantly being reworked by judges also casts additional light on the receiving statutes discussed above.<sup>68</sup> States enacted these statutes to make clear that the

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67. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

68. See *supra* notes 56-61 and accompanying text.

principles governing common law decisions would include those established and recognized in England. The statutes were not needed to authorize courts to engage in common law adjudication, but rather to provide appropriate starting points for the courts' work.

In my view, the change from *Swift* to *Erie* — from common law as “field” to common law as “power” — shifts our understanding in a way that renders questions of original intent unhelpful. Of course, serious questions have been raised about how reliably we can ever extrapolate from the world of the framers to our own.<sup>69</sup> But even if the task may be accomplished in some contexts, the place of federal common law in a scheme of separated powers seem not to be one of them. On the one hand, the common law of the framers resembled ours in that it had an element of affirmative lawmaking. On the other hand, this power was limited by subject-matter and by the constraints of custom and reason. We simply cannot know how the framers would have reacted to the loss of these limitations, especially since this loss results not from doctrinal changes, but from changes in our beliefs about the nature of law and the lawmaking process. To ask what the framers would have thought about modern common lawmaking powers is thus like asking what Renaissance artists would think of modern art: the same oils and canvas are used, but our understanding of the surface and its relation to an external reality has been too radically altered.<sup>70</sup>

There is still another reason to eschew arguments based on original intent. The framers' theory of separation of powers simply was not worked out in enough detail to answer a question like whether federal courts could make common law. On the contrary, the historical evidence suggests that the framers' notion of separation of powers was unformed and tentative, and

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69. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 477 (1981).

70. It bears emphasizing that the claim here is a modest one. I am not suggesting that we can draw no conclusions about what the framers would have thought about federal common law. On the contrary, I argue in Part III that the early understanding of federalism supports imposing limits on the common lawmaking power of federal courts. I do, however, believe that we cannot draw any firm conclusions about the place of common law in the federal scheme of separation of powers.

that they had few fixed institutional arrangements in mind beyond the basic idea that there should be a separation.<sup>71</sup> Indeed, the best reading of the framers' intent with respect to separation of powers may be that they wanted to see how things went while retaining enough flexibility to develop appropriate institutional responses.<sup>72</sup>

Such uncertainty is hardly surprising. After all, the framers did not have much to build upon. The government established in Philadelphia was unique, and the principle of separation of powers had yet to be fully tested anywhere. Moreover, the political theorists with whom the framers were familiar and upon whom they relied — primarily Montesquieu, Locke, and Blackstone — were not entirely consistent on what separation of powers meant.<sup>73</sup> Indeed, the Constitution mixes powers as much as it separates them, reflecting numerous compromises made in the effort to fashion a workable government.<sup>74</sup> One simply cannot approach a problem like judicial lawmaking as if there is some well-defined theory of separation of powers to bring to bear on the question. On the contrary, whether courts should have this power is itself one of the issues to be resolved in constructing a workable system of separation of powers.

In the final analysis, we must formulate our own solution to the problem of federal common law and separation of powers, and we should do so with the same pragmatic spirit as the men

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71. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Arthur Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973). Many of the basic source materials are collected in 1 PHILLIP B. KURLAND & RALPH LERNER, *THE FOUNDERS' CONSTITUTION* 311-35 (1987). The framers' uncertainty about how exactly a government based on separation of power should work is revealed by their own actions in the early years of the republic, many of which are inconsistent with views on separation of powers that are well established today: John Marshall served simultaneously (albeit briefly) as Secretary of State and Chief Justice of the Supreme Court; Washington requested the views of the Supreme Court on various statutory and other questions through his Secretary of State Thomas Jefferson; Madison proposed a council of revision that would have included executive and judicial officials. These issues were resolved as they arose, but that is consistent with my claim that separation of powers was a partially developed concept that needed to be worked out in practice.

72. See Larry Kramer, *The Constitution as Architecture: A Charette*, 65 IND. L.J. 283, 285-88 (1980).

73. See 1 KURLAND & LERNER, *supra* note 71, at 316, 318-19, 624-28.

74. See THE FEDERALIST Nos. 47-48 (James Madison).



who wrote the Constitution. The question is not whether federal common law conforms to some abstract theory of separation of powers, but something much more practical: does allowing federal judges to make common law improve the quality of government? Here I feel comfortable in the company of Judge Friendly and others answering this question affirmatively, relying on the functional arguments made in Part I and citing for proof what the federal courts have done so far.<sup>75</sup> Such a claim is hardly incontestable, of course, and part of my argument is that this is the issue we should be debating. But isn't it striking that none of the critics of federal common law argue that the federal decisions are substantively bad or that federal courts have achieved anything less than excellent results in their common law decisions? They argue only that it is *inappropriate* for federal courts to make these decisions, and that claim has little force in the abstract.

### III. Federal Common Law: Federalism

The argument so far is straightforward. There are substantial benefits from allowing federal courts to make common law, and separation of powers does not prevent us from obtaining them. On the contrary, Part I contends that common lawmaking arguably furthers some purposes of separation of powers.<sup>76</sup> I have not yet focused on the limits of this lawmaking power, however. And clearly there must be limits. Constitutional government means limited government. So even if I am right and federal courts have some independent lawmaking authority, the question is: how much?

I already suggested one important limitation: the lawmaking power of the federal courts cannot exceed that of the federal government itself.<sup>77</sup> Of course, as also noted, this restriction means less than it once did because the Supreme Court has interpreted the Constitution to make federal sovereignty poten-

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75. See, e.g., Friendly, *supra* note 1, at 180-95 (discussing examples of federal common law); Paul Mishkin, *The Varioussness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957) (similar discussion).

76. See *supra* text accompanying notes 9-10, 19-20.

77. See *supra* text accompanying notes 27-28.

tially as broad as state sovereignty (broader in some respects).<sup>78</sup> Nonetheless, there are commentators who argue that this is the only limit on federal common lawmaking and who maintain that federal courts can therefore fashion common law rules in any area in which Congress could enact legislation.<sup>79</sup>

At first blush, the analysis in Parts I and II appears to support this conclusion. After all, no one objects when state courts take the initiative in fashioning common law. But while the common law authority of state and federal courts may not differ in terms of separation of powers, it does not follow that these courts are identical in every other respect as well. On the contrary, in my view the principle of federalism limits the lawmaking power of federal courts along a line previously suggested by Judge Friendly and Professor Field, namely, that federal courts can make common law only in reference to a federal statute.<sup>80</sup> To avoid confusion, let me first explain what this means; I will then discuss my reasons for advocating this limitation.

In a nutshell, my position is that the lawmaking power of the federal courts is limited by federal statutes in basically the same way as the lawmaking power of Congress is limited by the Constitution. The text of the Constitution lists areas in which Congress can act and forbids legislation on matters not included in this enumeration. At the same time, Article I authorizes Congress to make "all Laws which shall be necessary and proper" to achieve these ends.<sup>81</sup> As interpreted in *McCulloch v. Maryland*,<sup>82</sup> this provision gives Congress broad authority to act in furtherance of its other powers. Congress is not limited to laws explicitly contemplated by the framers of the Constitution. Rather, any federal enactment is legitimate if it is consistent with the general purpose of the constitutional provision on which it is based. In the oft-quoted words of Chief Justice Marshall: "Let the end . . . be within the scope of the Constitution,

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78. *See id.*

79. *See, e.g.,* Weinberg, *supra* note 3, at 809-14.

80. FRIENDLY, *supra* note 1, at 186-94; Field, *supra* note 3, at 927-28. Indeed, my chief concern with Judge Friendly's and Professor Field's earlier work is that they offer this formulation to explain what the Supreme Court has done without providing any historical or functional justification for their position. *Id.*

81. U.S. CONST. art. I, § 8, cl. 18.

82. 17 U.S. (4 Wheat.) 316 (1819).

and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the Constitution, are constitutional.”<sup>83</sup>

The lawmaking power of federal courts can be described in similar terms, except that the relevant authorization must come from a federal statute. That is, apart from a few special contexts,<sup>84</sup> the grant of powers in the Constitution is to Congress and not the federal courts. This means that federal judges must wait for Congress to take the first step. Once Congress has acted, however, federal courts can make any common law “necessary and proper” to implement the statute. Like Congress’s power under *McCulloch*, this does not limit the courts to common law rules specifically contemplated or authorized by Congress. Rather, their lawmaking power is broad enough to encompass any rule consistent with the general purposes of the statute on which it is based. To paraphrase Chief Justice Marshall, “Let the end be . . . within the scope of the [statute], and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the [statute]” are permitted.

Perhaps the best way to understand this position is to contrast it with those of other scholars. On the one hand, my view of the lawmaking power of the federal courts is narrower than Louise Weinberg’s in that it precludes federal common law that cannot be justified by reference to a federal statute.<sup>85</sup> One

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83. *Id.* at 421. Daniel Webster made the same point more succinctly: “The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited.” *Id.* at 324.

84. Federal courts exercise lawmaking authority unconnected to substantive laws enacted by Congress in cases involving admiralty, foreign relations, and disputes between states. See ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* § 6.2 at 309-12 (1989); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1030-35 (1967). In these contexts, the Constitution makes federal sovereignty exclusive and completely preempts state law, thereby eliminating the federalism constraints discussed below. See *id.*; Merrill, *Judicial Prerogative*, *supra* note 7, at 347, n 77. Federal courts may also have inherent power to develop their own rules of procedure (though this power has generally been exercised pursuant to statutory grant): the states have no interest in dictating the procedures used by federal courts except where these interfere with state substantive law. This, of course, is the classic “*Erie* problem.”

85. Again, with important exceptions in admiralty, foreign relations, disputes between states, and procedure. See *supra* note 84.

might, for example, justify creating a federal law of multistate defamation to handle problems created by state regulation of the national communications market. But while this seems (and may well be) sensible, my position is that Congress must take this step and that federal courts cannot create such law unless Congress has done something to which it is a useful addendum.

On the other hand, my view of federal common law is broader than Tom Merrill's, because it requires neither a decision by Congress to delegate lawmaking authority nor a finding that state law would "unduly frustrate or undermine" federal policy.<sup>86</sup> Rather, federal courts can make common law even though state law might also work, so long as whatever rules the courts fashion are consistent with and further an underlying federal enactment. To use Merrill's terminology, federal courts may exercise a limited judicial prerogative: the occasion for making federal common law must be to improve the effectiveness of a statute, but the court need not locate the source of its rules "in" the statute (which means, among other things, that the court need not pretend that Congress addressed questions it never considered and that the court has broad latitude to determine what policies are relevant). Hence, unlike Merrill,<sup>87</sup> I am not the least bit troubled by cases like *Boyle*,<sup>88</sup> *Clearfield*,<sup>89</sup> and *Steelworkers v. Weber*.<sup>90</sup> To be sure, one can argue that the Court should have decided these cases differently, just as one might quarrel with a statute enacted by Congress. But in each of these cases, the Court acted to facilitate the implementation of a federal statutory scheme. Consequently, the legitimacy of its common law rules — as opposed to their wisdom — is not problematic.

In the final analysis, I am advocating a broad, though not limitless, power to make federal common law. The power is broad because Congress has already enacted statutes covering a wide range of topics, and an ingenious court could probably find excuses to make common law on all of these. One obvious im-

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86. See Merrill, *Common Law Powers*, *supra* note 7, at 36-46.

87. *Id.* at 38-39. See generally, Merrill, *The Judicial Prerogative*, *supra* note 7.

88. 487 U.S. 500 (1988).

89. 318 U.S. 363 (1943).

90. 443 U.S. 193 (1979).

plication of my position; for example, is to challenge the present Supreme Court's stingy approach to implied private rights of action, which rests on the argument from separation of powers addressed in Part II.<sup>91</sup> At the same time, there are limits in this account of the lawmaking power of the federal courts. Federal statutes provide some constraint given the requirement that any federal common law further ascertainable statutory purposes. And there are still many areas in which Congress has not acted or in which no plausible justification for federal common law is available. Thus, while it is important to recognize the breadth of the lawmaking power of the federal courts, it is equally important not to exaggerate or ignore its limits.

The justification for this position is partly historical. Defining the relationship between state and federal governments was among the most vexing problems to confront the framers of the Constitution. "The one issue with the potential to explode the convention was the role of the states in the new government."<sup>92</sup> The story is familiar to anyone with even a passing knowledge of American history.<sup>93</sup> Experience under the Articles of Confederation convinced an important segment of the political elite of the need for more effective central authority. But an equally important segment opposed such "consolidation" on the ground that state governments are smaller and closer to the people, hence more democratic and less likely to abuse their power. This presented the framers with a dilemma: how, on the one hand, to establish a national government that could act directly on the citizenry while, on the other, assuaging fears that such a government would swallow the independent states.

Their solution was a system of "dual federalism" in which concurrent sovereignty is vested in state and national govern-

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91. The basis of the Court's decision on implied rights of action in separation of powers, and its potential implications for federal common law, are discussed in Doernberg, *supra* note 7, and Brown, *Of Activism*, *supra* note 7. Note that I am not arguing that federal courts should freely imply private rights of action in every statute that does not already have one. Rather, my claim is that the sort of statute-specific inquiry embodied in a case like *Cort v. Ash*, 422 U.S. 66 (1975), is appropriate.

92. ROBERT H. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 24 (1984).

93. For a basic account, see DANIEL ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984); WILLIAM K. HALL, *THE NEW INSTITUTIONS OF FEDERALISM: THE POLITICS OF INTERGOVERNMENTAL RELATIONS 1960-1985* 1-12 (1989). Some of the original materials are collected in 1 KURLAND & LERNER, *supra* note 71, at 242-97.

ments.<sup>94</sup> This remarkable innovation was contrary to the best political science of the day, which held that there could be but one supreme legislative power.<sup>95</sup> Under dual federalism, in contrast, both state and national governments are authorized to act directly on the people. Proponents of this system argued that independent state and national sovereigns would compete for the loyalty and affection of the citizenry, checking one another while at the same time providing better government to all.<sup>96</sup> The framers thus managed to have their cake and to eat it too: creating the desired central authority (indeed, giving this authority powers well beyond those needed to cope with external threats) while preserving the independent states.

The problem with concurrent sovereignty, of course, is that overlapping authority inevitably generates conflict. Here, the solution seemed fairly easy (notwithstanding some later grouching about nullification): because the federal government acts for all the people and in the national interest, what it does must be supreme.<sup>97</sup> But this raised anew the fear that states would be reduced to insignificance by the national juggernaut. The framers therefore responded by making state sovereignty the presumed baseline, subject to displacement by the national government only after approval by an institution in which both the people and the states were represented and could exert influence, *viz.*, Congress.<sup>98</sup>

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94. See WEIBE, *supra* note 92, at 248; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 527-29 (1969).

95. *Id.*

96. See, e.g., THE FEDERALIST Nos. 28, 32, 36 (Alexander Hamilton).

97. See U.S. CONST. art. VI, cl. 2; THE FEDERALIST Nos. 34 (Alexander Hamilton), Nos. 39, 44 (James Madison); *McCulloch*, 17 U.S. (4 Wheat.) at 405-06.

98. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985); THE FEDERALIST Nos. 9, 32 (Alexander Hamilton), 39, 46, 62 (James Madison or Alexander Hamilton); Weibe, *supra* note 96, at 25-28. Under the original Constitution, the states' leverage came primarily from the fact that senators were chosen by state legislatures. The shift to popular elections in the Seventeenth Amendment has not deprived the states of their voice, however, for Senators are still elected on a statewide ballot, and both Senators and Representatives must maintain the goodwill of local interests and local political parties that invariably have close ties to the state legislature. The power of the states to check Congress may thus have been diminished, but states still retain considerable influence. Certainly they have more influence in Congress than in the federal courts. See JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 171-259 (1980); Herbert Weschler, *The Political Safeguards of Federalism*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 49-82 (1961).

Put another way, the framers established a system in which most governing is done at the state level, one which presupposes effective state sovereignty. State legislatures are thus presumptively free to enact laws, and state courts presumptively free to make common law, across the whole range of subjects not prohibited by state or federal constitutions. Federal sovereignty, in contrast, is best described as inchoate; this is why the mere potential for federal law does not ordinarily prevent the states from acting. Once federal law is enacted, however, the inchoate sovereignty of the federal government becomes effective, preempting inconsistent state law. And to reduce the risk that federal authorities would use their power to render the states insignificant, the framers required Congress to take this initial step and constituted Congress in a way that would give the states a voice.

One should not make too much of this history, of course, for the record respecting federalism is nearly as ambiguous as that regarding separation of powers. Like separation of powers, "dual federalism" was an experiment, and there was considerable uncertainty about what exactly the relationship between state and federal governments would be. In part, this uncertainty was intentional, and the framers deliberately left the appropriate roles of state and national governments unsettled to facilitate ratification of the Constitution and encourage further experimentation after its adoption.<sup>99</sup> But some uncertainty was also caused by the posturing of proponents and opponents of the Constitution. As often happens in political debates, the desire to win led participants to claim that the other side got too much, giving the record an ironic twist and complicating the task of reconstruction. Hence, advocates of a weak national government (many of whom continued to favor a loose confederation) claimed that the Constitution established a very strong one, while supporters of strong central authority (many of whom would have preferred to see the states abolished) argued that the Constitution actually left the states in an exceedingly powerful position.<sup>100</sup> Of course, neither side fully meant what it said.

Deciding whom to believe is further complicated by the fact

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99. See, e.g., ELAZAR, *supra* note 93, at 2; HALL, *supra* note 93, at 11.

100. See WEIBE, *supra* note 92, at 21-34.

that advocates on both sides tailored their arguments as needed to persuade different audiences and felt no compunction about being inconsistent.<sup>101</sup> Should we believe the Madison of the convention, who “clung as tenaciously as anyone to the extreme centralizers’ end of the spectrum?”<sup>102</sup> Or should we believe him when, speaking as Publius, he says that the Constitution is established by the people acting through their states and that the independent states provide the final guarantor of the nation’s republicanism?<sup>103</sup> Bear in mind also that there were disagreements within the ranks. James Wilson and John Jay, for example, were much more uncompromising nationalists than, say, Federal Farmer.<sup>104</sup> And “John Dickinson of Delaware and Oliver Ellsworth of Connecticut, who endorsed the document, shared more common constitutional ground with George Mason and Elbridge Gerry, who did not, than any of them shared with the likes of Alexander Hamilton and Gouverneur Morris.”<sup>105</sup> Adding a final complication, many participants undoubtedly changed their minds (perhaps more than once) during the long course of these dynamic debates.

Given this jumble of views, it would be disingenuous to claim that one knew how the framers thought federalism would work or even to argue that the framers had a carefully worked out design. This is especially true with respect to a question like federal common law, which was not specifically addressed by anyone, and particularly given the changes in our conception of

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101. *Id.* at 31-34.

102. *Id.* at 30.

103. THE FEDERALIST Nos. 39, 51 (James Madison). The Federalist Papers are filled with deliberate ambiguities of this sort. To pick just one of many, Hamilton begins the essays by describing the need for an active national government that can regulate internal affairs both to increase prosperity and to strengthen the Union against external threat. *See, e.g., id.* Nos. 6-7, 11-12, 21-22 (Alexander Hamilton). Faced with growing opposition from anti-federalists, the authors apparently decided to back away from this strong position, and Madison therefore uses one of the later papers to assure opponents that the national government will concentrate “principally on external objects,” leaving the “most extensive and important” functions of government to the states. *Id.* at No. 45 (James Madison). Indeed, Madison’s invocation of the states in No. 51 represents a subtle but important shift from the argument in No. 10, where Madison deliberately confined his defense of a large republic to the sociological claim that a multiplicity of factions would cancel one another out.

104. WIEBE, *supra* note 92, at 31.

105. *Id.*



what it means to exercise common law powers. Rather, as noted above, the most one can say is that federalism imposes some limit on the power of federal courts to take the initiative in making federal law. At the same time, this also seems to be the *least* one can say. For ambiguous as this history is, some compromises were unquestionably made. The extreme centralizers were clearly defeated and forced to provide the states with some protection, and the chief device was to give states a voice in the lawmaking process through the Senate.<sup>106</sup> At a minimum, then, the historical background appears inconsistent with the claim that federal courts can make common law whenever Congress could legislate.

Indeed, there may be better reasons to reject this claim today than there were in 1789. Beginning with Reconstruction, but especially after the New Deal, there was an enormous expansion in the scope of federal responsibilities at the expense of the states. Legal academics have tended to exaggerate this trend (in part, I suspect, because it is easier to learn one body of laws than fifty), but federal regulation has been extended to myriad new areas in the last half century.<sup>107</sup> To be sure, many of these new programs are administered jointly and give an appearance of state and federal interdependence. But the federal government has in fact assumed the dominant role, and it comfortably dictates terms to the states, which must follow the federal lead or risk losing what control they retain.<sup>108</sup>

These developments have dramatically altered the nature of the federalist system. Talk about co-equal state and federal sovereigns may have made sense to the generation that ratified the

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106. See WIEBE, *supra* note 92, at 24-25:

These attacks [on the need to preserve state sovereignty] pushed to the nub of the states' survival, and the primary battle at Philadelphia, therefore, concentrated on their rights as authentic sovereignties. In those terms the centralizers found themselves overwhelmed by more moderate gentlemen who, with Gerry, believed that the American states 'were neither the same Nation nor different Nations,' secured the existence of the states in a revamped Senate, and defeated Wilson's schemes for a new nationwide grillwork of districts to elect national officials. None of the leading centralizers facilitated the basic compromise that made the Senate equally representative of each state. Unrepentant, they simply lost the vote, and in the process they became federalists in spite of themselves.

*Id.*

107. See HALL, *supra* note 93, at 14-18.

108. *Id.* at 26-33.

Constitution, even to the one that fought the Civil War, but it has a distinctly outmoded ring today. It bears repeating that the reason is not that states no longer provide important services. In fact, most governing in this country is still done at the state level and by state officials. But a much larger proportion of it is done pursuant to federal guidelines or under the threat of federal supervision, and this has cast the states in a more subservient role. Judge Posner recently called the states "tattered quasi-sovereigns,"<sup>109</sup> fighting words (literally) a century earlier, but an apt description of the current state of affairs. In effect, what many federalists hoped for and every anti-federalist feared has largely come to pass, though it probably took longer than either side anticipated.

At the same time, we have during the past decade rediscovered the importance of preserving a robust federal system. The most public manifestations of this revival emanated from the Reagan administration, but legal scholars across the political spectrum have begun to celebrate the benefits of independent state and local governance.<sup>110</sup> Interestingly, the modern case for federalism closely resembles the original, and the advantages proffered thus include freedom to experiment with new approaches, flexibility in tailoring regulation to local needs and conditions, the security of decentralization as a strategy to minimize factional control, independence as a source of strengthened protection of rights, and the superior democratic pedigree that

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109. *Wood v. Mid-Valley, Inc.*, 942 F.2d 425, 427 (7th Cir. 1991). See also *Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991) (states are "only quasi-sovereign").

110. See, e.g., C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 225 (1990); Deborah Jones Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review); Richard B. Stewart *Reconstitutive Law*, 46 MD. L. REV. 86 (1986); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985); Mark Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981 (1985); *A Symposium on Federalism*, 6 HARV. J.L. & PUB. POL'Y. (special issue 1982); Robert F. Nagle, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 S. CT. REV. 81; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Andrej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; V. OSTROM, *THE POLITICAL THEORY OF A COMPOUND REPUBLIC* (2d ed. 1987).

comes from closer contact with the citizenry.<sup>111</sup>

The problem is that a century of shifting power to Washington has taken its toll, leaving the states somewhat vulnerable and making it necessary to worry about preserving restraints on federal expansion. It is, I think, too late in the day to restore federal sovereignty to what it was prior to the New Deal. In today's complex world, problems that once could be handled by local regulation often require national solutions, and it is important to secure the ability to adopt such measures in case of need. It is, however, not too late to think about institutional structures that limit the full exercise of federal sovereignty and ensure that national solutions are not adopted unless such need is established.

In this light, it seems to me quite sensible to prohibit federal courts from creating common law unconnected to any statutory authority.<sup>112</sup> Not only has the sphere left to state governance grown smaller, but the ability of federal courts to interfere with what remains is significantly greater than in the past because the federal bench is more powerful today than it was in the 18th and 19th centuries. To begin with, the jurisdiction of the court is broader. In particular, the existence of general federal question jurisdiction gives a forum to any party that wants to ask for a new rule of federal common law, while the general expansion of federal powers makes virtually everything states do a fit subject for such law. In addition, as Tom Merrill points out, the relaxation of standing requirements and the proliferation of new actions and remedies (such as class actions, consent decrees, declaratory judgments, etc.) give federal courts powers of institutional reform unimaginable in the past.<sup>113</sup> Finally, the sheer size of the federal bench has become an issue to be reckoned with. Federal courts today constitute one of the nation's largest judicial systems, with 94 independent districts staffed by almost 650 district judges subject to review in thirteen courts of appeals

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111. See, e.g., SUNSTEIN, *supra* note 110, at 225; McConnell, *supra* note 110.

112. Bear in mind that federal courts have never asserted such broad lawmaking power in the past, but have instead expressly confined themselves to a position much like the one I am advocating in this paper. See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966); Field, *supra* note 3, at 923-30.

113. Merrill, *Judicial Prerogative*, *supra* note 7, at 347-48.

by approximately 180 appellate judges.

Empowering all these judges to make common law on any subject within federal cognizance under the Constitution threatens needlessly to undermine further what remains of federalism. On the one hand, the most common justification for federal jurisdiction is that federal courts have a national perspective that state courts lack.<sup>114</sup> Given this perspective, however, federal judges are likely to create federal law in many situations in which state law works just fine. On the other hand, there is reason to believe that much of this common law will not be needed. Making congressional enactments work is one thing, but federal judges have no special competence when it comes to making the initial decision to displace state law with federal regulation. Finally, Part I defends common lawmaking as a way to increase citizen access to the lawmaking apparatus and address problems that are too small or unfocused to make the legislative agenda. But these justifications have less force when it comes to federal courts, because state and federal sovereignty is concurrent and state courts are already available to provide these same services under state law.

If there is a justification for giving federal courts lawmaking power as broad as that of Congress, it must be that there is a gap between what the states can do and what Congress does that can be filled by federal courts making federal common law. This seems plausible enough. Certainly there are problems that Congress leaves unaddressed and that might benefit from national law. Moreover, if public choice theory can be believed, the failure to act on some of these problems results from flaws in the legislative process rather than from a deliberate choice not to regulate.<sup>115</sup>

What is not clear, however, is that we want federal courts to step in and close this gap. To reach that conclusion, one must believe that federal judges can successfully identify areas where national law would be beneficial and congressional inaction re-

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114. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 174-77 (1985); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 80-85.

115. See KAYE SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 315 (1986); FARBER & FRICKEY, *supra* note 23, chs. 1-2.

fects a democratic failure rather than a sensible decision to leave the problem to state governance. And even then, we may still question whether a decentralized federal bench (headed by an overworked Supreme Court) can successfully fashion uniform national common law, for if not, there is no reason to prefer federal to state law.

I am dubious about each of these propositions. Federal courts have neither the resources nor the perspective to identify problems that require a uniquely national solution, and they surely are in no position to second-guess the reasons for Congress's failure to act. The likely effect of broadening the common law powers of the federal courts will thus be to generate a certain amount of needless federal law in areas where state law works fine. Moreover, this federal common law is unlikely to be significantly more uniform than the law of the states. Federal judges already find it difficult enough to make uniform law when they are all working from the same statutory text; I doubt they will do better without such a text.

In sum, a constitutional prohibition on federal common law unrelated to any federal statute seems appropriate given (1) the benefits of independent state and local governance; (2) the increased scope of federal powers; (3) growth in the size and jurisdiction of the federal bench; (4) the corresponding diminution in state power; and (5) the presence of state courts to make state common law in areas of concurrent jurisdiction. Undoubtedly, such a prohibition will leave some problems that could benefit from national solutions unattended. But federal courts are not likely to develop uniform national rules without some initial guidance from Congress anyway, and the weightier concern is that federal courts will attend unnecessarily to problems that could and should be left to the states.

If all this is true, however, why stop at a prohibition on federal common law unrelated to a statute? Why not restrict the courts still further — adopting, for example, Tom Merrill's view that federal common law requires either an explicit delegation from Congress or a finding that state law will frustrate some specific federal policy? Indeed, why not go still further, to the position defended by Martin Redish (albeit for somewhat different reasons), and prohibit federal common law altogether?

These are difficult questions. The arguments above have no

natural stopping point, and one certainly can push them all the way to an outright prohibition on federal common law combined with a "plain language" approach to statutory interpretation. But there are reasons to let federal courts make common law in the service of a statute that do not apply to freestanding federal common law. In my view, moreover, the balance of interests shifts enough in this context to justify giving federal courts this power.

First, the restriction to federal common law that furthers statutorily defined objectives significantly limits the scope of the power. Congress has not acted in many areas where it could, and in most of these there will never be any excuse or need to create federal common law. To be sure, state sovereignty has already been reduced considerably by federal expansion. But most of that space has been occupied by acts of Congress, and only a small portion of the shrinkage is attributable to federal courts making common law. So long as we stick with existing practice and allow courts to make common law only in furtherance of a statutory scheme, there is no reason to expect this to change.

Second, there is a significantly greater likelihood that federal common law made in connection with a statute will usefully serve the national interest. Prior to congressional action, there are only reasons why federal intervention might be beneficial. By enacting legislation, Congress transforms these reasons into an effective manifestation of federal sovereignty: the states have had their say, and inchoate federal interests have become actual federal interests. At that point, the justifications for common lawmaking discussed in Part I come into play. Congress will often have overlooked problems that could or should have been resolved to implement the federal statute properly. Many of these problems will be too insignificant or unfocused to command the attention of an overworked legislature, making judicial resolution sensible and appropriate. At the same time, because federal statutes reflect national interests, it is less likely that state courts can satisfactorily handle these problems as a matter of state common law. Often, uniquely federal law will be required, and in this context, the nationalist perspective of the federal bench becomes a distinct advantage. And because this common law is made pursuant to a statute, there is a significantly greater likelihood that federal judges will develop uniform

(or at least consistent) rules.

Third, the existence of a federal statute diminishes the interest of the states. Congress has decided to occupy an area of formerly exclusive state sovereignty, and in doing so it has called into question the continued viability of overlapping state and local regulation. Consequently, to the extent that federal common law is made to improve the effectiveness of a federal statute, the states have a weaker objection than when Congress has not acted.

In the end, just as with separation of powers, I cannot prove that this assessment is correct.<sup>116</sup> The need for federal common law to facilitate the implementation of federal legislation, on the one hand, and the threat this poses to state sovereignty, on the other, are matters of practical politics, not deductive logic. I believe that common law made in the service of a federal statute will be useful often enough to justify giving judges power to make it. Once again, however, the only evidence I have to offer is that derived from observing existing practice — though, once again, this seems pretty persuasive. As noted above, federal courts have made a great deal of common law along these lines since *Erie* was decided, and (to quote Judge Friendly) given its benefits “we must wonder why a century and a half was needed to discover them, and must wonder even more why anyone would want to shy away once the discovery was made.”<sup>117</sup>

A final word. The potential scope of this power is broad enough to carry a risk of abuse. But whether the power has been

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116. One could try to refine these arguments by drawing from the analysis a list of factors that distinguish “legitimate” from “illegitimate” exercises of federal common law. One might, for example, argue that federal courts can make common law only where there is a distinct need for nationally uniform rules or only if the ineffectiveness of state rules is established. But little is gained in trying to limit the legitimate scope of a power to instances where its exercise is desirable, and criteria such as these are too uncertain and variable to function as effective restrictions on the authority to make common law. Compare *Boyle* and *Clearfield*, for example. In form, these cases are very similar: the Court adopted federal common law based on its perception that this would serve statutorily created proprietary interests of the United States. In my view, a strong argument can be made for the result in *Boyle*, but it is much harder to justify what the Court did in *Clearfield*. Reasonable people can (and I am sure do) disagree with these conclusions, however. Rather than describe such disagreements in terms of the legitimacy of judicial common law, I prefer to call them what they really are: arguments about the expediency of adopting a particular federal solution.

117. FRIENDLY, *supra* note 1, at 195.

abused or not is something we can argue about only in particular contexts. The fact that Congress has very broad powers does not discourage arguments about whether its statutes are wise. The same is true of federal judge-made law. Having laid the question of legitimacy to rest, we can turn to more concrete debates about the need for particular federal solutions in particular contexts and in light of particular competing state concerns, abandoning abstractions about the nature and structure of a federal system whose nature and structure is constantly changing.

#### IV. Conclusion

Opponents and proponents of federal common law seldom actually join issue. Opponents argue that federal common law is inconsistent with the structural principles on which our government is based, ignoring the fact that the courts have made such law in one form or another almost since their inception. Proponents emphasize this latter fact without explaining how or why the practice is consistent with the theory underlying the Constitution. As a result, the literature provides a disjointed sequence of theoretical and practical claims that never meet.

My goal in these comments has been to draw the two forms of argument together: to explore how theory might be read consistent with practice and how practice can be used to justify theory. This is the classic pragmatist agenda, one which sees theory as something that must be tested against and informed by real world consequences without making those consequences fully determinative. Thus, while I have tried to provide a theoretical framework for understanding why courts can make common law, why this is not inconsistent with separation of powers, and why federalism requires only that federal common law be made in reference to a statute, at each turn in the argument, I have cited the apparent benefits of existing practice for support.

In the end, I am comfortable with this approach and confident that it is consistent with the spirit in which the Constitution was written and adopted. We need theory to help us understand our objectives and their risks. But lurking always in the background is the question that really counts: what works? And the answer to that question can only be found in practice.