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THE LEGITIMACY OF (SOME) FEDERAL COMMON LAW

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INTRODUCTION

ON topics that come within the reach of the states’ lawmaking powers, modern federal judges have no doubts about the legal status of the common law. With respect to such topics, the unwritten law in force in any particular state has long been regarded as part of that state’s law.¹ Ever since *Erie Railroad Co. v. Tompkins*, moreover, federal courts have followed the settled precedents of each state’s highest court about the content of the state’s unwritten law.²

On topics that lie beyond the reach of state law, however, federal courts are less confident about the role of unwritten law. To be sure, in an opinion issued on the same day as *Erie*, the U.S. Supreme Court

¹ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). The Supreme Court had embraced this classification even before *Erie*. See, e.g., *Chi., Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U.S. 133, 136 (1898) (observing that although federal courts did not feel bound to follow state-court precedents about the content of the “general” aspects of the common law in force in each state, “the law to be applied is none the less the law of the State”); Caleb Nelson, A Critical Guide to *Erie Railroad Co. v. Tompkins*, 54 Wm. & Mary L. Rev. 921, 927–29 (2013) (discussing *Solan*); see also Michael G. Collins, Justice Iredell, Choice of Law, and the Constitution—A Neglected Encounter, 23 Const. Comment. 163, 171 (2006) (calling attention to Justice Iredell’s opinion in *United States v. Mundell*, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834), as an early exposition of “a theory by which a broodingly omnipresent version of the common law shared with other states could operate within each state as a matter of positive state law”); Michael Steven Green, Law’s Dark Matter, 54 Wm. & Mary L. Rev. 845, 856–57 (2013) (suggesting that even in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), Justice Story conceived of the law that he was applying as “New York law”).

² See *Erie*, 304 U.S. at 78–80.

applied what it called “federal common law” to such a topic,³ and that practice has continued; in various contexts, modern courts recognize legal principles that are said to have the status of federal law but that have not been codified in any written enactment.⁴ Still, even Justice Douglas—who wrote some of the most expansive opinions in this vein⁵—observed that “[t]he instances where we have created federal common law are few and restricted.”⁶ Subsequent Courts have agreed that federal common law exists only in “limited areas,”⁷ but they have not specified exactly how to identify those areas.

One idea, which Professor Alfred Hill suggested nearly fifty years ago and to which I still subscribe, is that preemption is a pre-condition for recognizing federal common law; by definition, “federal” common law operates only where something has displaced or restricted the states’ lawmaking powers.⁸ Depending on one’s view of preemption, that threshold limitation is potentially significant. For instance, I agree with Professor Bradford Clark that preemption needs to be traced to one of the forms of federal law listed in the Constitution’s Supremacy Clause, which refers to “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof[,] and all Treaties made, or which shall be made, under the Authority of the United States.”⁹ I also agree with Professor Clark that when the Supremacy Clause refers to “Laws of the United States” that are “made” in pursuance of the

³ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁴ See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405–17, 421–22 (1964) (citing cases); see also Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 607 (6th ed. 2009) (noting that modern scholars “have offered a range of definitions of federal common law,” but using the term to mean “federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to [written federal laws]”).

⁵ See, e.g., *Illinois v. Milwaukee*, 406 U.S. 91, 103–07 (1972); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943).

⁶ *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

⁷ *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981).

⁸ See Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 *Colum. L. Rev.* 1024, 1028, 1030–68 (1967) (noting that “[t]he term federal common law is probably applied most often in cases involving an area that has been federally preempted by action of Congress,” but observing that other enclaves of federal common law can be explained on the ground that the Constitution itself preempts state law in those enclaves).

⁹ U.S. Const. art. VI; see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1338 (2001).

Constitution, it is referring to federal statutes enacted through the process of bicameralism and presentment.¹⁰ On this view, courts can recognize federal common law only on topics that something in *written* federal law implicitly or explicitly puts beyond the reach of the states' lawmaking powers.

This conclusion, however, potentially leaves a lot of room for federal common law. On any question that the Constitution, a federal statute, or a federal treaty prevents state law from answering but does not itself resolve, courts might be able to articulate a rule of decision as a matter of unwritten law.¹¹ Indeed, according to one commentator who takes a

¹⁰ See Clark, *supra* note 9, at 1334–36; see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 500 (1954) (“[T]he supremacy clause is limited to those ‘Laws’ of the United States which are passed by Congress pursuant to the Constitution”); cf. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 *Harv. L. Rev.* 881, 897 n.64 (1986) (observing that many of the prominent cases holding that state judges should follow federal Supreme Court precedents about the content of federal common law “did not use the supremacy clause to justify their rulings,” but adding that under modern doctrine, “it is now settled that federal common law is ‘law’ within the meaning of the supremacy clause”). For an argument that the Supremacy Clause probably was originally understood to refer only to written law, but that subsequent practice and changing jurisprudential ideas cut against rigid adherence to that view today, see Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 *Colum. L. Rev.* 731 (2010). For a response to the latter point, see Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 *Ohio St. L.J.* 559 (2013).

¹¹ As Professors Garrick Pursley and Michael Ramsey have both explained, the relevant analysis can be thought of as proceeding in two steps. See Garrick Pursley, *Dormancy*, 100 *Geo. L.J.* 497, 568–70 (2012); Ramsey, *supra* note 10, at 604–05. First, courts read the Constitution (or a federal statute or treaty) to preempt state law in some area. Second, to the extent that written federal law fails to answer some questions that lie within the preempted area, courts look to unwritten law for rules of decision. See Ramsey, *supra* note 10, at 604–07 (suggesting that the Supreme Court used this analysis in the key twentieth-century opinion about federal common law in maritime cases, and adding that the same reasoning might extend to interstate disputes and cases about the rights and obligations of the federal government).

On this view, federal common law does not have preemptive effect in its own right. See Pursley, *supra*, at 568–69. Instead, federal common law operates within the space preempted by written federal law. Within that space, however, federal courts need not defer to the courts of a particular state about the applicable rules of unwritten law. Cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947) (suggesting that a “more accurate[]” label for federal common law might be “law of independent federal judicial decision”). In fact, deference has long run in the opposite direction; just as state courts are expected to follow the Supreme Court’s precedents about the meaning of written federal laws, so too state courts are expected to follow the Supreme Court’s precedents about the content of the unwritten law that operates in the space preempted by those laws. See, e.g., *Chi., Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926) (noting that the Federal Employers’ Liability Act had the effect of superseding all state laws in “the field of employers’ liability

fairly broad view of federal common law, that is essentially what the Supreme Court did in the initial decades after *Erie*: Judges felt free to recognize federal common law “whenever either the Constitution or Congress has ‘federalized’ an area of the law but has failed to provide rules of decision for all issues that may arise.”¹²

Many modern federal judges deny that unwritten law can operate so broadly at the federal level. Their concerns revolve around the idea that articulating rules of decision as a matter of unwritten law entails a robust type of “lawmaking,” analogous to the power that a legislature exercises when it enacts a written law.¹³ After *Erie*, federal judges are used to acting as if *state* courts enjoy this sort of power (on matters as to which the states have lawmaking authority), but the Supreme Court has said that *federal* courts are different (even in areas of federal preemption). In Justice Rehnquist’s words, “Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.”¹⁴

For many federal judges and commentators, it follows that every rule of decision that has the status of federal law must be traced in some way to a written federal enactment—not simply in the sense that the written enactment preempts state law, but in the sense that the written enactment either establishes the rule itself or authorizes the judiciary to do so.¹⁵ To be sure, this idea leaves room for disagreement about when a particular statute or constitutional provision should be understood to authorize “federal common lawmaking.”¹⁶ But some distinguished commentators

to employees in interstate transportation by rail,” and indicating—even before *Erie*—that state courts should follow federal precedents about the content of the common law in that field).

¹² Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895, 914 (1996).

¹³ See, e.g., *Milwaukee v. Illinois*, 451 U.S. 304, 312–14 (1981).

¹⁴ *Id.* at 312; see also *id.* at 314 (referring to federal common law as “an unusual exercise of lawmaking by federal courts”).

¹⁵ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 856 (1997) (“Courts and scholars generally agree that federal common law must be authorized in some fashion by the Constitution or a federal statute.”); Field, *supra* note 10, at 946 (arguing that under “prevailing” doctrine, “any exercise of federal common law power [must] be traceable to some federal enactment interpreted to authorize it, at least by implication,” and endorsing this approach).

¹⁶ See Field, *supra* note 10, at 887–88 (acknowledging that Justices Powell and Rehnquist favored “applying strict rules of interpretation to the question of authorization, . . . at least in some areas of federal common lawmaking,” but arguing that “[t]he prevalent approach” is “more permissive”); *id.* at 942–43 (elaborating upon “how different Justices define the

have advocated restrictive approaches.¹⁷ Justice Scalia has drawn the logical conclusion: “[I]n the federal courts, . . . with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution.”¹⁸

Academic critics of this logic have tended to accept the premise that all common-law decisionmaking entails robust lawmaking power, while arguing that federal courts can assert more such power than skeptics of

congressional or constitutional intent that is necessary to support federal common law,” and concluding that the then-current majority “allows federal common law whenever it best fits with the policies behind congressional legislation, whether or not Congress adverted to the possibility of federal common law”; *id.* at 945 (endorsing the idea that when courts are trying to decide whether a particular statute or constitutional provision authorizes the creation of federal common law, and what the content of any such law should be, “[i]t is proper for courts to ask . . . what Congress, or the Constitution’s framers, would have wanted if they had adverted to the problem before the Court and had known the facts and circumstances known to the Court”).

¹⁷ For instance, Professor Thomas Merrill has suggested that every federal rule of decision must be traced to a written enactment in one of three ways: (1) the rule can be derived from the enactment itself through “conventional textual interpretation”; (2) the rule is “collateral or subsidiary” to a written federal enactment, and it is “truly necessary” for courts to recognize the rule “in order to effectuate or to avoid frustrating the specific intentions of the draftsmen”; or (3) courts have been authorized to articulate the rule by a written federal enactment that was “specifically intended to delegate lawmaking power to the federal courts.” Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 36–37, 41, 46–47 (1985); see also Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 Nw. U. L. Rev. 761, 790 n.115 (1989) (“The Supreme Court should not be able to construe a statute to delegate common law-like power to the federal judiciary, without first carefully examining the statute in question to determine that Congress so intended, lest the Court effectively usurp legislative power.”); *id.* at 799 n.164 (urging a cautious approach to Professor Merrill’s middle category, and arguing that courts should not infer authority to articulate federal rules of decision in “vacuum[s]” created by preemption unless “the open legal issue represents an intermediate question that must be resolved before the federal statute may be appropriately applied”).

Professor Merrill is careful to distinguish “rules of decision” from “procedural and housekeeping rules for the conduct of litigation in federal courts.” Merrill, *supra*, at 27, 46–47; see also *id.* at 24 (concluding that except as affirmatively restricted by Congress, “federal courts should be regarded as having inherent authority to adopt their own provisions governing the conduct of litigation and internal operations without violating any principle of separation of powers”); Redish, *supra*, at 787 n.104 (drawing a similar distinction). For a sophisticated analysis of federal common law on procedural topics, see Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813 (2008).

¹⁸ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 13 (Amy Gutmann ed., 1997).

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federal common law think.¹⁹ This Article suggests exactly the opposite criticism. Like Justices Rehnquist and Scalia, I am reluctant to interpret either the Constitution or the typical federal statute as giving federal courts sweeping authority to invent new rules of decision out of whole cloth, even in the service of policies established by Congress. Nonetheless, I see a substantial role for certain types of federal common law in areas of federal preemption, because I do not think that modern federal courts are inventing rules of decision out of whole cloth whenever they articulate and apply any legal doctrines that have not been codified.

I am not trying to revive the old rhetoric that judges simply “discover” the common law and play no role in “making” it. But to say that courts participate in “making” the common law is to speak ambiguously, for there are different senses in which law can be made.²⁰ As a result, even if all common law is properly characterized as “judge-made,”²¹ one should not leap to the conclusion that each individual court brings common-law rules into being in the way that a legislature might enact a new statute.²² While some prominent commentators have indeed spoken of the common law as “judicial legislation,”²³ that way of talking is at best “a metaphor,”²⁴ and the comparison that it draws is

¹⁹ For an extreme version of this position, see Louise Weinberg, *Federal Common Law*, 83 *Nw. U. L. Rev.* 805, 833–34 (1989) (taking for granted that “[i]n the United States, today, common law means judge-made law,” and arguing that “[t]he power and duty to make pure federal common law, as the national interest may require, are ultimately lodged in the Supreme Court of the United States”). For a more conventional version, see Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 *Pace L. Rev.* 263, 265 (1992) (defending “a fairly broad (though not limitless) conception of the lawmaking power of the federal courts”).

²⁰ See, e.g., John Gardner, *Some Types of Law*, in *Common Law Theory* 51, 51–72 (Douglas E. Edlin ed., 2007) (distinguishing among “legislated law,” “customary law,” and “case law”).

²¹ See Merrill, *supra* note 17, at 44 (“Common law rules are judge-made rules . . .”).

²² See Gardner, *supra* note 20, at 51 (criticizing Ronald Dworkin for allegedly equating “the claim that judges sometimes make law” with “the claim that judges are part-time legislators”).

²³ See, e.g., Kenneth Culp Davis, *Official Notice*, 62 *Harv. L. Rev.* 537, 549 (1949) (referring to “the familiar observation that the common law is the product of ‘judicial legislation,’” and calling this observation “[e]ntirely accurate”).

²⁴ John Harrison, *The Power of Congress over the Rules of Precedent*, 50 *Duke L.J.* 503, 508 n.17, 526 n.71 (2000); see also George P. Fletcher, *Paradoxes in Legal Thought*, 85 *Colum. L. Rev.* 1263, 1275 (1985) (“The phrases ‘judicial lawmaking’ and ‘judicial legislation’ are but metaphors designed to capture the phenomenon of innovation in the case law.”).

controversial.²⁵ Part I of this Article therefore summarizes a few other ways of thinking about the common law.

Of course, common-law decisionmaking is extraordinarily complex, and it may not lend itself to a unitary description. In practice, rules of decision recognized by common-law courts presumably reflect a mix of sources, including precedents established by prior courts, customs and other social practices followed in the real world, policies reflected in written laws, modes of reasoning commonly used by lawyers, values widely shared by the public, and the policy preferences of individual judges. The relative importance of each of these inputs may well vary for different judges and in different areas of law. Still, the idea that *all* common-law decisionmaking is quasi-legislative strikes me as an exaggeration.

Part II discusses some of the questionable conclusions that have flowed from this idea. For instance, skeptics of federal common law sometimes suggest that in the absence of a special delegation of lawmaking authority, federal courts cannot legitimately recognize *any* rules of decision as a matter of unwritten law in areas of federal

²⁵ See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. Pa. L. Rev. 825, 909–10 (2005) (“It does not follow from the fact that judicial decisions in a real sense make law that they must make it as a matter of purely forward-looking policy determinations. Scholars of various jurisprudential stripes have described a common law process in which real constraints on judicial lawmaking are possible and observed.”); Daniel A. Farber & Brett H. McDonnell, “Is There a Text in this Class?”: The Conflict Between Textualism and Antitrust, 14 J. Contemp. Legal Issues 619, 658 (2005) (lamenting “the simplistic view of the common law that seems endemic among textualists,” and observing that “it is a caricature of the common law to equate it with judicial legislation”); Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 Geo. L.J. 301, 342–43 (2014) (acknowledging that “[l]egal realists insist that judges ‘make’ the common law no differently than legislators make rules by statutes,” but arguing that “this blinks the reality of how legislators and common law judges actually operate”); Diarmuid F. O’Scannlain, *Rediscovering the Common Law*, 79 Notre Dame L. Rev. 755, 757, 761 (2004) (acknowledging “the familiar idea of the judge as lawmaker,” but “propos[ing] a return to an older, truer spirit of common law adjudication” that emphasizes “past precedents and the dictates of reason, natural law, and tradition” as substantial restraints on “judicial creativity”); cf. Kent Greenawalt, *Statutory and Common Law Interpretation* 179 (2013) (“On the question of how to conceptualize what judges do when the law they must apply is not clearly determined, a division exists between those who think judges ‘make law,’ and those who think what they do, even in difficult cases, is better viewed as a kind of discovery rather than legislative-like creation of law.”); Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 Fordham L. Rev. 1689, 1702 n.72 (2014) (noting that “[w]hether common law ‘powers’ are akin to judicial legislation is a contested matter,” and exploring how different premises about the nature of unwritten law can lead to different conclusions about the interactions between statutes and unwritten law).

preemption. This way of talking elides the potential distinction between rules that the courts would be creating out of whole cloth and rules that are firmly grounded in sources outside the federal judiciary (such as widespread customs, traditional principles of common law, or the collective thrust of precedents from across the fifty states). Likewise, to account for the role that unwritten law plays at the state level, many skeptics of federal common law suggest that state law gives state courts robust lawmaking power of a sort that federal law withholds from federal courts. Not only is this distinction implausible, but it may have the unintended effect of encouraging state judges to behave more like legislators when articulating rules of decision as a matter of state common law. By the same token, the premise that all common-law decisionmaking is quasi-legislative may affect how judges behave in the enclaves of federal common law that courts do recognize. The more judges think that articulating rules of decision as a matter of common law entails unfettered discretion to create whatever rules they please, the less they will feel bound to respect either the traditional content of the common law or the trend of opinions from other jurisdictions.

Part III calls attention to a subtler consequence of the skeptics' position: To the extent that judges refuse to recognize federal common law, they may end up compromising their normal approach to the interpretation of *written* federal laws. Many modern skeptics of federal common law embrace textualism in statutory interpretation and originalism in constitutional interpretation. As a practical matter, however, reluctance to recognize federal common law creates pressure to interpret written federal laws in ways that depart from the tenets of textualism and originalism. In a prior article, I suggested that the felt need to attribute federal rules of decision to written enactments has caused post-*Erie* judges to expand the domains of individual federal statutes to encompass issues that might more naturally be seen as matters of unwritten law.²⁶ Consistent with a recent observation by Professor Stephen Sachs,²⁷ Part III argues that a similar dynamic is at work in constitutional law.

²⁶ See Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657 (2013) (arguing that modern courts treat the typical federal statute as having a larger presumptive domain than an identically worded state statute would be understood to have).

²⁷ See Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. Ill. L. Rev. 1797, 1845 (warning that if we fail to recognize the role of unwritten law in our system,

I. DIFFERENT SENSES IN WHICH JUDGES MIGHT “MAKE” THE COMMON LAW

Over the years, accounts of the nature and sources of the common law have varied. From at least the seventeenth century on, though, many authors associated the common law with customs followed by people in the real world.²⁸ Proponents of this view tended to be vague about whether real-world customs always *preceded* the rules of decision that judges and juries applied in court, or whether judicial decisions and custom sometimes had a more symbiotic relationship; perhaps some rules of decision that were recognized as part of the common law had originated in one or more court cases, but customs had grown up around those rules in such a way as to validate them and to dictate the use of the same rules in later cases.²⁹ On either account, though, the content of the common law was said to reflect social practices rather than simply the ideas of individual judges.

For enthusiasts of the common law, this feature was one of the system’s main strengths. To the extent that the rules applied by courts derived from the customs of the people, those rules enjoyed a species of democratic legitimacy.³⁰ What is more, the processes by which customs

“we’ll end up ‘interpreting’ (some might say ‘twisting’) the text [of the Constitution] into expressing a great deal that it doesn’t say”).

²⁸ See, e.g., 1 William Blackstone, *Commentaries* *63–64 (associating unwritten laws with customs and indicating that “they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom”); Matthew Hale, *The History of the Common Law of England* 24 (London 1713) (apparently providing the template for this passage in Blackstone); cf. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *Yale L.J.* 1651, 1655 (1994) (arguing that the idea of common law as customary law was a development of the early seventeenth century).

²⁹ In the seventeenth and even eighteenth centuries, the mere fact that a single judicial opinion had recognized a rule would not itself have been thought to dictate the use of the same rule in later cases. While a *series* of judicial decisions could be “strongly persuasive” about the true content of the common law, an isolated opinion usually was not thought to have as much significance. See Theodore F.T. Plucknett, *A Concise History of the Common Law* 347–50 (5th ed. 1956) (tracing “the principle that a single case may be a binding precedent” to the seventeenth century, but indicating that this principle applied “only to decisions of the Exchequer Chamber” and not other English courts); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 *Am. J. Legal Hist.* 28, 50 (1959) (studying the emergence of the doctrine of stare decisis in the United States).

³⁰ See 1 William Blackstone, *Commentaries* *74 (“[I]t is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.”); cf. David J. Bederman, *Public Law and Custom*, 61 *Emory L.J.* 949, 949–

developed were said to filter out bad ideas and to refine good ones, producing better rules than any single lawmaker could invent on his own. According to this hopeful story, a practice would not gain widespread acceptance unless it seemed sensible to enough people, and people would not continue to follow it unless it stood the test of experience.³¹

Of course, widely accepted practices are more likely to resolve some kinds of legal questions than others. In the eighteenth century, perhaps the English rule allowing three “days of grace” for payment on a bill of exchange could plausibly be attributed to the customs of merchants.³² But judges and juries surely confronted many questions that existing practices did not specifically resolve.

Still, what Professor Gerald Postema calls the “classical” conception of the common law had an answer to this potential objection.³³ According to a substantial group of seventeenth- and eighteenth-century thinkers, the common law reflected not only specific practices but also “the social habits of a people,” on the basis of which judges (over time) identified principles that were organic to the community.³⁴ Even with respect to novel issues, then, these thinkers characterized judges as

50 (2012) (“Custom . . . is a bottom-up dynamic, where legal rules are being made by the actual participants in the relevant legal community.”).

³¹ In his classic study of the “common-law mind” during the early modern period, J.G.A. Pocock finds a clear articulation of this view in the preface that Sir John Davies wrote for his *Irish Reports* in 1612. See J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* 32–34 (1957); cf. F.A. Hayek, *The Constitution of Liberty* 54–70 (1960) (contrasting the “empiricist” ethos of eighteenth-century British thought, which was “rooted in the jurisprudence of the common law” and recognized that “the result of the experimentation of many generations may embody more experience than any one man possesses,” with the “rationalist” ethos of eighteenth-century French thought, which invited individual lawmakers to try to “fashion civilization deliberately”); Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 *Case W. Res. L. Rev.* 961, 989–1007 (1996) (discussing possible advantages of Hayek’s model of the common law).

³² See Daniel Defoe, *The Complete English Tradesman* 433 (London, Charles Rivington 1726) (calling this rule “one of those many instances which may be given, where custom of trade is equal to an establish’d law”).

³³ Gerald J. Postema, *Bentham and the Common Law Tradition* 3–13 (1986) (presenting a rich synthesis of that conception).

³⁴ *Id.* at 7; see also *id.* at 30–38, 60–77 (discussing the roles of reason and principle in the classical conception of the common law); cf. Gerald J. Postema, *Classical Common Law Jurisprudence* (pts. 1 & 2), 2 *Oxford U. Commonwealth L.J.* 155 (2002), 3 *Oxford U. Commonwealth L.J.* 1 (2003) (elaborating upon different understandings of both “common custom” and “common reason” in seventeenth-century writing about the common law).

deriving or “discover[ing]” the principles of the common law on the basis of sources external to the courts.³⁵

Most modern lawyers do not see those sources as being so determinate. In Justice Souter’s words,

[T]he prevailing conception of the common law has changed since 1789 Now, . . . in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.³⁶

Unfortunately, the modern consensus that judges “make law” obscures potential disagreements about what that means.³⁷

³⁵ Postema, *supra* note 33, at 4; see also *id.* at 71 (reading Hale to argue that when faced with novel issues, “the judge looks to the same resources of experience and common sense, of shared understandings and common ways, as those which informed past decisions and settled rules and can be presumed to underlie the ordinary interactions of members of the community”); Kramer, *supra* note 19, at 281–82 (discussing the sense in which eighteenth-century lawyers thought that judges “discovered” the law, and cautioning against modern caricatures of that view); cf. Allan Beever, *The Declaratory Theory of Law*, 33 *Oxford J. Legal Stud.* 421 (2013) (defending declaratory theories of law against modern misunderstandings).

³⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

³⁷ The discussion that follows focuses on where courts get the content of the law that they apply. By adopting that focus, I am glossing over jurisprudential debates about what counts as “law.” Historically, though, those debates have created yet more uncertainty about what people mean when they say that judges “make law.”

For John Austin and his followers, even if a judge were to base a decision entirely on a pre-existing custom that plainly shaped the expectations of the parties to the relevant transaction, the judge should still be thought of as making law (and, indeed, engaging in “judicial legislation”). According to Austin, custom is not properly classified as law “before it is adopted by the courts, and clothed with the legal sanction.” John Austin, *The Province of Jurisprudence Determined* 27–28 (London, John Murray 1832); see also *id.* at 173 (“Customary laws are positive laws fashioned by judicial legislation upon preexisting customs.”).

John Chipman Gray took this idea even farther. In the jargon that Gray sought to popularize, the term “Law” referred exclusively to “the rules which the courts . . . lay down for the determination of legal rights and duties.” John Chipman Gray, *The Nature and Sources of the Law* 82 (1909). On this way of speaking, nothing is Law until the courts recognize and apply it, and so “all the Law is judge-made law.” *Id.* at 119 (indicating that even statutes are only “sources of Law, and not . . . part of the Law itself”). Simply as a matter of definition, Gray apparently would have said that courts make Law whenever they draw a rule of decision from any source, even if they feel bound to apply it and have no discretion about its content.

H.L.A. Hart famously developed a concept of “law” that avoids this anomaly. See H.L.A. Hart, *The Concept of Law* 43–48 (1961) (accommodating the possibility that “[custom], like statute, [can] be law before the court applies it”). Over the years, though, different authors

On one possible view, unwritten law does indeed rest partly on sources that exist outside of the courts, such as real-world customs and other social practices,³⁸ but these sources are only partially determinate. Any time a judge formulates a rule of decision on the basis of these raw materials, or applies a previously recognized rule in a context where its import is uncertain, there is a sense in which the judge has made new law.³⁹ Still, unlike legislatures (which “make law in the primary literal sense of selecting a norm on the basis simply of its merits and prescribing it *ex nihilo*”⁴⁰), judges who articulate and apply rules of unwritten law are not necessarily asserting authority to enact whatever rules they please. The more one believes that unwritten law has external sources that substantially constrain judicial discretion, the more one might think that common-law decisionmaking entails only a subsidiary type of “lawmaking.” At least in the areas where such external sources exist, perhaps common-law decisionmaking is less analogous to *legislation* than to a species of *interpretation*.⁴¹

A second possible view maintains that instead of having external sources, the common law “has been made from first to last by judges.”⁴² In that respect, some commentators have long described the common

have used the word “law” in different senses. Cf. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (“Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it.”). Given the influence of Austinian jurisprudence, modern readers should not casually assume that whenever an earlier author spoke of courts as “making law,” the author meant that courts invent the content of the rules of decision that they recognize.

³⁸ For a forceful modern expression of this view, see David J. Bederman, *Custom as a Source of Law* (2010).

³⁹ At a minimum, the judge has participated in “making law” for the case at hand. Depending upon the nature of the judge’s court and the applicable doctrines of *stare decisis*, the judge’s formulation of the rule may also have precedential effect in future cases.

⁴⁰ Harrison, *supra* note 24, at 508 n.17.

⁴¹ Modern accounts of interpretation acknowledge that interpreters may have to resolve indeterminacies in the sources of law that they are interpreting. See, e.g., *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–45 (1984) (addressing statutory interpretation). At least when appellate courts engage in interpretation, moreover, the glosses that they adopt may have precedential effect in future cases. Still, the underlying sources of law are thought to impose substantial constraints upon what interpreters can legitimately say.

⁴² Timothy Walker, *Introduction to American Law* 53 (Philadelphia, P.H. Nicklin & T. Johnson 1837) (specifically rejecting the view that the common law is “a collection of customs and traditions commencing in immemorial times, acquiesced in by the successive generations, and gradually enlarged and modified in the progress of civilization”).

law as “the stupendous work of *judicial legislation*.”⁴³ But unlike a true legislature (which can repeal existing laws at will), common-law courts are thought to be bound at least to some extent by their own precedents. In a federal system like the United States, moreover, courts in one jurisdiction might also feel some obligation to follow the consensus of decisions by courts in other American jurisdictions.⁴⁴ Thus, although proponents of the second view describe the common law as entirely judge-made, they do not believe that current judges have freewheeling power to articulate whatever rules they like. Despite the absence of *external* sources, common-law decisionmaking is said to be constrained by sources *internal* to the courts—the precedential effect of “the mass of decisions” that, on this account, “constitute the common law.”⁴⁵ To the extent that precedents help to “define and point out [the courts’] duty” in particular cases,⁴⁶ even someone who thinks that courts made the common law out of whole cloth might not think that any current common-law court enjoys quasi-legislative authority.⁴⁷

Jeremy Bentham famously offered a third and more radical view of common-law decisionmaking. To begin with, Bentham vigorously mocked the idea that the common law rests on external sources.

⁴³ *Id.*

⁴⁴ See, e.g., Caleb Nelson, *The Persistence of General Law*, 106 *Colum. L. Rev.* 503, 506–07 (2006).

⁴⁵ Stanley Reed, *Stare Decisis and Constitutional Law*, 9 *Pa. B. Ass’n Q.* 131, 133 (1938) (asserting that “the doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere,” because “[t]he common law amounts to no more than a collection of decided cases”); cf. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 *Va. L. Rev.* 1, 21–48 (2001) (arguing that the doctrine of *stare decisis* may have gained strength in the nineteenth century precisely because of declining confidence in the external sources of the common law).

⁴⁶ *The Federalist* No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴⁷ Consider Justice Holmes. Although he famously declared that “judges do and must legislate,” he added that they can do so only “interstitially” and incrementally: “[T]hey are confined from molar to molecular motions.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Consistent with this rhetoric, a leading scholar has shown that Holmes’s judicial opinions reflect “the very strong . . . distinction he made between the roles of judge and legislator.” Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 *Wm. & Mary L. Rev.* 19, 32 (1995); see also *id.* at 27 (“Holmes’s actual judicial practice was marked by two unusually strong tendencies: adherence to judicial precedent and deference to legislative judgment.”); *id.* at 34–37 (explaining that the “interstices” within which Holmes thought that judges could “legislate” were both “relatively small” and “already occupied by the overlapping penumbral policies that radiate out from the adjoining concepts or rules”); cf. Greenawalt, *supra* note 25, at 181 (“Even proponents of the perspective that judges ‘legislate in the gaps’ acknowledge that judges are under substantial constraints that do not apply to legislators.”).

Throughout his writings, he insisted that “common law” is nothing but an alias for “judge-made law.”⁴⁸ But he went farther: He suggested that rather than simply having been created by judges in the past, much of what we think of as common law is continually being made by *current* judges. While Bentham believed that judges in a common-law system should rigidly follow established precedents,⁴⁹ he did not think that the doctrine of *stare decisis* operated as a substantial constraint on judicial discretion.⁵⁰ Among other things, common-law courts tended to make

⁴⁸ Jeremy Bentham, An Introductory View of the Rationale of Evidence, *in* 6 The Works of Jeremy Bentham 1, 100 (John Bowring ed., Edinburgh, William Tait 1843); see also, e.g., Jeremy Bentham, Supplement to Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constituted Authorities in the American United States 108 (London, J. M’Creery 1817) [hereinafter Bentham, Supplement] (asserting that whenever a judge decides a case according to the common law, “either he makes for the purpose a piece of law of his own, . . . or . . . he refers to, and adopts, and employs for his justification, a piece of law already made, or said to have been already made, by some other Judge or Judges”); Postema, *supra* note 33, at 274 & n.33 (discussing Bentham’s view that “Common Law is *nothing* if it is not *Judge-made*” and calling this “a pervasive theme in Bentham’s writing”).

As Professor Postema has explained, Bentham did not deny the existence of real-world customs or the idea that law should take account of them. At least in his less polemical writings, moreover, Bentham acknowledged the possibility that common-law courts had sometimes based decisions on what he called “custom *in pays*” (customs that had grown up among the people) rather than just “custom *in foro*” (the customs of the courts themselves). See Postema, *supra* note 33, at 218–30 (discussing Bentham’s “relatively sophisticated account of custom”); see also Jeremy Waldron, Custom Redeemed by Statute, 51 *Current Legal Probs.* 93, 107 (1998) (“Bentham is willing to acknowledge that ‘[s]ome where or other there is some thing of custom in Common Law.’”). Still, Bentham questioned whether either real-world customs or collections of past judicial decrees were really capable of supplying determinate rules of decision for courts. See Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence* 161–62, 185–86 (Philip Schofield ed., 2010) (defining “customary” laws as those that are “not expressed in words,” and arguing that because “[a] customary law . . . is one single indivisible act,” it is “capable of all manner of constructions”); see also Postema, *supra* note 33, at 286–300 (discussing Bentham’s attack on “the conception of Common Law as customary law,” and explaining Bentham’s view that even “custom *in foro*” could not really supply the “general propositions” that he regarded as essential to law); Waldron, *supra*, at 104–08 (elaborating upon Bentham’s view that “custom itself does not disclose a rule,” and adding that even if a particular judicial decision was informed by some custom *in pays*, Bentham believed that the subsequent course of decisions would take on “an arbitrary life of its own, which has very little to do with its customary provenance”); cf. *id.* at 112–14 (discussing Bentham’s reasons for believing that to whatever extent custom should serve as a source of law, it should be “taken up into the form of statute” rather than being “the plaything of the judges”).

⁴⁹ See Postema, *supra* note 33, at 191–217 (discussing Bentham’s view of *stare decisis*).

⁵⁰ See, e.g., Jeremy Bentham, Bentham on Humphreys’ Property Code, 6 *Westminster Rev.* 446, 463 n.d (London, Baldwin, Cradock & Joy 1826) (“As for *Judge-made*, alias *Common Law*,—it *fixes* nothing; it keeps everything *afloat* . . .”).

law for the particular cases that they were adjudicating, and such case-specific law did not provide determinate rules for other cases.⁵¹ Thus, Bentham believed that the common law routinely operated *ex post facto*: Courts were perpetually making new law, and they announced and applied that law in the context of cases about conduct that had already occurred.⁵²

Bentham himself did not refer to the common law as “judicial legislation,” perhaps because he did not want to dignify the common law by comparing it to written enactments. Indeed, Bentham sometimes wrote as if what common-law judges made was not “law” at all, in the sense of rules applicable to more than a single case; although judges issued orders “bearing upon the individual persons and things in question,” and although judges might purport to articulate rules to justify those orders, Bentham argued that the purported rules created so little certainty about the likely resolution of future cases that they were only “sham law.”⁵³ Still, Bentham described common-law judges as usurping the legislative function by inventing the law that they purported to apply.⁵⁴

At the time that Bentham was writing, orthodox common lawyers might still have insisted that courts merely discover the common law

⁵¹ Cf. Waldron, *supra* note 48, at 107 (“Most common law judging in Bentham’s view is an unprincipled progress from decision to decision, with very little in the way of explicit rules emerging.”).

⁵² See Letter from Jeremy Bentham to President James Madison (Oct. 1811), in Jeremy Bentham, *Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constituted Authorities in the American United States* 1, 33 (London, J. M’Creery 1817). This view led Bentham to his famous characterization of the common law as “dog law.” See Jeremy Bentham, *Truth Versus Ashhurst; or, Law as It Is, Contrasted with What It Is Said to Be* 11 (London, T. Moses 1823) (“When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the Judges make law for you and me.”).

⁵³ See Bentham, *Supplement*, *supra* note 48, at 105–10; see also *id.* at 105 (“Would you wish to know what a law—a real law—is? Open the statute-book . . .”); Letter from Jeremy Bentham to President James Madison, *supra* note 52, at 34 (arguing that the “perpetual fruits” of the common law included giving judges “power every where *arbitrary*, with the semblance of a set of rules to serve as a *screen* to it”); *supra* note 51.

⁵⁴ See James Bernard Murphy, *The Philosophy of Customary Law* 68 (2014); see also, e.g., Jeremy Bentham, *Pannomial Fragments*, in 3 *The Works of Jeremy Bentham*, *supra* note 48, at 211, 223 (noting that judges refuse to call themselves legislators, and remarking that “[i]n the domain of common law, everything is fiction but the power exercised by the judge”); Letter from Jeremy Bentham to President James Madison, *supra* note 52, at 33 (calling the common law a “spurious and impostrous substitute” for statutes).

and play no creative role of any sort. Bentham ultimately was very successful in helping to banish that view.⁵⁵ Even if some common-law rules are grounded in social practices that exist outside the courts, modern accounts of the common law emphasize the courts' contribution, and participants in the legal system routinely characterize the common law as judge-made law.⁵⁶ But while conventional wisdom has shifted toward Bentham on this point, one should not assume that modern lawyers also share Bentham's understanding of the precise sense in which courts "make" the common law. On many modern accounts, common-law judging tends to be more constrained than Bentham suggested.⁵⁷

Nonetheless, Bentham's views certainly have modern adherents. Textualists, in particular, have embraced various aspects of his critique of unwritten law. Indeed, an essay that Justice Scalia published in 1997 has accurately been called a "neo-Benthamite attack on the common law."⁵⁸ In the essay, Justice Scalia associated common-law decisionmaking with largely unfettered discretion to make policy.⁵⁹ He specifically denied that common-law rules have much connection to real-world customs or other social practices;⁶⁰ he portrayed the common

⁵⁵ See Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 *Emory L.J.* 675, 692 (2009) (observing that Bentham "did more than anyone else in the history of English jurisprudence" to replace the idea "that the common law originated in the customs of the people of England" with "a more accurate and somewhat less comforting account of the common law as the . . . customs of the English judiciary").

⁵⁶ See, e.g., Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. Rev.* 1, 5 (1995) ("The common law is, of course, lawmaking and policymaking by judges.").

⁵⁷ See *id.* at 5 (cautioning that "[p]olicymaking under the common law is not . . . a freewheeling exercise," and emphasizing the constraining effect of judicial precedents); Meyer, *supra* note 25, at 340–42 (discussing customs and other social practices as sources of common law); *id.* at 342–49 (discussing other constraints); cf. Benjamin N. Cardozo, *The Nature of the Judicial Process* 125 (1921) (indicating that just as Blackstone was wrong to suggest "that the law is never made by judges," so too "the votaries of the Austinian analysis" are wrong to suggest "that it is never made by anyone else").

⁵⁸ Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 *Yale L.J.* 529, 541 (1997) (book review).

⁵⁹ See Scalia, *supra* note 18, at 7 ("[P]laying common-law judge . . . consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."); see also Frank H. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 545 (1983) (appearing to equate the common law with "the judges' conception of the good").

⁶⁰ Scalia, *supra* note 18, at 4.

law as essentially anti-democratic,⁶¹ and he quoted extensively from an 1836 speech in which a Benthamite reformer denounced the common law as purely “[j]udge-made.”⁶² Like Bentham, moreover, Justice Scalia suggested that even the law made by courts in the past does little to prevent current courts from making new law. While Justice Scalia portrayed *stare decisis* as an essential feature of a common-law system, he also described common-law judges as masters of “the technique of . . . ‘distinguishing’ cases” in the service of making what they regard as “the best rule of law for the case at hand.”⁶³ In his view, common-law judges have “the mind-set that asks, ‘What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?’”⁶⁴

II. THE IMPLICATIONS OF THE IDEA THAT ALL COMMON-LAW DECISIONMAKING ENTAILS ROBUST LAWMAKING POWER

Appreciating the different senses in which judges might be said to “make” common-law rules is not simply an academic exercise. In combination with one’s views of the separation of powers, where one falls on the spectrum described in Part I can affect one’s conclusions about the conditions under which common-law decisionmaking is legitimate.

Suppose that with respect to a particular legal question, one accepts the first view of the common law described in Part I: One thinks that the courts’ project is to distill a rule of decision from real-world customs and other external sources. If those external sources of law are “in force” (in the sense of informing the legal rights and duties of the parties to particular transactions) even before judges encounter them, and if they

⁶¹ See *id.* at 9 (referring to the common-law process as a “system of making law by judicial opinion,” and suggesting that it stands in opposition to “a trend in government that has developed in recent centuries, called democracy”).

⁶² *Id.* at 10–11 (quoting Robert Rantoul, Oration at Scituate (July 4, 1836), in Kermit L. Hall et al., *American Legal History* 317, 317–18 (1991)).

⁶³ *Id.* at 7–9. Unlike Bentham, Justice Scalia acknowledged that common-law judges create “law” in a sense that goes beyond simply “resolving the particular dispute before them.” *Id.* at 7. In his view, though, each new set of judges typically retains ample room for maneuvering. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175, 1177 (1989) (“[S]ticking close to th[e] facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common-law system.”).

⁶⁴ Scalia, *supra* note 18, at 13.

are sufficiently determinate to operate like other kinds of law, one might well conclude that common-law decisionmaking needs no special justification. On this way of thinking, a simple grant of jurisdiction can be warrant enough for courts to seek to identify rules of decision supplied by the common law. After all, whenever a court has jurisdiction over a case, the court is presumably supposed to decide the case according to the applicable rules of decision. In the Anglo-American tradition, moreover, that obligation does not depend on whether the applicable rules of decision come from written law (like a statute) or unwritten law (like principles established by social practices). Thus, in cases where the applicable rules of decision come from real-world customs, courts might have not only the power but the duty to investigate those customs and to try to identify the rules of decision that they support.

Someone who accepts the second view of the common law described in Part I—someone who doubts that the common law ever had external sources, but who believes that common-law precedents are *internal* sources of law for the courts—might reach much the same conclusion. To be sure, such a person might have doubted the legitimacy of common-law decisionmaking in its early days, because “the field of judicial discretion” would have been “almost boundless at first.”⁶⁵ But as precedents accumulated, they might steadily provide sources of law to future courts, and they might also shape people’s expectations in the real world. In both of these respects, judicial precedents might operate in much the same way as real-world customs. Nowadays, then, someone who accepts the second view of the common law could offer much the same justification for its continued applicability as someone who accepts the first view.⁶⁶

That is not surprising, for these two views share some important features. If the common law has either external or internal sources that courts have a duty to respect, common-law rules can be thought of as

⁶⁵ Walker, *supra* note 42, at 54.

⁶⁶ See, e.g., 1 F.A. Hayek, *Law, Legislation and Liberty* 86 (1973) (asserting that “[t]he chief concern of a common law judge must be the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of actions rests on,” and indicating that both customs and precedents inform those expectations); see also *id.* at 115–16 (discussing how a judge should approach cases of “conflicting expectations,” and arguing that even in those cases the judge is bound by “the existing body of . . . rules” in such a way that “the judge will still not be free to decide in any manner he likes”).

existing in at least semi-determinate form before current judges crystallize them in particular cases. Even though the judges are transforming semi-determinate sources of law into fully formulated rules, and even though the judges can therefore be said to be “making” or developing new law, one might think that the judges are doing exactly what they must always do in cases over which they have jurisdiction: They are attempting to determine the rights and duties of the parties according to the applicable rules of decision. If doing so sometimes requires the judges to resolve lingering indeterminacies about the content of those rules, the judges are still adjudicating rather than legislating.

That account, however, will ring false to people who hold the third view described in Part I—people who agree with Jeremy Bentham that the common law has neither external sources nor strong internal sources, and that each new set of common-law judges therefore has freewheeling discretion to make law in the guise of applying it. If that is one’s image of all common-law decisionmaking, one might well conclude that courts need more than a simple grant of jurisdiction before they can properly participate in “making” the common law. Unless a court can point to some special delegation of lawmaking power, perhaps the court should confine itself to interpreting and applying laws made by others, and perhaps the court therefore should not purport to articulate rules of common law.

At least as far as *federal* courts are concerned, Justice Scalia and others have taken positions of this sort. This Part discusses both the premises and the implications of those positions.

A. Federal Common Law as “Delegated Lawmaking”

Federal courts are happy to apply the common law of a particular state (as the highest court of that state would declare it) in cases that lie within the reach of that state’s law. But on topics that the Constitution or other aspects of federal law put beyond the states’ lawmaking powers, some modern federal judges suggest that courts need special authorization in order to articulate any substantive rules of decision that cannot be traced to a written federal enactment. In Justice Scalia’s words, a court that articulated this sort of federal common law would be exercising “substantive lawmaking power,” and federal courts enjoy such power only to the extent that something in written federal law

delegates it to them.⁶⁷ A mere grant of jurisdiction, moreover, typically does not confer such lawmaking power.⁶⁸

People who hold these views often attribute them to *Erie Railroad Co. v. Tompkins*.⁶⁹ At first glance, the attribution is puzzling. Rather than considering questions that lie beyond the states' lawmaking powers, *Erie* addressed the relationship between state and federal courts on questions as to which the states do have lawmaking authority. *Erie*'s holding, moreover, can plausibly be understood to have rested on two key propositions: (1) On matters that lie within the reach of the states' lawmaking powers, the unwritten law in force in each state is best regarded as being part of "the law of that State,"⁷⁰ and (2) in our system of federalism, federal judges should defer to each state's highest court about the content of all aspects of that state's law.⁷¹ These propositions do not tell federal courts how to behave in realms that lie beyond the reach of state law.

Still, *Erie* can be read to have broader ramifications. Although Justice Brandeis's rhetoric was noncommittal about the sources of the common law,⁷² many commentators take his logic to reflect "[t]he recognition that courts 'make' law when they engage in common law

⁶⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741–47 (2004) (Scalia, J., concurring in part and concurring in the judgment); see also *supra* note 17 (describing the views of Professors Merrill and Redish).

⁶⁸ See *Sosa*, 542 U.S. at 741–43 (Scalia, J., concurring in part and concurring in the judgment); *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640–41 (1981) (Burger, C.J.) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.").

⁶⁹ 304 U.S. 64 (1938).

⁷⁰ *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

⁷¹ See *id.* (indicating that if the common law in force in a state is indeed "the law of that State existing by the authority of that State," then "the voice adopted by the State as its own . . . should utter the last word" (quoting *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting))). See generally Nelson, *supra* note 1 (discussing different ideas about the deference that federal courts owe to state courts about the content of different types of law, and analyzing *Erie* in these terms).

⁷² In this respect as in others, Justice Brandeis's opinion in *Erie* followed Justice Holmes's dissent in the taxicab case, which had explicitly ducked debates about how to describe common-law decisionmaking. See *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting) ("Whether [the supreme court of a state] be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described."); cf. *id.* at 534 (indicating that the decisions of each state's highest court "establish" the law—a formulation that seems deliberately ambiguous).

decisionmaking.”⁷³ The more robust one’s sense of the relevant “lawmaking,” the more likely one is to characterize *Erie*’s holding in these terms: Rather than speaking of deference to the state courts’ views about the content of state law, one will speak of the state courts as themselves making laws that federal courts are obliged to follow. Indeed, from the perspective of federal judges, acting as if state courts have *very* robust lawmaking authority may be the simplest way of conforming to *Erie* and its progeny. On substantive matters that come within the reach of the states’ lawmaking powers, federal courts will not run afoul of *Erie* if they think of each state’s judiciary as “making” the state’s common law in much the same sense that the state legislature makes the state’s statutes.

For federal judges who are used to acting *as if* state courts have quasi-legislative power, it may seem but a small step to the proposition that state courts *do* have quasi-legislative power. Conversely, the fact that federal courts must accept the substantive laws formulated by state courts, rather than being able to formulate laws of their own, might seem to imply that federal courts lack this sort of power. To be sure, in areas where the federal government shares lawmaking authority with the states, Congress can certainly enact written federal laws that will take precedence over any contrary rules of state law (whether written or unwritten). But if Congress has not acted, *Erie* tells federal courts to apply state law as articulated by the highest court of the relevant state. *Erie* might therefore seem to carry important lessons not only about federalism but also about the allocation of lawmaking authority within the federal government. Specifically, various scholars have associated *Erie* with the idea that “[p]rinciples related to the separation of powers . . . limit . . . the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress).”⁷⁴

⁷³ Bradley & Goldsmith, *supra* note 15, at 854.

⁷⁴ Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 Harv. L. Rev. 1682, 1682–83 (1974) (endorsing this view at least where the result of the federal courts’ lawmaking would be “to displace state law”); cf. Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 Pepp. L. Rev. 129, 144 (2011) (citing Mishkin’s paper to illustrate a shift from “the notion that *Erie* was based on federalism-derived limits on congressional authority” to the idea “that it was based on principles of *judicial* federalism and separation of powers”). For thoughtful criticism of both the “old myth” that *Erie* has a solid basis in constitutional federalism and the “new myth” that “*Erie*’s principal concern was to eliminate undue judicial policymaking,” see Craig Green, *Repressing Erie’s Myth*, 96 Calif. L. Rev. 595, 599–622 (2008).

There is little question that certain kinds of “lawmaking” are indeed off limits to federal courts. After all, Article I of the Constitution vests the federal government’s “legislative Powers” in Congress, not the federal courts.⁷⁵ Federal courts therefore lack comprehensive authority to create new rules of decision out of whole cloth, in the way that a legislature might. If that is one’s image of common-law decisionmaking, one might conclude that federal courts have no inherent authority to draw rules of decision from the common law. What is more, one might take *Erie* to support that conclusion. On this way of thinking, one reason why Justice Brandeis refused to treat federal courts as equal partners with state courts in articulating common-law rules on topics that lie within the concurrent legislative powers of the federal government and the states is that separation-of-powers principles ordinarily keep federal courts from participating in the sort of “lawmaking” that common-law decisionmaking entails.

In the late 1970s or early 1980s, some Justices began invoking *Erie* in just this way.⁷⁶ Thus, when Justice Rehnquist proclaimed that “[f]ederal courts . . . are not general common-law courts and do not possess a general power to develop and apply their own rules of decision,” he cited *Erie*.⁷⁷ In his view, *Erie* recognized that “[t]he enactment of a federal rule” is usually a matter for Congress rather than the federal judiciary, and hence that “a federal court could not generally apply a federal rule of decision . . . in the absence of an applicable Act of Congress.”⁷⁸

For people who think of the common law in these terms, *Erie* potentially matters even in realms that lie beyond the reach of state law and that therefore do not implicate *Erie*’s specific holding.⁷⁹ Justice

⁷⁵ U.S. Const. art. I, § 1.

⁷⁶ See 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, 617 (1984) (noticing that “something is afoot with *Erie*,” and explaining that Justices Powell and Rehnquist had started citing *Erie* “in cases that have nothing to do with the *Erie* doctrine as the phrase is normally used”); see also *id.* at 625 (“A substantial block of the [Burger] Court—probably four Justices—views the common-law powers of federal courts as extremely limited and stresses the primacy of Congress in all matters of ‘lawmaking.’”).

⁷⁷ *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).

⁷⁸ *Id.* at 312–13.

⁷⁹ But see Anthony J. Bellia Jr. & Bradford R. Clark, General Law in Federal Court, 54 Wm. & Mary L. Rev. 655, 707 (2013) (“*Erie* does not prohibit federal judicial application of general law to matters beyond the regulatory authority of the states.”); cf. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2253–54 (2011) (Thomas, J., concurring in the judgment)

Scalia has explained that after *Erie*, “federal common law [is] self-consciously ‘made’ rather than ‘discovered[.]’ by judges,” and so “federal courts must possess some federal-common-law-making authority before undertaking to craft it.”⁸⁰ According to Justice Scalia, moreover, *Erie* establishes that neither the typical jurisdictional statute nor the general language of Article III confers such authority.⁸¹ For a number of federal judges, the upshot seems to be that unless some other written federal law gives the federal courts lawmaking authority in a specific area, courts cannot legitimately articulate any federal rules of decision as a matter of unwritten law, even on questions that the common law or equity jurisprudence has traditionally been understood to address.⁸²

(concluding that the common law operates of its own force, rather than through incorporation into the federal Patent Act, to supply the standard of proof when a litigant challenges the validity of a patent).

⁸⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in the judgment).

⁸¹ See *id.* at 744 (referring to “the ‘lesson of *Erie*[.]’ that ‘grants of jurisdiction alone . . . are not themselves grants of lawmaking authority’” (quoting Daniel J. Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int’l L. 513, 541 (2002))); *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting) (citing *Erie* for the proposition that “[i]n general, . . . the ‘judicial Power’ created under Article III of the Constitution . . . does not encompass the making of substantive law”); see also *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring in the judgment) (indicating that in *Erie*, the Supreme Court “washed its hands of general common-lawmaking authority”).

⁸² See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 17 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (indicating that because customary international law “is a kind of international common law” that “does not result from any of the mechanisms specified in the U.S. Constitution for the creation of U.S. law,” its norms do not supply rules of decision for federal courts unless “a statute or self-executing treaty” incorporates them); *id.* at 10, 32–36 (arguing that “in the post-*Erie* era,” federal courts cannot legitimately recognize norms of customary international law even to the extent of allowing those norms to affect the interpretation of a federal statute); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 553 (7th Cir. 1997) (Easterbrook, J., concurring in part and dissenting in part) (citing *Erie* for the proposition that “there is no free-floating common law,” and concluding that because federal courts are not authorized simply to “make up” principles of agency law in the context of claims under Title VII, courts must draw such principles from the law of some individual state), *aff’d* on other grounds sub nom. *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); see also J. Harvie Wilkinson III, *Our Structural Constitution*, 104 Colum. L. Rev. 1687, 1694 (2004) (“The famous maxim that ‘[t]here is no federal general common law’ means that federal courts should stick to their basic task of interpreting the Constitution and statutes and not go about creating new rules on their own.” (quoting *Erie*, 304 U.S. at 78)).

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B. How Modern Skeptics of Federal Common Law Account for State Common Law

The claim that federal courts need special authorization to articulate any substantive rules of decision as a matter of unwritten law, because doing so entails a form of “lawmaking” that separation-of-powers principles ordinarily put beyond the federal courts’ proper role, invites an objection. American-style separation of powers is not confined to the federal government; state constitutions also separate judicial power from legislative power. Nonetheless, state courts routinely draw substantive rules of decision from various bodies of unwritten law, including the common law and equity jurisprudence. For reasons of federalism, one can certainly conclude (as *Erie* does) that federal courts should follow what state courts say about the content of the unwritten law in force in any given state. But in areas where the federal Constitution, a federal statute, or a federal treaty has preempted state law, why can’t federal courts do the same sorts of things that state courts do in other areas?⁸³

By and large, this objection has not caused skeptics of federal common law to rethink the assumption that common-law decisionmaking necessarily entails robust lawmaking authority. Instead, skeptics of federal common law suggest that state courts have more such authority in areas of state law than federal courts have in areas of federal preemption. As we shall see, though, the skeptics’ efforts to distinguish the role of common law at the state level from its role at the federal level are not obviously correct.

1. Do State Constitutions Give State Courts More Robust Lawmaking Powers than the Federal Constitution Gives Federal Courts?

Skeptics of federal common law often speak as if state and federal courts are fundamentally different: State courts are “common-law courts” with “common-law powers” to develop new rules of decision as

⁸³ See Hill, *supra* note 8, at 1025 (arguing that “there is no qualitative difference between federal and state judicial power” and that in “areas of federal preemption, created by force of the Constitution,” federal courts can and do “formulate rules of decision without guidance from statutory or constitutional standards”); Kramer, *supra* note 19, at 279 (“[A]bsent 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.”).

they see fit,⁸⁴ while federal courts are not.⁸⁵ People tend to make this assertion in passing, and therefore without much explanation. For people who think that common-law decisionmaking entails quasi-legislative power, though, one possible explanation is that the typical state constitution gives state courts more such power than the federal Constitution gives federal courts. On this view, the federal Constitution establishes a crisper separation between judicial and legislative power than the typical state constitution.⁸⁶

Of course, federal judges who think that all common-law decisionmaking requires robust lawmaking power, and who understand the federal Constitution to withhold such power from federal courts, do not necessarily have to argue that state constitutions are different. From the perspective of federal judges, the authoritative interpretation of state constitutions is a matter for the highest court of each state. Federal judges can therefore say that whether or not the courts of any particular state are correct to assert “common-law powers” under their state’s constitution, the federal Constitution does not confer such powers on federal courts.⁸⁷

⁸⁴ See *supra* text accompanying note 14; see also, e.g., *Allison v. Boeing Laser Technical Servs.*, 689 F.3d 1234, 1240 (10th Cir. 2012) (treating “[j]udge-made common law” like “legislature-made law” for purposes of the doctrine that new state laws do not operate in geographic enclaves that the state has already ceded to the federal government, and explaining that “[w]hen a state court adopts a new cause of action through its common-law powers, . . . [the state] creates new law no less than when it speaks through the legislature”).

⁸⁵ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (“Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.” (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted)); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981) (“It is well established that the federal courts do not have the authority to make law that is inherent in state common law courts.”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 109 (2012) (“[F]ederal courts do not possess the lawmaking power of common-law courts.”).

⁸⁶ Cf. Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 *Tex. L. Rev.* 479, 496 & n.113 (2013) (discussing the consequences of “assum[ing] that state constitutions vest in or impliedly reserve for the judiciary general common law powers” that the federal Constitution withholds from federal courts).

⁸⁷ Cf. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *Fordham L. Rev.* 319, 347 & n.162 (1997) (indicating that the state courts’ authority to “engage in general common-lawmaking” is “a matter of state constitutional law,” but that the federal Constitution restricts such lawmaking by federal courts).

Still, no one seems to doubt that the typical state court does indeed have legitimate authority to articulate and apply certain rules of decision as a matter of unwritten law. If one thinks that state courts get that authority from their state's constitution, and if one further assumes that common-law decisionmaking inherently entails a robust type of lawmaking, then one must think that the typical state constitution is properly interpreted to give state courts robust lawmaking power.

At least for people who favor an originalist approach to state constitutions, however, that idea should seem strange. Perhaps it is superficially plausible that some *modern* state constitutions might give state supreme courts substantial discretionary power to make up rules of state law. But *old* state constitutions probably were not written and adopted on Benthamite premises about what courts do, and some states continue to operate under constitutions that are very old indeed. The constitutions of Massachusetts and New Hampshire are both even older than the federal Constitution, and ten other states also retain constitutions that were adopted before the Civil War.⁸⁸ I am inclined to doubt that any of these antebellum constitutions was originally understood to delegate robust lawmaking authority to the state courts.⁸⁹ (By their very terms, indeed, more than half of these constitutions explicitly restrict mixing “judicial” and “legislative” powers in the same department of the state government.⁹⁰) I also see little reason to believe

⁸⁸ The oldest state constitutions that remain in force are those of Massachusetts (1780), New Hampshire (1784), Vermont (1793), Maine (1820), Rhode Island (1843), Wisconsin (1848), Indiana (1851), Ohio (1851), Iowa (1857), Minnesota (1858), Oregon (1859), and Kansas (1861).

⁸⁹ Legal historians might not be of one mind on this point. Compare Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 2 (1977) (arguing that “by 1820 the process of common law decision making had taken on many of the qualities of legislation” and “judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules”), with, e.g., R. Randall Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1780–1860*, and on the Common Law in America, 53 *Ind. L.J.* 449 (1978) (criticizing Professor Horwitz's interpretation of the evidence).

⁹⁰ For provisions prohibiting all such mixing, see Mass. Const. pt. 1, art. XXX (“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”); Vt. Const. ch. II, § 5 (“The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”). For provisions prohibiting the combination of powers except as “expressly” provided by the constitution itself, see Ind. Const. art. 3, § 1; Iowa Const. art. III,

that any of these constitutions was originally understood to vest a fundamentally different sort of judicial power in the state courts than Article III of the federal Constitution vested in the federal courts. At least in these states, differences between the state and federal constitutions are not a promising way for originalists to explain why state courts enjoy “common-law powers” within realms of state law while federal courts lack such powers within realms of federal preemption.

2. Does the Lack of a Federal “Reception Statute” Justify Blanket Skepticism of Federal Common Law?

Professor Merrill has advanced a different and more plausible reason to distinguish the role of unwritten law at the state level from its role at the federal level.⁹¹ Most states have enacted written “reception” provisions that explicitly adopt the common law as a source of rules of decision. By contrast, Congress has not enacted a similar federal statute specifying that the common law applies in realms that lie beyond the reach of state law.

On July 3, 1776, a lawmaking convention in Virginia set the pattern for the states by adopting an ordinance that apparently was designed both to address longstanding disputes about the status of English law in the American colonies⁹² and to identify categories of pre-existing law that would remain in force notwithstanding independence. The ordinance specified that “the common law of England,” along with colonial statutes and many statutes enacted by Parliament before Virginia was settled, “shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.”⁹³ Most of the other original states also

§ 1; Me. Const. art. III, § 2; Minn. Const. art. III, § 1. For a more flexible but still strongly worded separation-of-powers provision, see N.H. Const. pt. 1, art. 37. See also Pojanowski, *supra* note 86, at 510 (“If anything, the separation norms in many state constitutional regimes are stronger than in the federal context.”).

⁹¹ Thomas W. Merrill, *The Judicial Prerogative*, 12 *Pace L. Rev.* 327, 346–47 (1992).

⁹² See generally Elizabeth Gaspar Brown, *British Statutes in American Law, 1776–1836*, at 1–22 (1964) (describing the English position that “the common law and acts of Parliament in force in England at the time of the settlement of each colony were not . . . automatically brought by the settlers to that colony,” and contrasting the American position that they were).

⁹³ Ordinance of July 3, 1776, *in* *Ordinances Passed at a General Convention, of Delegates and Representatives, from the Several Counties and Corporations of Virginia* 9, 10

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adopted statutory or constitutional provisions specifying in one way or another that the common law was in effect, and most states that have joined the Union more recently have followed suit.⁹⁴ All told, more than forty states currently have such provisions.⁹⁵

In keeping with the idea that common-law decisionmaking entails quasi-legislative authority, Professor Merrill describes these provisions as delegating lawmaking power to the state courts.⁹⁶ But even people who have a more old-fashioned view of the common law are likely to invoke the reception provisions when explaining why courts should draw rules of decision from the common law on matters that lie within the reach of state law. Conversely, the absence of any general reception statute at the federal level might seem to explain why courts should *not* typically draw rules of decision from the common law on questions that lie *beyond* the reach of state law. No matter how well-defined the common law might be, perhaps it is simply not in force with respect to such questions (absent adoption by Congress).

(Richmond, Ritchie, Trueheart & Du-Val 1816); cf. Act of Nov. 25, 1789, *in* 13 *The Statutes at Large; Being a Collection of All the Laws of Virginia* 23, 24 (William Waller Hening ed., Philadelphia, Thomas DeSilver 1823) (repealing the reception of statutes enacted by Parliament).

⁹⁴ See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 *Vand. L. Rev.* 791, 797–804 (1951).

⁹⁵ See Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and de Homine Replegiando*, 37 *Golden Gate U. L. Rev.* 219, 249 n.134 (2007) (providing a good collection of citations). More than half of the current provisions still refer to “the common law of England.” See, e.g., Ala. Code § 1-3-1 (1975); Va. Code Ann. § 1-200 (1950). But cf. Alaska Stat. § 01.10.010 (1962) (simply referring to “the common law”); N.M. Stat. Ann. § 38-1-3 (West 1978) (referring to “the common law as recognized in the United States of America”).

⁹⁶ Merrill, *supra* note 91, at 347 (“These receiving statutes . . . represent an example of what I have called ‘delegated lawmaking’: the state legislature has transferred discretionary authority to the state courts to exercise a defined common law jurisdiction, specifically, a general jurisdiction building on the common law of England.”). Of course, that is not exactly how people would have described the reception provisions in the eighteenth and early nineteenth centuries, when some of the provisions were first enacted. See Kramer, *supra* note 19, at 280 (“Merrill’s reading of the receiving statutes is anachronistic in that the kind of delegation he assumes is a distinctly modern phenomenon.”). As a historical matter, then, the early reception provisions may not really satisfy Professor Merrill’s test for identifying delegations of lawmaking authority. See Merrill, *supra* note 17, at 41 (asking whether “the enacting body specifically intended to delegate lawmaking power”).

This explanation is elegant, and it does have some history on its side.⁹⁷ But it is not perfect.⁹⁸ Some states lack statutes adopting the common law, and yet the common law is still thought to be in force in those states.⁹⁹ In a number of the states whose legislatures did adopt the common law, moreover, the state courts made clear that the reception statutes were merely “declaratory of existing law,” and hence that the common law had been in force before the legislature confirmed its status.¹⁰⁰ At least in these states, customary practices (or whatever else the common law might reflect) apparently were thought to be capable of supplying rules of decision for courts even without written enactments.¹⁰¹ And if Anglo-American legal norms allow for this possibility at the state level, then they might also allow for it in areas that lie beyond the reach of state law.

To be sure, *Erie* famously endorsed Justice Holmes’s observation that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”¹⁰² In areas that lie beyond the reach of state law, it might seem to follow that only federal law can supply rules of decision.¹⁰³ On one plausible reading of the Constitution,

⁹⁷ See, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (“There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.”). But see Peter S. Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* 88 (Philadelphia, Abraham Small 1824) (arguing that “at the moment of the adoption of the Constitution of the United States,” the common law “filled up every space which the State laws ceased to occupy”).

⁹⁸ See Kramer, *supra* note 19, at 280–81 (responding to Professor Merrill’s argument).

⁹⁹ See Wise, *supra* note 95, at 250 n.134 (identifying Connecticut and Ohio as states that fit this description); see also *id.* (noting that Rhode Island’s reception provision is limited to English statutes and makes “no reference to the common law”). Ohio did have a reception provision briefly, but the state legislature repealed it in 1806. See Act of Jan. 2, 1806, *in* 1805 Ohio Acts 38. Even so, the Ohio Supreme Court continued to say that the common law “has always been in force” in Ohio. *Carroll v. Olmsted’s Lessee*, 16 Ohio 251, 259 (1847).

¹⁰⁰ Hall, *supra* note 94, at 804. No less a figure than Chief Justice Marshall expressed this view of Virginia’s reception ordinance. See *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8,411); Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1822 (2012) (quoting *Livingston*, 15 F. Cas. at 665).

¹⁰¹ Cf. Hart, *supra* note 37, at 46 (noting that a legal system might treat customary rules as having “the status of law” even before courts recognize and apply them).

¹⁰² *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

¹⁰³ See Bradley & Goldsmith, *supra* note 15, at 852 (taking *Erie* to mean that “all law applied by federal courts must be either federal law or state law”). But cf. Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 *Va. J. Int’l L.* 365, 492–96

moreover, rules of decision cannot have the status of federal law unless they stem from one of the forms of law listed in the Supremacy Clause,¹⁰⁴ which arguably refers only to *written* federal laws.¹⁰⁵ People who combine *Erie* and the Supremacy Clause in this way might be skeptical of federal common law even if they are not skeptical of common law at the state level.

The Supremacy Clause, however, does not purport to identify all the forms of law (other than state law) that can supply rules of decision in American courts. Instead, it identifies the forms of law that will trump contrary rules of state law. Consistent with the Supremacy Clause, one could simultaneously believe that (1) only written federal law is capable of preempting state law and (2) in areas where written federal law does preempt state law, federal courts can sometimes draw rules of decision from unwritten law. Indeed, Professor Clark (who is the nation's leading expositor of the Supremacy Clause) takes precisely this position.¹⁰⁶

As for *Erie*, even if every rule of decision needs a "definite authority behind it," and even if no individual state can supply that authority in areas of federal preemption, one need not conclude that every rule of decision applied in such areas has to be federal law in the same sense as an act of Congress. Perhaps the requisite authority sometimes can be supplied by widespread customs, the collective thrust of precedents recognized across the fifty states, or other sources of validation. On this view, even if principles of unwritten law have a different legal status than statutes and treaties, they might still have the authority of the

(2002) (pointing out that Bradley and Goldsmith's formulation neglects the possibility that state or federal choice-of-law rules might tell federal courts to apply the law of a foreign country, and concluding that domestic choice-of-law doctrines could also tell courts to draw rules of decision from customary international law or other principles that are not identified with any particular sovereign).

¹⁰⁴ U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); see Merrill, *supra* note 91, at 336 (noting that the Supremacy Clause contains a "description of federal law"); Vasani Kesavan, *The Three Tiers of Federal Law*, 100 Nw. U. L. Rev. 1479, 1480 (2006) ("According to the Constitution's Supremacy Clause, there are only three kinds of federal law: the Constitution, laws, and treaties.").

¹⁰⁵ See *supra* note 10.

¹⁰⁶ See Bellia & Clark, *supra* note 79 (endorsing the second proposition); Bradford R. Clark, *Erie's Constitutional Source*, 95 Calif. L. Rev. 1289, 1302 (2007) (endorsing the first proposition); see also Ramsey, *supra* note 10, at 569, 580, 619 (agreeing that the Supremacy Clause supports the first proposition and does not foreclose the second proposition).

people of the United States behind them in such a way as to be capable of providing rules of decision for courts. In a nation whose legal heritage traces primarily to England and in which every state but Louisiana has adopted the common law, it does not seem logically impossible for the common law to operate in realms of federal preemption notwithstanding the absence of a federal reception statute.

C. Are Customs and Precedents Across the United States Too Varied to Supply Any Federal Common Law Not Based on “Delegated Lawmaking”?

Apart from the absence of a federal reception statute, there is another possible reason why someone who accepts the role of common law at the state level might nonetheless question the concept of federal common law. Even if one thinks of the common law as customary law (either in the sense that it reflects social practices or in the sense that it reflects judicial precedents), the geographic scale of the relevant customs might be limited: The social practices and precedents followed in one state might differ dramatically from the social practices and precedents followed in another state. Depending on the facts, it might make more sense to speak of the common law of individual states than to speak of the common law of the nation as a whole. If state-by-state practices and precedents are not sufficiently cohesive, the nation as a whole might not *have* any common law that is capable of supplying rules of decision in areas of federal preemption.¹⁰⁷

Again, this argument has some historical support. For instance, the diversity of the common law in the United States played a role in early debates about whether federal courts could entertain prosecutions for conduct that Congress had not criminalized by statute, but that the common law allegedly regarded as offenses against the United States.¹⁰⁸

¹⁰⁷ Cf. Sachs, *supra* note 100, at 1882–84 (considering, but rejecting, this sort of argument).

¹⁰⁸ See, e.g., *United States v. Worrall*, 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766) (opinion of Chase, J.) (“Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?”).

The fact that each state had its own version of the common law also cropped up in congressional debates about the Sedition Act.¹⁰⁹

On the other hand, the concept of “general” law that Justice Story invoked in *Swift v. Tyson*,¹¹⁰ and that informed the relationship between state and federal courts for much of American history, was predicated on the idea that certain aspects of the common law in force in each state are the same throughout the country (unless modified by local statutes or peculiar local customs).¹¹¹ Historically, moreover, courts looked to the “general” law for rules of decision not only on topics that came within the lawmaking powers of individual states, but also in realms of federal

¹⁰⁹ See, e.g., 8 Annals of Cong. 2137 (1798) (“There is not, Mr. G[allatin] said, any such thing as a common law of the United States. The common law of Great Britain received in each colony had in every one received modifications arising from their situation; those modifications differed in the several States; and now each State had a common law, in its general principles the same, but in many particulars differing from each other.”); see also Stewart Jay, *Origins of Federal Common Law* (pt. 1), 133 U. Pa. L. Rev. 1003, 1075–83 (1985) (discussing the debates, though portraying this particular argument as a red herring).

The fact that different states have different versions of the common law may also have entered into Justice M’Lean’s opinion for the Supreme Court in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). There, Henry Wheaton (who had published reports of the Court’s cases from 1816 to 1827) sued his successor for republishing some of Wheaton’s work. Wheaton argued that the federal copyright statutes gave him exclusive rights in his reports, but he also sought to assert such rights as a matter of common law. According to Justice M’Lean, the latter claim raised the question “whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania” (the state where the relevant events had occurred). *Id.* at 658. M’Lean explained: “It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law.” *Id.* In context, though, M’Lean’s point probably was less about the *coherence* of common law at the national level than about its *authority*. While M’Lean argued that “[t]he common law could be made a part of our federal system, only by legislative adoption,” he did not suggest that there was nothing coherent for Congress to adopt. *Id.*; see also Stewart Jay, *Origins of Federal Common Law* (pt. 2), 133 U. Pa. L. Rev. 1231, 1318 (1985) (noting that M’Lean later joined Justice Story’s opinion in *Swift v. Tyson*, which characterized some aspects of the common law as being “general” across the states).

¹¹⁰ 41 U.S. (16 Pet.) 1 (1842). For the canonical article showing that the concept of “general” law in the United States long pre-dated *Swift*, 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); see also *id.* at 1521 (acknowledging that “[t]he common law had never been perfectly uniform among the states and was growing less so [by the 1820s],” but concluding that “there had always been, and still remained, a substantial core of uniform law that was administered by the federal and state courts as a general American common law”).

¹¹¹ See *Swift*, 41 U.S. (16 Pet.) at 19; cf. Nelson, *supra* note 1, at 929–49 (discussing the logic behind *Swift*’s conclusion that federal courts did not have to defer to the courts of any single state about the content of the “general” aspects of the state’s unwritten law).

preemption. For instance, at a time when the dormant Commerce Clause was understood to prevent state law from regulating interstate commercial transactions,¹¹² companies that were engaging in interstate commerce sometimes sought to escape common-law obligations by arguing that the common law is not in force at the national level. Although this argument prompted a division of opinion in the lower courts,¹¹³ the Supreme Court firmly rejected it.¹¹⁴ The Court explained away past statements that “[t]here is no common law of the United States”¹¹⁵ as meaning only that there is no *distinctively* federal common law—not “that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.”¹¹⁶ Despite the absence of a federal reception statute, the Court held that “the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment.”¹¹⁷

Admittedly, some lower courts resisted the idea that the common law might operate at the national level in the same manner that it operated in the states. For example, a panel of the U.S. Court of Appeals for the Second Circuit asserted that in areas of federal preemption, when courts sought to flesh out a federal statute by referring to the common law, they “must refer to the common law existing at the time of the Declaration of Independence.”¹¹⁸ But the Supreme Court did not itself embrace this

¹¹² See, e.g., *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 570–77 (1886); see also Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1101–24 (2000) (discussing the doctrinal categories that the Supreme Court used to identify impermissible regulations); James W. Ely, Jr., “The Railroad System Has Burst Through State Limits”: Railroads and Interstate Commerce, 1830–1920, 55 Ark. L. Rev. 933, 937–61 (2003) (emphasizing the complexity of the case law).

¹¹³ Compare *Swift v. Phila. & Reading R.R. Co.*, 58 F. 858, 859 (C.C.N.D. Ill. 1893) (accepting the argument and sustaining an interstate railroad’s demurrer to a complaint accusing it of violating the common law by charging unreasonable rates), and *Gatton v. Chi., Rock Island & Pac. Ry. Co.*, 63 N.W. 589, 601 (Iowa 1895) (similar), with *Murray v. Chi. & Nw. Ry. Co.*, 62 F. 24, 36 (C.C.N.D. Iowa 1894) (rejecting the proposition “that the principles of the common law are not in force in this country in regard to such matters as are placed under national control”).

¹¹⁴ *W. Union Tel. Co. v. Call Publ’g Co.*, 181 U.S. 92, 100–03 (1901).

¹¹⁵ *Smith v. Alabama*, 124 U.S. 465, 478 (1888).

¹¹⁶ *W. Union*, 181 U.S. at 101.

¹¹⁷ *Id.* at 102.

¹¹⁸ *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 F. 574, 577 (2d Cir. 1916); see also 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*

temporal limitation. In myriad areas of federal preemption, moreover, the Court applied “principles of common law” that the Court treated as being common to the nation as a whole.¹¹⁹

As I have noted in prior work,¹²⁰ *Erie* did not end this practice. On various topics, federal courts continue to speak as if customs and precedents that are recognized across the fifty states sometimes fall into coherent patterns, from which courts can distill answers to questions that lie beyond the lawmaking power of any individual state. To take a simple example, when a federal statute uses terms familiar to the common law without offering any alternative definition, interpreters typically do not conclude either that the terms lack meaning or that their meaning varies from state to state. Instead, the Supreme Court routinely takes such terms to refer to “the general common law”—that is, “the dominant consensus of common-law jurisdictions,” as reflected in such sources as the Restatements published by the American Law Institute.¹²¹ Likewise, modern courts often look to these sources for rules of decision when a federal statute preempts state law throughout an entire field but does not itself answer all questions within that field,¹²² or when

§ 50:4 (7th ed. 2012) (repeating, to this day, the idea that “courts interpret federal statutes in light of the common law existing before the Declaration of Independence”).

¹¹⁹ See, e.g., *New Orleans & Ne. R.R. Co. v. Harris*, 247 U.S. 367, 371 (1918); see also Nelson, *supra* note 26, at 742–44 (citing other examples).

¹²⁰ See Nelson, *supra* note 44, at 505–25.

¹²¹ *Field v. Mans*, 516 U.S. 59, 70 & n.9 (1995) (interpreting the word “fraud” in a provision of the Bankruptcy Act to refer to “the general common law of torts”); see also, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–41 (1989) (similarly using “the general common law of agency” to distinguish an “employee” from an independent contractor for purposes of provisions in the federal Copyright Act); Nelson, *supra* note 44, at 521–23 (providing other examples). For some of the pros and cons of treating the Restatements as “presumptively accurate summaries of general American jurisprudence,” see Nelson, *supra* note 44, at 510 & n.35; see also W. Noel Keyes, *Government Contracts Under the Federal Acquisition Regulation* 20–21 & n.80 (3d ed. 2003) (warning that “the Restatements . . . cannot be automatically cited as the ‘general law of contracts’ in the United States,” because modern Restatements sometimes state the Reporters’ policy preferences rather than the collective thrust of existing case law).

¹²² See Nelson, *supra* note 44, at 520–21, 524; see also, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 496–97 (1996) (discussing the role of “the common law of trusts” in ERISA cases); *Agathos v. Starlite Motel*, 977 F.2d 1500, 1508–09 (3d Cir. 1992) (noting that “[f]ederal common law governs the construction of a collective bargaining agreement,” and proceeding to apply “general principles of contract law” as distilled in the Restatement (Second) of Contracts). Admittedly, different judges suggest different theories about the precise mechanism through which this sort of general law operates. Compare *Rogers v. Baxter Int’l*, 521 F.3d 702, 705 (7th Cir. 2008) (“ERISA . . . incorporates normal rules of trust law . . .”), with *Rodrigue v. W. & S. Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991)

Congress creates a federal cause of action without addressing details like survivability or the measure of damages.¹²³

The same concept of “general” American law also continues to operate in what today are regarded as the purest enclaves of federal common law, where the Constitution itself has been held to preempt state law but Congress has not supplied comprehensive rules of decision by statute.¹²⁴ For instance, suppose that a modern court needs to figure out the federal government’s rights and obligations under a contract to which the government is a party. Because the Supreme Court has held that this topic lies beyond the reach of state law,¹²⁵ no individual state’s understanding of the common law of contracts will be dispositive. On many questions of contract law, however, decisions from across the country can be aggregated into general doctrines, of the sort taught in contracts courses at national law schools that try to prepare students for practice in multiple jurisdictions. In the absence of relevant federal statutes or regulations, courts use these general principles of American contract law to handle questions about federal contracts.¹²⁶

The idea that courts can identify coherent themes in American common law also plays a role in many admiralty cases. American courts have always recognized “general maritime law” as a source of rules of decision.¹²⁷ For at least a century, moreover, the Supreme Court has held that the Constitution restricts each state’s power to displace or modify those rules of decision, even with respect to waters inside the state’s

(“Congress intended that federal courts should create federal common law when adjudicating disputes regarding ERISA.”). As styles of statutory interpretation have changed over the years, judges have also expressed different views about the extent to which they can depart from general American law in service of the purposes that they attribute to the relevant federal statute. See Nelson, *supra* note 26, at 749–50.

¹²³ Nelson, *supra* note 44, at 544–49.

¹²⁴ See *id.* at 507–19 (discussing the role of general American law in admiralty cases, cases about state boundaries, and cases about the proprietary rights and obligations of the federal government).

¹²⁵ See *United States v. Cnty. of Allegheny*, 322 U.S. 174, 183 (1944).

¹²⁶ See, e.g., *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*, 758 F.3d 592, 600 (5th Cir. 2014) (noting that the federal common law applicable to government contracts reflects “the core principles of the common law of contracts that are in force in most states” (internal quotation marks omitted)); see also *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1906–08 (2011) (Scalia, J.) (referring to the Supreme Court’s “common-law authority to fashion contractual remedies in Government-contracting disputes,” but drawing applicable principles from the Restatement (Second) of Contracts).

¹²⁷ See, e.g., *Dixon v. The Cyrus*, 7 F. Cas. 755, 757 (D. Pa. 1789) (No. 3,930).

borders.¹²⁸ States have even less lawmaking power with respect to the high seas.¹²⁹ As a result, modern American courts frequently must determine the content of the general maritime law. Sometimes, moreover, that entails distilling rules of decision from customs or precedents recognized across the United States. For instance, in cases about shipboard torts that have a sufficient nexus to the United States, courts routinely identify and apply general American doctrines of tort law rather than the law of a particular state.¹³⁰ Other kinds of maritime cases depend on general doctrines of agency law¹³¹ or contract law.¹³²

To be sure, courts and commentators alike frequently describe federal courts as “making” the rules of decision that they articulate in admiralty and other enclaves of federal common law.¹³³ Starting in the mid-twentieth century, moreover, the Supreme Court has sometimes suggested that it enjoys truly robust lawmaking powers in those enclaves.¹³⁴ Correspondingly, some scholars think of the Court as

¹²⁸ See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (“[P]lainly, we think, no [state] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”).

¹²⁹ See Nelson, *supra* note 44, at 514–15.

¹³⁰ See *id.* at 517 & n.75 (citing examples of the use of general common law in cases involving defamation, trespass, products liability, and intentional infliction of emotional distress).

¹³¹ See, e.g., *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading*, 697 F.3d 59, 71–73 (2d Cir. 2012) (noting that “[i]n admiralty, whether one party has authority to bind another to a maritime contract is a question of general maritime law,” and invoking the Restatement (Third) of Agency to answer it).

¹³² See, e.g., *In re Frescati Shipping Co.*, 718 F.3d 184, 198–99 (3d Cir. 2013) (consulting the Restatement (Second) of Contracts for rules about third-party beneficiaries of maritime contracts).

¹³³ See, e.g., *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23 (2004) (referring to “[o]ur authority to make decisional law for the interpretation of maritime contracts”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (observing that “there are enclaves of federal judge-made law which bind the States,” and citing “the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters” as examples); see also Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585, 594–614 (2006) (discussing the recognized enclaves “in which courts have created federal common law,” and referring throughout to “federal common lawmaking”).

¹³⁴ See, e.g., *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20–21 (1963) (“Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.”); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943) (“The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . In absence of an applicable

engaging in “delegated lawmaking” in these enclaves.¹³⁵ According to Professor Merrill, for instance, the Court has concluded that the statutory and constitutional provisions about admiralty jurisdiction differ from most similarly worded provisions: Given what the Framers were trying to accomplish when they extended the federal government’s judicial power to “all Cases of admiralty and maritime Jurisdiction,”¹³⁶ and given what Congress was trying to accomplish when it gave the federal district courts *exclusive* jurisdiction over “[a]ny civil case of admiralty or maritime jurisdiction,”¹³⁷ the Supreme Court allegedly has read these provisions to contain an “[i]mplicit delegation of lawmaking authority” despite their purely jurisdictional language.¹³⁸ Frank Easterbrook has offered a similar explanation for the role that unwritten law continues to play in disputes about state boundaries (another recognized enclave of federal common law).¹³⁹

At least for people who favor originalist or textualist methods of interpretation, however, this explanation should not have much appeal.

Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); see also *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957) (“We conclude that the substantive law to apply in suits under § 301(a) [of the Labor-Management Relations Act] is federal law, which the courts must fashion from the policy of our national labor laws. . . . The range of judicial inventiveness will be determined by the nature of the problem.”). But cf. *Bellia*, supra note 25, at 916–17 (noting that the Court has asserted less creative authority in other cases about the content of unwritten law in areas of federal preemption, and suggesting that “the general practice of the Supreme Court in this regard seems somewhat inconsistent”).

¹³⁵ The term “delegated lawmaking” comes from Professor Merrill. See Merrill, supra note 17, at 40–46.

¹³⁶ U.S. Const. art. III, § 2.

¹³⁷ 28 U.S.C. § 1333 (2012).

¹³⁸ See Merrill, supra note 91, at 347–48; Merrill, supra note 17, at 30; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., concurring in part and concurring in the judgment) (describing admiralty as “[t]he most firmly entrenched [exception]” to “[t]he rule against finding a delegation of substantive lawmaking power in a grant of jurisdiction”); Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. Pitt. L. Rev. 367, 403–06 (2000) (arguing that in 1948, when Congress re-enacted the statutory grant of admiralty jurisdiction without substantially changing its language, Congress implicitly “ratified the law-making power” that the Supreme Court had already asserted—with the result that § 1333 “should be understood as a delegation of admiralty law-making power by Congress to the judiciary”).

¹³⁹ See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla. L. Rev. 1, 6 (2004) (“Article III itself delegated to the Supreme Court a power to make up a law of interstate boundary disputes”); see also Merrill, supra note 91, at 347–48 (attributing the relevant “delegation” to 28 U.S.C. § 1251(a), which gives the Supreme Court exclusive original jurisdiction over “all controversies between two or more States”).

Unless one attributes “occult content” to provisions that are cast in jurisdictional terms,¹⁴⁰ it is hard to identify written federal laws that really delegate robust lawmaking authority to the Supreme Court in all these enclaves. If courts need such a delegation in order to recognize any rules of decision as a matter of unwritten law, then the logical conclusion is that unwritten law should not really operate in many of these enclaves.

Perhaps that conclusion would make sense in some legal systems.¹⁴¹ But ours is not one of them. Consider again the federal government’s rights and obligations under contracts to which it is a party (a longstanding enclave of federal common law). Although federal statutes and regulations extensively address certain aspects of the procurement process,¹⁴² written federal law says relatively little about how to interpret federal contracts.¹⁴³ Nonetheless, courts surely should not hold that federal contracts are unintelligible and unenforceable. In the absence of written federal law on this topic, it is natural for courts to resolve questions about the federal government’s contractual rights and obligations in light of general American principles of contract law.¹⁴⁴

¹⁴⁰ Cf. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 460–61 (1957) (Frankfurter, J., dissenting) (criticizing the majority’s interpretation of § 301 of the Labor-Management Relations Act).

¹⁴¹ Cf. Letter from Jeremy Bentham to President James Madison, *supra* note 52, at 1 (offering to prepare “a *compleat body* of proposed law, in the form of Statute law,” that could be enacted to end all reliance upon unwritten law in the United States).

¹⁴² See, e.g., 41 U.S.C. §§ 101–8707 (2012); 48 C.F.R. §§ 1.000–9905.506-63 (2013).

¹⁴³ See *XTRA Lease v. United States*, 50 Fed. Cl. 612, 621 (2001).

¹⁴⁴ Of course, one might question the premise that federal contracts really lie beyond the reach of state law. More generally, people sometimes argue that the enclaves of federal common law currently recognized by the Supreme Court go too far. See, e.g., Ernest A. Young, *Preemption at Sea*, 67 *Geo. Wash. L. Rev.* 273 (1999) (arguing that state law should play a greater role in admiralty cases). Still, the idea that the Constitution puts *some* topics beyond the reach of state law is not particularly controversial. For instance, state law surely does not govern all questions about state boundaries; a state cannot always end disputes with neighboring states simply by getting its own legislature to enact a statute that favors its position. Nor can state law comprehensively regulate everything that occurs on the high seas. To whatever extent there are questions of domestic American law that state law *cannot* answer and that written federal law *does not* answer, courts can be expected to seek rules of decision in the traditional sources of unwritten law (such as customary practices or the collective thrust of precedents from across the fifty states or other relevant jurisdictions).

While recognizing some enclaves of federal preemption, Professor Clark has suggested a different way of minimizing the role of unwritten law at the federal level. In his view, at least some of the substantive rules of decision that courts currently recognize in these enclaves can be derived from the Constitution itself, and hence have a source in *written* law. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 *U. Pa. L.*

If one agrees that courts can indeed identify and apply some rules of decision as a matter of unwritten law in this enclave, one should think hard about why this sort of federal common law is legitimate. Nothing in the Constitution or any relevant federal statute can plausibly be understood to give the Supreme Court quasi-legislative authority with respect to the interpretation of federal contracts. But courts do not necessarily *need* quasi-legislative authority in order to distill rules of decision from the collective thrust of precedents across the fifty states (or directly from customs and other social practices). To be sure, the task of aggregating different states' customs and precedents into principles of general American contract law will entail resolving some indeterminacies and making some judgment calls, and courts performing this task can certainly be described as "making law" in some sense. The more the relevant customs and precedents constrain the courts' discretion, though, the less the task might seem to require a special delegation of lawmaking authority, above and beyond the courts' ordinary power (or duty) to determine the rules of decision applicable to the cases that come before them. Thus, the more seriously one takes the idea that federal common law can be grounded in pre-existing customs or precedents, the more natural it will seem for courts to recognize it in areas of federal preemption.¹⁴⁵

D. Some Consequences of the Skeptics' Arguments

So far, I have been focusing on whether unwritten law can legitimately play any role in areas of federal preemption. As we shall see, though, some of the arguments advanced by skeptics of federal common law have broader consequences. This Section identifies a few consequences that the skeptics themselves might find troubling.

Rev. 1245, 1251 (1996); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 Va. L. Rev. 729 (2012) (extending this argument). Even if that is true to some extent, though, it is not a complete explanation of the rules of decision that operate in areas of federal preemption. Any attempt to make it so, moreover, runs into problems of the sort discussed in Part III of this Article.

¹⁴⁵ See Sachs, *supra* note 100, at 1834–38 (noting that "charges of illegitimacy" arise when courts act as if they can simply "invent" federal common law in areas of constitutional preemption, but observing that federal common law "is arguably more legitimate" when its content reflects general law); cf. Bellia, *supra* note 25, at 920 (concluding that even when "federal courts are justified in making federal common law," they should not assume that "they are justified in making it as an adjunct federal legislature").

1. Implications for State Courts

Federal judges who argue that common-law decisionmaking is quasi-legislative often are trying to explain their opposition to the concept of federal common law. But their arguments have implications for the development of *state* common law. In particular, modern rhetoric about the alleged differences between state and federal courts may exacerbate the tendency of some state courts to think that they are completely in charge of the content of the common law in their state and that they can legitimately establish whatever rules they like. When eminent federal judges speak as if state law gives state courts quasi-legislative authority to make up their own rules of decision, some state judges might listen.¹⁴⁶

One can understand why federal judges might have fallen into the habit of thinking that state courts really do enjoy robust lawmaking powers. After all, *Erie* tells federal courts to defer to each state's highest court about the content of that state's law—so if a state supreme court were to invent rules of decision out of whole cloth, federal courts would not second-guess them.

Still, there is a difference between telling federal courts that they should defer to what state courts say about the content of state law and telling state courts that they enjoy legitimate authority to say whatever they want. At least where *written* state laws are at issue, everyone would acknowledge this difference; even though federal courts must accept whatever glosses state courts put on state statutes, no one would conclude that state courts therefore have legitimate authority to treat state statutes as empty vessels for the judges' views. By the same token, some modern state judges continue to draw a distinction between their own policy preferences and the common law that is in force in their states.¹⁴⁷

When skeptics of federal common law speak as if common-law decisionmaking is quasi-legislative, and when they explain the role of common law at the state level by suggesting that state law delegates quasi-legislative authority to the state courts, they risk undermining the position of these state judges. To the extent that modern skepticism of federal common law grows out of concerns about judicial policymaking,

¹⁴⁶ Cf. *Nat'l Trust for Historic Pres. v. City of Albuquerque*, 874 P.2d 798, 801 (N.M. Ct. App. 1994) (citing federal opinions and concluding that "a state court, because it possesses common-law authority, has significantly greater power than a federal court to recognize a cause of action not explicitly expressed in a statute").

¹⁴⁷ See, e.g., *Taylor v. Virginia*, 710 S.E.2d 518, 523 (Va. Ct. App. 2011).

it would be ironic if the skeptics' arguments encouraged more aggressive judicial policymaking at the state level.

2. *Implications in the Special Enclaves of Federal Common Law*

A similar irony is possible in the special enclaves where even skeptics acknowledge the existence of federal common law. To be sure, the idea that common-law decisionmaking is quasi-legislative has led skeptics to try to minimize those enclaves. According to the skeptics, even in areas that lie beyond the reach of state law, courts cannot legitimately articulate rules of decision as a matter of federal common law unless Congress or the Constitution has delegated a robust type of lawmaking power to the federal judiciary. Judges who accept this argument will conclude that they cannot legitimately recognize federal common law on many topics. But the argument has a corollary: In areas where courts do recognize federal common law, federal judges can properly base the content of that law on their own views of sound policy. In these areas, after all, federal judges are operating on the theory that they enjoy delegated power to make law (as opposed to the duty to identify rules of decision supplied by pre-existing sources).

Justice Scalia's majority opinion in *Boyle v. United Technologies Corp.*¹⁴⁸ arguably illustrates the results. David Boyle, a helicopter co-pilot for the United States Marines, had drowned during a training exercise off the coast of Virginia Beach; his helicopter had crashed in the ocean and he had not gotten out. Alleging that the co-pilot's escape hatch had been badly designed, Boyle's estate sued the private company that had supplied the helicopter to the United States. Although the escape hatch apparently had conformed to the specifications in a contract between the supplier and the United States, nothing in written federal law explicitly immunized the supplier from liability to government employees who were injured because of defects in that design. If the supplier had sold the helicopter to a private buyer, moreover, the fact that the buyer had approved the design probably would not have prevented injured employees of the buyer from suing the supplier over design defects.¹⁴⁹ Nonetheless, Justice Scalia concluded

¹⁴⁸ 487 U.S. 500 (1988).

¹⁴⁹ To be sure, many states do recognize some version of a "contract specifications defense" in product-liability cases. See David G. Owen, Special Defenses in Modern Products Liability Law, 70 Mo. L. Rev. 1, 3-6 (2005). The relevant doctrine originated in negligence suits as "a specialized application of the familiar . . . concept of reasonable

that “so-called ‘federal common law’”—which he described as “federal law of a content prescribed . . . by the courts”¹⁵⁰—protected companies that supply military equipment to the federal government against liability of this sort. Specifically, Justice Scalia formulated the following rule:

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.¹⁵¹

While indicating that federal common law supplants state tort law in only “a few areas,” Justice Scalia invoked precedents to support the conclusion that Boyle’s claim implicated such an area.¹⁵² And once he

reliance”: When a buyer arranges for a contractor to build something according to the buyer’s specifications, it is not negligent for the contractor to rely upon those specifications “unless they are so obviously defective and dangerous that a competent contractor would not have followed them.” Richard C. Ausness, *Surrogate Liability: The Government Contract Defense and Products Liability*, 47 *Ohio St. L.J.* 985, 992–93 (1986). In many states, this principle of non-negligence has evolved into a defense that can operate in strict-liability cases too. See Owen, *supra*, at 4–5 (acknowledging that “the courts have split” on this topic, but asserting that “[a] growing majority of courts have . . . [held] that even in strict liability, a manufacturer who merely fabricates a product according to the purchaser’s design is not responsible, in the absence of an obvious defect, if the design proves bad”).

Some of the main justifications for this defense, however, assume that “the manufacturer is not an expert” on the design issues and can “reasonabl[y] . . . rely on the purchaser’s superior knowledge.” Richard C. Ausness, *Risky Business: Liability of Product Sellers Who Offer Safety Devices as Optional Equipment*, 39 *Hofstra L. Rev.* 807, 822 (2011). Other justifications assume at least that “the manufacturer has not participated in the design of the product.” *Id.* In *Boyle*, the manufacturer did not fit either of these descriptions: It was very much an expert, and it had actively participated (and indeed may have taken the lead) in designing the helicopter. See *Boyle v. United Techs. Corp.*, 792 F.2d 413, 414–15 (4th Cir. 1986), vacated, 487 U.S. 500 (1988). For both of those reasons, it might not have been able to benefit from standard versions of the contract-specification defense. Cf. Raymond A. Pelletier, Jr., Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 *B.C. L. Rev.* 1025, 1034–39 (1982) (addressing the contract-specifications defense in the specific context of claims against government contractors, and noting the possible relevance of “[a]ny special knowledge or expertise possessed by the manufacturer” as well as “[whether] the manufacturer participated in developing the design”).

¹⁵⁰ *Boyle*, 487 U.S. at 504.

¹⁵¹ *Id.* at 512.

¹⁵² See *id.* at 504–05 (noting that past decisions had recognized federal common law in two “closely related” areas); *id.* at 506 (adding that *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), had already recognized some federal immunities for government

decided that the Court could articulate substantive defenses as a matter of federal common law, Justice Scalia based his conclusions about the content of those defenses largely on policy concerns. Admittedly, he did not purport to be dreaming up the relevant policies entirely on his own: Congress's decision to build a "discretionary function" exception into the Federal Tort Claims Act figured prominently in his analysis.¹⁵³ But the Federal Tort Claims Act does not govern suits against private companies, and Justice Scalia does not ordinarily allow a statutory provision's alleged policies to spill beyond the provision's explicit limits. Apart from the policy that he attributed to the Federal Tort Claims Act, moreover, Justice Scalia freely made additional policy arguments of his own. For instance, he rejected a lower court's narrower version of the government-contractor defense because "it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process."¹⁵⁴ Likewise, he used quasi-legislative language to explain his decision to accord immunity only if the supplier warned the government of dangers known to the supplier but not the government: "We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision."¹⁵⁵

Perhaps Justice Scalia can be forgiven for not trying to derive the applicable rule of decision from real-world customs or other external sources. Even if real-world customs can shed light on certain issues in tort (such as standards of care), the existence and scope of a government-contractor defense for product-liability claims might not be the sort of issue that customary practices are likely to illuminate. But even if one thinks that the common law on such topics is likely to be largely judge-made, one need not conclude that each court gets to make up the law for itself. Instead, perhaps the applicable common-law rules reflect the combined judgments of courts across multiple jurisdictions, and perhaps cases of first impression in one jurisdiction should usually be handled according to the consensus that has emerged in other

contractors); *id.* at 506–08 (concluding that although government contractors do not enjoy blanket immunity from all state-law liabilities, courts could find preemption of state laws that conflicted with "federal policy" or a "federal interest," and "[t]he conflict . . . need not be as sharp as that which must exist for ordinary preemption").

¹⁵³ See *id.* at 511–12 (citing 28 U.S.C. § 2680(a)).

¹⁵⁴ *Id.* at 513.

¹⁵⁵ *Id.* at 512–13.

jurisdictions. In the years since *Erie*, many federal judges have indeed based their decisions about the content of federal common law on patterns in the jurisprudence and laws of the fifty states.¹⁵⁶ In *Boyle*, however, Justice Scalia made no effort to investigate what other courts had said about government-contractor defenses.

That was no oversight. In the special areas where Justice Scalia accepts the legitimacy of federal common law, he is assuming that Congress or the Constitution has delegated a robust type of lawmaking power to the federal courts. If federal courts have indeed been handed this sort of lawmaking power, there is no obvious reason why the law that they make should be constrained by the decisions of judges in other jurisdictions.¹⁵⁷ To the contrary, the idea that federal common law rests on a delegation of quasi-legislative power might well imply that federal courts can shape its content at will, subject only to whatever limits Congress or the Constitution might suggest. In sum, the arguments that skeptics have used to confine the concept of federal common law are likely to encourage relatively unconstrained judicial policymaking in the enclaves of federal common law that courts do recognize.

3. Implications for Statutes that Borrow Terms from the Common Law

a. Common-Law Terms as Delegations of Lawmaking Power

The idea that judges create the common law out of whole cloth also has ripple effects on the interpretation of federal statutes that borrow terms from the common law. Consider the Sherman Act of 1890, which outlaws “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”¹⁵⁸ Because Congress took the concept of “contract[s] . . . in restraint of trade” from the common law,¹⁵⁹ scholars and judges alike have

¹⁵⁶ See supra notes 120–32 and accompanying text.

¹⁵⁷ Cf. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 84 (1994) (Scalia, J.) (doubting the relevance of a litigant’s arguments about “the rule applied in the vast bulk of decisions from 43 jurisdictions,” and asserting that if federal common law governed the question at issue, “we see no reason why it would necessarily conform to that ‘independently . . . adopted by most jurisdictions’” (citation omitted)).

¹⁵⁸ Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890).

¹⁵⁹ See *Newell v. Meyendorff*, 23 P. 333, 333 (Mont. 1890) (“The rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances.”); Elisha Greenhood, *The Doctrine of Public Policy in the Law of Contracts* 683–770 (1886) (attempting to systematize cases on this subject from England and the United States). But see Robert H. Bork, *Legislative Intent and the Policy of the Sherman*

understood the Sherman Act “to transform a body of existing common law . . . into federal law and to authorize federal courts to continue to build upon that law through the incremental case-by-case process.”¹⁶⁰ Many people describe the resulting rules of decision as “federal common law”¹⁶¹ and the Sherman Act itself as “a clear-cut . . . delegation of lawmaking power to courts.”¹⁶²

In theory, such statements could simply mean that federal courts applying the Sherman Act are supposed to formulate rules of decision on the basis of the traditional common law (or, perhaps, modern case law from other jurisdictions).¹⁶³ But most people who describe the Sherman Act as a delegation apparently have a more freewheeling sort of power in mind.¹⁶⁴ In keeping with that idea, policy considerations have long

Act, 9 J.L. & Econ. 7, 36–37 (1966) (arguing that “there was in 1890 no unitary body of common law doctrine which could give meaning to the statute,” and concluding from congressional debates that “‘the common law’ relevant to the Sherman Act is an artificial construct, made up for the occasion out of a careful selection of recent decisions from a variety of jurisdictions plus a liberal admixture of the senators’ own policy prescriptions”); cf. 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 104, at 62 (2d ed. 2000) (observing that as of 1890 there were “numerous variations” in the case law across jurisdictions, and adding that even when considered as a whole “the common law of competition was . . . in a state of flux”).

¹⁶⁰ Merrill, *supra* note 17, at 45; see also, e.g., 1 Areeda & Hovenkamp, *supra* note 159, ¶ 103d2, at 59 (reading the Sherman Act “to invest the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”).

¹⁶¹ See Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 Mich. L. Rev. 849, 906 (2000) (“[M]ost courts and scholars regard antitrust as a statutorily sanctioned area of federal common law . . .”).

¹⁶² Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 429 (2008); see also, e.g., Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan. L. Rev. 1709, 1811 (1998) (“Some statutes, such as the Sherman Act, expressly delegate lawmaking power to the courts.”). But see Richard A. Posner, *The Problems of Jurisprudence* 289 (1990) (“[F]ew statutes contain a delegation of common law authority to courts. The Sherman Act is not one of them. . . . The term ‘restraint of trade’ has a common law meaning, but it does not follow that Congress meant the term to become a judicial plaything . . .”).

¹⁶³ Cf. Farber & McDonnell, *supra* note 25, at 632–33 (criticizing Justice Scalia and Judge Easterbrook for assuming that the Sherman Act authorizes them to “develop[] an entirely independent body of federal law,” as opposed to applying either “the common law of restraints of trade as it existed in 1890” or “the evolving common law of contractual restraints”).

¹⁶⁴ See Andrew S. Oldham, *Sherman’s March (In)to the Sea*, 74 Tenn. L. Rev. 319, 322–23 (2007) (describing the “conventional wisdom,” though arguing that this interpretation makes the Sherman Act unconstitutional).

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dominated antitrust cases.¹⁶⁵ Since the 1970s, for instance, the Supreme Court has evaluated rules of decision largely on the basis of their economic effects, without much regard to “the state of the common law . . . 100 years ago.”¹⁶⁶

Although this understanding of the Sherman Act has adherents across the ideological spectrum, one might expect textualists to question it. The Sherman Act certainly does not *say* that it is handing quasi-legislative power to the federal courts. Apart from its use of a term drawn from the common law, moreover, it provides little reason to infer such a delegation. To the contrary, Professors Daniel Farber and Brett McDonnell have argued that a “conscientious textualist” who applied his

¹⁶⁵ See *id.* at 330 (“[T]he antitrust statute’s humble origins in the common law were simply a jumping-off point for court-ordered policymaking.”).

¹⁶⁶ *Cont’l T.V. v. GTE Sylvania*, 433 U.S. 36, 51–59, 53 n.21 (1977) (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 392 (1967) (Stewart, J., dissenting)); see also Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 *Harv. L. Rev.* 4, 59 (1984) (“In the 1983 Term the antitrust opinions read like short treatises on microeconomic analysis.”); cf. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731 (1988) (“In resting our decision upon the foregoing economic analysis, we do not ignore common-law precedent concerning what constituted ‘restraint of trade’ at the time the Sherman Act was adopted. But neither do we give that pre-1890 precedent the dispositive effect some would.”).

Admittedly, the fact that the Supreme Court emphasizes modern economics in antitrust cases does not prove that the Court sees the Sherman Act as a delegation of quasi-legislative authority. Instead of assuming that the Act’s reference to the common law leaves the courts in charge of inventing antitrust policy, the modern Supreme Court may simply believe that the Act itself puts the focus on economics. In the 1960s, then-Professor Robert Bork famously advanced an argument to that effect. Professor Bork disputed the “widely held” view that Congress “had given the federal courts virtual *carte blanche* to choose the values they would implement through the Sherman Act.” Bork, *supra* note 159, at 9–10. Instead, Professor Bork argued, members of the enacting Congress had intended the courts to decide antitrust cases on the basis of “the maximization of wealth or consumer want satisfaction.” *Id.* at 7; see *id.* at 36–37 (asserting that the common law of 1890 was too indeterminate to lend meaning to the Sherman Act, but using the legislative history to identify Congress’s intentions); cf. *id.* at 47 (declining to take a firm position about the relevance of this sort of “legislative intent”). Professor Bork still thought that the Act “delegat[ed] . . . broad discretion to the courts.” *Id.* at 35; see also *id.* at 48 (indicating that even a judge who did what Congress had expected him to do would face “the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process”). In Professor Bork’s view, though, members of Congress had “specified a value, a core of meaning,” and had simply intended “to delegate to the courts the task of distinguishing between those . . . combinations which increase efficiency and those that restrict output.” *Id.* at 35–36. The modern Supreme Court may have accepted this understanding of the legislative history. See Douglas H. Ginsburg, *Bork’s “Legislative Intent” and the Courts*, 79 *Antitrust L.J.* 941, 943–47 (2014) (tracing the influence of Professor Bork’s thesis on the Supreme Court).

ordinary interpretive methods to the Sherman Act would disavow “[t]he free-wheeling policy-making of modern antitrust law.”¹⁶⁷

Because of their assumptions about the nature of unwritten law, however, some leading textualists see no contradiction. In their view, the Sherman Act instructs courts to articulate and apply a species of common law, and that instruction is tantamount to giving the federal judiciary robust policymaking discretion. Judge Easterbrook has expressed this point crisply: When he asserts that “[a]ntitrust is a form of common law,” he means that “[t]he Sherman Act . . . told the courts to make up a law on the subject of restraint of trade.”¹⁶⁸ Thus, to the extent that federal judges assume that common-law decisionmaking is quasi-legislative, they may find delegations of robust policymaking authority in statutes that simply use common-law terms.

b. Should Courts Prefer Static Incorporation?

Admittedly, textualists may worry about giving the judiciary this sort of authority. That concern, in turn, can itself affect how they interpret statutes that use common-law terms or that adopt common-law concepts. One of the recurring questions about any such statute is whether its reference to the common law is “static” or “dynamic”: Does the statute simply incorporate the relevant common-law doctrines as they were understood at the time of its enactment, or does the statute instead accommodate continuing development of those doctrines? Although textualist federal judges have accepted the prevailing view that the Sherman Act uses the term “restraint of trade” in a dynamic sense,¹⁶⁹ they have reached a different conclusion about other federal statutes. Justice Scalia, for one, often gravitates toward the static interpretation of

¹⁶⁷ Farber & McDonnell, *supra* note 25, at 623, 639, 657–64.

¹⁶⁸ Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 *Antitrust L.J.* 135, 136 (1984); see also Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 *Tex. L. Rev.* 705, 706 (1982) (“The Sherman and Clayton Acts authorized the Supreme Court to invent and enforce a law of restraint of trade in the common law fashion.”); Easterbrook, *supra* note 59, at 544 (describing the Sherman Act as “effectively authoriz[ing] courts to create new lines of common law”); cf. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 *Tex. L. Rev.* 661, 663 (1982) (“By adopting a common-law approach, Congress in effect delegated much of its lawmaking power to the judicial branch.”).

¹⁶⁹ See *Bus. Elecs.*, 485 U.S. at 732 (Scalia, J.) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.” (citations omitted)).

federal statutes that refer to the common law without specifying whether the reference is static or dynamic.¹⁷⁰

That instinct may grow out of modern textualists' understanding of common-law decisionmaking, combined with a sort of "nondelegation canon"¹⁷¹—that is, a preference for reading ambiguous federal statutes to delegate less rather than more quasi-legislative authority to the federal courts. For someone who believes that ordinary common-law decisionmaking entails largely unfettered judicial discretion, a federal statute that incorporates the common law on a dynamic basis is effectively giving the federal courts robust authority to make new law. By contrast, statutes that incorporate the common law on a static basis are rarely described as delegations of lawmaking authority.

To be sure, even when a federal statute simply incorporates the common law on a static basis, courts applying the statute will have to identify the content of the common-law doctrine that the statute incorporates. But if the doctrine was relatively determinate at the time of enactment, even skeptics of common-law decisionmaking might analogize that task to a form of "discovery" rather than a robust type of "lawmaking"; a federal statute that incorporates the common law on a

¹⁷⁰ See, e.g., *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 127–34 (2008) (Scalia, J., dissenting) (relying upon "the Restatement of Trusts current at the time of ERISA's enactment" to identify trust-law principles that ERISA allegedly incorporates); see also Samuel L. Bray, *The Supreme Court and the New Equity*, 68 *Vand. L. Rev.* (forthcoming 2015) (detecting a similar theme in Justice Scalia's opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)); cf. *Smith v. Wade*, 461 U.S. 30, 65–68 (1983) (Rehnquist, J., dissenting) (indicating that insofar as 42 U.S.C. § 1983 incorporates concepts from the common law of torts, it incorporates the understandings of those concepts that prevailed in the 1870s, when Congress enacted the statute). As Professor Bernadette Meyler has noted, modern-day originalists have taken a similar approach to constitutional provisions that draw upon the common law. See Bernadette Meyler, *Towards a Common Law Originalism*, 59 *Stan. L. Rev.* 551, 582 (2006) (referring to originalists' tendency to "insist[] on a unitary substance of common law, fixed forever at the moment of constitutional ratification"); see also, e.g., *United States v. Jones*, 132 S. Ct. 945, 949–53 (2012) (interpreting the Fourth Amendment's reference to "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and drawing upon the common law of trespass as it stood in the late eighteenth century); *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (concluding that the Sixth Amendment's Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding").

¹⁷¹ See generally Cass R. Sunstein, *Nondelegation Canons*, 67 *U. Chi. L. Rev.* 315 (2000) (identifying various canons that discourage reading federal statutes to delegate certain types of authority to administrative agencies).

static basis might be thought of as adopting law that courts made in the past, but not as authorizing federal courts to continue developing the law as they see fit. As a result, federal judges who believe that common-law decisionmaking is quasi-legislative, and who want to minimize the quasi-legislative activity of federal courts, can be expected to prefer static incorporation of the common law to dynamic incorporation.

This preference, however, is driven by the assumption that common-law doctrines have neither external nor internal sources that constrain current courts, and that reading federal statutes to refer to common-law doctrines on a dynamic basis therefore amounts to inviting each new set of federal judges to write their own policy preferences into law. If one thinks that federal judges would be more constrained in recognizing doctrinal change—for instance, if one thinks that most such change would simply keep pace with shifting customs in the real world or with refinements in the laws and precedents of the fifty states—then one might see less reason to put a thumb on the scale in favor of static incorporation. Of course, whether references to the common law in a federal statute are static or dynamic is a question about the proper interpretation of that particular statute; there are reasons why Congress might make either choice. But to the extent that federal statutes are ambiguous on this topic, judges who do not assume that common-law decisionmaking is inherently quasi-legislative might not apply an artificial presumption in favor of static incorporation.

III. HOW SKEPTICISM ABOUT FEDERAL COMMON LAW MAY ENCOURAGE NON-ORIGINALIST INTERPRETATIONS OF THE CONSTITUTION

Apart from affecting how courts approach federal statutes that explicitly refer to the common law, skepticism about common-law decisionmaking may also have some other consequences for the interpretation of written laws. If one thinks that all unwritten law is made by courts in a strong, quasi-legislative sense, and if one also thinks that federal courts lack any inherent quasi-legislative power, one is likely to conclude that unwritten law never operates of its own force at the federal level. That position is perfectly coherent, but it does not fit our existing legal system very well. As a result, it creates pressure for courts to read extra content into written federal laws.

The problem arises because many written federal laws are not comprehensive; instead of answering all questions that might arise in the fields that they address, they are designed simply to fit on top of other

legal rules. Often, courts can and should draw those other rules from state law. But some questions are so closely bound up with the implementation of federal law as to lie beyond the legislative competence of any individual state.¹⁷² In the old days, courts facing such questions felt comfortable drawing the necessary answers from the unwritten law.¹⁷³ But if modern judges believe that the unwritten law does not operate of its own force at the federal level, how should they handle questions of this sort?

In prior work, I have studied how courts have responded to this problem in connection with the implementation of federal statutes.¹⁷⁴ Faced with various recurring questions that state law *cannot* address and that written federal law *does not* address (at least explicitly), courts that might once have invoked generic principles of unwritten law now use the rubric of statutory interpretation to impute answers to the particular federal statute that they are implementing. For example, although the Federal Employers' Liability Act of 1908 says nothing one way or the other about prejudgment interest, the modern Supreme Court reads the Act as implicitly incorporating the generic doctrines that were part of the common law on that topic in 1908.¹⁷⁵ Likewise, to handle the sorts of questions that unwritten choice-of-law doctrines traditionally addressed, the Court uses a canon of construction to import the necessary distinctions into each individual federal statute.¹⁷⁶ In these and other respects, skepticism about the role of unwritten law at the federal level

¹⁷² See, e.g., *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884) (holding that individual states' laws about the types of causes of action that survive the deaths of the original parties do not govern the survival of *federal* causes of action); see also Nelson, *supra* note 44, at 530–32, 544–49 (discussing other accoutrements of federal causes of action that have similarly been held to lie beyond the reach of state law).

¹⁷³ See, e.g., *Sullivan v. Associated Billposters & Distribs.*, 6 F.2d 1000, 1004 (2d Cir. 1925) (“A cause of action which is given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law.”).

¹⁷⁴ See generally Nelson, *supra* note 26.

¹⁷⁵ See *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337–38 (1988) (observing that “[i]n 1908 . . . the common law did not allow prejudgment interest in suits for personal injury or wrongful death,” and concluding that Congress intended to freeze this rule into place for all future suits under the Act); cf. Nelson, *supra* note 26, at 746 (noting that before *Erie*, courts treated the unavailability of prejudgment interest in suits under the Federal Employers' Liability Act as a question of uncodified general law—albeit one that lay beyond the reach of the states' lawmaking powers).

¹⁷⁶ See Nelson, *supra* note 26, at 701–23 (discussing the presumption against extraterritoriality).

appears to have prompted judges to presume that federal statutes encompass more issues than they explicitly address.

This Part argues that a similar phenomenon is at work in constitutional law. The text of the Constitution says very little about many basic questions of jurisprudence, such as the proper techniques for interpreting federal statutes or the norms of *stare decisis* in the federal judiciary. Many lawyers and judges nonetheless want courts to feel some legal constraints on those topics. Traditionally, such constraints might have been regarded as matters of unwritten law. But if one thinks that unwritten law cannot operate of its own force at the federal level, or that courts can freely change its content whenever they like, one might try to find a different source for the constraints that one wants courts to recognize. On a number of topics, modern skeptics of federal common law have reacted by reading the relevant constraints into the Constitution itself.

A. *The Use of Legislative History in Statutory Interpretation*

For a prominent example, consider debates over the use of legislative history in statutory interpretation. The Constitution specifically addresses the process for *enacting* federal statutes: To exercise its legislative powers, Congress must reduce proposals to written bills that pass both houses of Congress in the same form and are then presented to the President for signature or veto.¹⁷⁷ On its face, though, the Constitution says very little about how to *interpret* the statutes that pass through this process.¹⁷⁸ Nor do other types of written federal laws provide courts with many instructions on this topic.¹⁷⁹

One should not conclude that each individual judge is free to use wholly idiosyncratic methods to ascribe meaning to federal statutes. To the contrary, customs of various sorts—including the general conventions of the English language, the specialized usages of lawyers and legal draftsmen, and the practices of courts themselves—may well supply principles of interpretation that judges are obliged to apply. One

¹⁷⁷ U.S. Const. art. I, § 7.

¹⁷⁸ See, e.g., Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 31 (2006) (“The Constitution cannot plausibly be read to say a great deal about the contested issues of statutory interpretation.”).

¹⁷⁹ Cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085, 2140–56 (2002) (advocating the codification of rules of statutory interpretation).

might describe such principles as themselves being a species of “law.”¹⁸⁰ But to the extent that principles of statutory interpretation are matters of “law” at all, they are largely matters of *unwritten* law.

At the time of the Founding, and for many years thereafter, the principles of statutory interpretation followed in Anglo-American courts focused on the text of the statute, the background supplied by other laws, and historical or social facts of which courts could take judicial notice. Especially where a provision seemed ambiguous, courts were happy to look to these sources for clues about what members of the enacting legislature had probably intended the provision to convey.¹⁸¹ Indeed, Founding-era rhetoric associated the overall project of interpretation with a search for the “intention” of a statute.¹⁸² But courts constructed their understanding of a statute’s “intention” on the basis of a limited universe of information. By and large, that universe did not include what modern lawyers call “legislative history”—documents like committee reports and records of debates that occurred within the legislature during its consideration of a bill.¹⁸³

Some modern textualists say that the Constitution absorbed this aspect of traditional practice. To be sure, they also advance other arguments against the use of legislative history in statutory interpretation. But according to Justice Scalia and Bryan Garner, “use of

¹⁸⁰ To be sure, principles of statutory interpretation refer to many things that would not naturally be classified as “law.” For instance, courts interpreting statutes rely heavily on the general conventions of the English language, and “rules of English grammar aren’t rules of law.” Sachs, *supra* note 27, at 1804. But while conventions about grammar and vocabulary are not themselves “law,” the courts’ obligation to pay attention to those conventions when interpreting statutes might be. Cf. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 *Wm. & Mary L. Rev.* 753, 755–58 (2013) (claiming that “[a]lmost all jurists and scholars resist the notion that [the rules of statutory interpretation] are ‘law,’” but pushing against this purported consensus). I agree with Professor Gluck that one can naturally classify various principles of statutory interpretation as a type of “law.”

¹⁸¹ See 4 Matthew Bacon, *A New Abridgment of the Law* 648 (3d ed. 1768) (“The Intention of the Legislators is sometimes to be collected from the Cause or Necessity of making a Statute; sometimes from other Parts of the same Statute; and sometimes from foreign Circumstances.”).

¹⁸² See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 894 (1985).

¹⁸³ *Id.* at 897–98; see Scalia & Garner, *supra* note 85, at 369–72; Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *Yale L.J.* 266, 273 (2013). But cf. Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 *Ohio St. L.J.* 1239, 1262–68 (2007) (identifying a few uses of legislative history).

legislative history is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented.”¹⁸⁴

As this laundry list might suggest, though, the idea that the Constitution forbids the use of legislative history in statutory interpretation is hard to attribute to any single constitutional provision. It is true that the Bicameralism and Presentment Clause of Article I establishes a text-based process for enacting federal statutes. Because committee reports and transcripts of legislative debates do not go through that process, the Constitution makes clear that they are not themselves laws. But nothing in the Constitution necessarily prevents interpreters from considering them when trying to resolve ambiguities in the texts that do become laws—the bills that successfully navigate the process of bicameralism and presentment.¹⁸⁵ Once one concedes, as one must, that courts can properly consult *some* outside sources of information to help resolve such ambiguities, one will be hard pressed to find provisions in the Constitution that regulate which sources are and are not permissible. For instance, Article I nowhere specifies that “the public history of the times in which [a statute] was passed” can form part of the relevant interpretive context,¹⁸⁶ but that the publicly available legislative history cannot. Reading the Constitution to regulate the principles of statutory interpretation in such detail requires loose and impressionistic arguments of the sort that textualists would resist in other contexts.¹⁸⁷

The Constitution probably is not *wholly* silent about techniques of statutory interpretation. For instance, if a particular method of ascribing meaning to statutes went beyond the “judicial Power” that Article III vests in the federal courts, the Constitution would forbid federal courts to use that method. But many different techniques of statutory interpretation are all consistent with the fact that courts exercise

¹⁸⁴ Scalia & Garner, *supra* note 85, at 388.

¹⁸⁵ See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 863–64 (1992).

¹⁸⁶ See Scalia, *supra* note 18, at 30 (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)).

¹⁸⁷ See Caleb Nelson, Statutory Interpretation 326–34 (2011) (analyzing textualists’ constitutional arguments against the use of legislative history); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 670–78 (1990) (observing that those arguments are not “rigorous”).

“judicial” power, and Article III does not speak to which of those techniques courts should use. As a matter of original meaning, that is not what Article III was about. To the extent that judges face legal constraints on this topic, originalists should conclude that the constraints come largely from *unwritten* law. As a matter of unwritten law, moreover, it may now be permissible for federal courts to consult various kinds of legislative history for various purposes.

B. The Constitution and “Prospective” Overruling

Modern debates about whether federal courts can overrule precedents “prospectively” reflect a similar tendency to constitutionalize principles that Founding-era lawyers probably would have regarded as matters of unwritten law. Understanding this point, however, requires some background.

Imagine that an American court of last resort is facing a legal question that one of the court’s precedents concededly covers, but the court’s current members believe that the precedent gave the wrong answer. Until the twentieth century, the federal Supreme Court and its state counterparts generally did one of two things in this situation: Either (1) they invoked the doctrine of stare decisis and continued to give the answer supplied by their precedent or (2) they overruled their precedent and articulated a new understanding of the law, which they proceeded to apply both to the case at hand and to all other pending or future cases that presented the same question. In the early twentieth century, however, some commentators voiced support for a third possibility: Perhaps the court could overrule its precedent “prospectively only,” so as to protect people who had relied upon the precedent while simultaneously correcting people’s understanding of the law with respect to future transactions.¹⁸⁸

At first, this idea was largely confined to speeches and law reviews. But in 1932, the Supreme Court of Montana issued an opinion prospectively overruling one of its precedents,¹⁸⁹ and the federal

¹⁸⁸ Robert Hill Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 Colum. L. Rev. 230, 251 (1918); see also Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1, 7–25 (1960) (tracing the history of this idea).

¹⁸⁹ See *Mont. Horse Prods. Co. v. Great N. Ry. Co.*, 7 P.2d 919, 925–26 (Mont. 1932) (upholding the judgment of a trial court that had ordered the defendant to refund money to a shipper under a cause of action recognized by one of the state supreme court’s precedents,

Supreme Court held that the federal Constitution did not prevent state courts from behaving this way.¹⁹⁰ According to Justice Cardozo, just as it would not have violated the Due Process Clause for the state supreme court either to adhere to its precedent in all pending and future cases or to apply the court's new understanding in all pending and future cases, so too the Due Process Clause did not prevent the court from adhering to the precedent in cases about past transactions while announcing that the court planned to apply a different understanding of the law in cases about future transactions. Without addressing "whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law," Justice Cardozo concluded that "the federal constitution has no voice upon the subject."¹⁹¹

Three decades later, the Warren Court extended this statement to encompass not just the behavior of *state* courts with respect to precedents about the content of *state* law, but also the behavior of *federal* courts with respect to precedents about the content of *federal* law.¹⁹² And having concluded that the Constitution did not prohibit federal courts from overruling federal precedents prospectively, the Supreme Court did not seriously entertain the possibility that *unwritten* law might prohibit this practice. Instead, the Court assumed that it was at liberty to determine the temporal effect of its decisions simply by "weigh[ing] the merits and demerits in each case."¹⁹³ Indeed, the Court did not limit this approach to decisions that overruled precedents. The Court suggested that *any* decision "establish[ing] a new principle of law," even on "an issue of first impression," might be "applied nonretroactively" if the circumstances warranted.¹⁹⁴

but simultaneously announcing that the precedent had misunderstood the applicable law and that the state supreme court would not be recognizing the cause of action as to future shipments); cf. Levy, *supra* note 188, at 8–9 (discussing a few earlier instances of prospective overruling).

¹⁹⁰ Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364–66 (1932).

¹⁹¹ *Id.* at 364.

¹⁹² See *Linkletter v. Walker*, 381 U.S. 618, 629 (1965) (quoting Justice Cardozo's statement); see also Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 *Yale L.J.* 922, 973 (2006) (noting that *Linkletter* was the first case in which the federal Supreme Court "squarely address[ed] its own power" to engage in prospective overruling).

¹⁹³ *Linkletter*, 381 U.S. at 629.

¹⁹⁴ *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971); see also, e.g., *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) ("Where a decision of this Court could produce

From the 1960s through the early 1980s, the Court occasionally engaged in two different forms of prospective decisionmaking. Under an approach called “pure prospectivity,”¹⁹⁵ the Court’s opinion in a case could articulate a new interpretation of the law, but the Court would not apply that interpretation in any case about events that had occurred before the date of its opinion (including even the case announcing the new interpretation).¹⁹⁶ Under an alternative approach that came to be called “selective prospectivity,” the Court would apply its new understanding of the law in the case that actually overruled a precedent, but courts would remain free to continue applying the old view of the law in other cases about conduct that occurred before the date of the overruling opinion.¹⁹⁷

In the 1980s and 1990s, however, the Court changed course. At least as far as its own precedents are concerned, the Court has categorically sworn off selective prospectivity,¹⁹⁸ and it has raised grave doubts about the propriety of pure prospectivity too.¹⁹⁹

A majority of the Court has not clearly identified the source of the restrictions that it perceives on its ability to establish new understandings of the law prospectively without also applying them in cases about prior events. In his concurring opinion in *James B. Beam Distilling Co. v. Georgia*, however, Justice Scalia attributed those restrictions to the Constitution. Specifically, he argued that “[t]he judicial Power” that Article III vests in the federal courts “must be deemed to be the judicial power as understood by our common-law tradition.”²⁰⁰ According to Justice Scalia, Founding-era norms about judicial decisionmaking did not accommodate either prospective

substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.”).

¹⁹⁵ *Linkletter*, 381 U.S. at 622.

¹⁹⁶ See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536–37 (1991) (opinion of Souter, J.) (citing examples of this approach).

¹⁹⁷ See *id.* at 537 (using the label “modified, or selective, prospectivity” for the practice of “apply[ing] a new rule in the case in which it is pronounced, then return[ing] to the old one with respect to all others arising on facts predating the pronouncement”).

¹⁹⁸ See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

¹⁹⁹ Compare *James B. Beam*, 501 U.S. at 544 (opinion of Souter, J.) (rejecting selective prospectivity and refusing to “speculate” about “the bounds or propriety of pure prospectivity”), with *id.* at 549 (Scalia, J., concurring in the judgment) (“I would find both ‘selective prospectivity’ and ‘pure prospectivity’ beyond our power.”).

²⁰⁰ *Id.* at 549 (Scalia, J., concurring in the judgment).

overruling or other forms of prospective precedent-setting, and Article III should be understood to absorb those norms.²⁰¹

Justice Scalia certainly is not alone in suggesting that the federal Constitution prevents federal courts from engaging in prospective overruling. Not only did Justices Blackmun and Marshall join his concurring opinion in *James B. Beam*, but earlier commentators had occasionally struck similar themes.²⁰² Likewise, Article III has sometimes been said to prohibit other departures from Founding-era norms about *stare decisis*. For instance, a panel of the U.S. Court of Appeals for the Eighth Circuit once used an argument like Justice Scalia's to hold that a federal circuit court's rules cannot validly deny precedential effect to opinions that the court designates as "unpublished."²⁰³ The panel reasoned that "[t]he duty of courts to follow their prior decisions" was both "well established" and "well regarded" at

²⁰¹ See *id.* A stray comment in Justice Souter's separate opinion prompted Justice Scalia to try to reconcile these traditional norms about judicial decisionmaking with his own Benthamite tendencies. Justice Souter had remarked that the normal practice of giving "retroactive" effect to judicial precedents "reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it." *Id.* at 535–36 (opinion of Souter, J.) (citations omitted). Justice Scalia responded as follows:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed* to, or what it will *tomorrow* be.

Id. at 549 (Scalia, J., concurring in the judgment); cf. Postema, *supra* note 33, at 207–10 (discussing related comments by Bentham).

²⁰² Writing in 1924, for instance, Chief Justice Robert von Moschzisker of the Pennsylvania Supreme Court had argued that prospective overruling would depart from the proper function of the judiciary and "would . . . be plain and outright legislation by the courts." Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 *Harv. L. Rev.* 409, 426–27 (1924). Although Chief Justice von Moschzisker had not explicitly cast these arguments in constitutional terms (and had not been focusing on the federal courts), a student author filled that gap in 1962. While defending the constitutionality of certain forms of *selective* prospectivity, the author argued that Article III should be understood to prevent federal courts from overruling precedents on a *purely* prospective basis, because statements about the position that a court will take in the future are not "derived from the case or controversy" that provides the occasion for exercising the federal government's judicial power. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 *Yale L.J.* 907, 930–33 (1962); see also *id.* at 951 (concluding that when a federal court overrules a precedent, the court should apply its new understanding of the law to the litigants before it, but "[t]he question of whether the new rule should be applied retroactively [in other cases] should not be decided until it is presented to a court as an actual case or controversy").

²⁰³ *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000).

the time of the Founding,²⁰⁴ and the panel concluded that this duty was “implicit” in the “judicial Power” that Article III confers. In the panel’s view, if a federal appellate court could freely disregard a category of its own past opinions, or could issue new opinions without fear of constraining its behavior in the future, it would be exercising “a power that goes beyond the ‘judicial.’”²⁰⁵

In response to the Eighth Circuit, however, various scholars made a powerful point: The fact that Founding-era courts followed doctrines of precedent does not mean that the Constitution required them to do so, let alone that the Constitution makes it impossible for circuit rules to exempt any opinions from those doctrines. In Professor John Harrison’s words, “There were norms of precedent [at the time of the Founding], but they were principles of general jurisprudence, no more fixed by the Constitution than is the law of admiralty.”²⁰⁶

I would say the same thing about prospective overruling: The fact that Founding-era courts did not engage in this practice does not mean that Article III prohibits it. To be sure, norms about stare decisis (including norms about the propriety of prospective overruling) can certainly be described as a species of law, on the theory that courts are obliged to follow them.²⁰⁷ To the extent that these norms are law, though, most of them are most naturally described as *unwritten* law.²⁰⁸ Article III certainly does not address the norms of stare decisis explicitly, and I am not aware of historical evidence suggesting that its general reference to “[t]he judicial Power” was originally understood to incorporate a particular version of those norms. At least if one is an originalist, then, one should not lightly assume that Article III encompasses the issue of prospective overruling.

²⁰⁴ Id. at 900, 903. But cf. Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 *Notre Dame L. Rev.* 135, 151–73 (2001) (providing a more complex and more accurate view of the history, and pointing out that to this day the opinions of federal district courts lack precedential force).

²⁰⁵ *Anastasoff*, 223 F.3d at 899–903.

²⁰⁶ Harrison, *supra* note 24, at 525; see also Sachs, *supra* note 100, at 1864–65 (similarly criticizing *Anastasoff*’s premise that “stare decisis was part of the linguistic meaning of ‘judicial Power’”).

²⁰⁷ See Harrison, *supra* note 24, at 506–09 (assuming that “the rules of stare decisis are authoritative legal rules” and defending this assumption).

²⁰⁸ See id. at 505 (“Most of [the federal courts’ norms of precedent] are federal common law, or as it was once called, general law”); cf. Sachs, *supra* note 27, at 1832 (agreeing that “stare decisis might just be a rule of unwritten law”).

To appreciate this point, it helps to isolate the key respect in which prospective overruling departs from standard norms of judicial behavior. From the standpoint of historical practice, there is nothing extraordinary about the idea that precedents might generate legitimate reliance interests, or that those interests might sometimes cause a federal court to continue drawing rules of decision from a precedent that the court now believes to be wrong.²⁰⁹ Perhaps one could argue that the court should not tell us that the precedent was wrong if the court ends up applying the precedent anyway; in this context, statements about the error of the precedent might seem to be dicta. Yet even this feature of pure prospectivity is not very remarkable. The statement that a precedent was wrong, but that the court is going to apply it in the case at hand because of the need to protect legitimate reliance interests, is simply an explanation of the court's reasoning process.²¹⁰ Nor is it bizarre for a portion of this explanation (the statement that the precedent was wrong) to be considered part of the court's "holding," and hence to have precedential force of its own, even though the court's disposition of the case at hand ultimately rests on another consideration (the need to protect reliance interests).²¹¹

Under traditional versions of stare decisis, though, reliance interests operated precedent-by-precedent, not transaction-by-transaction. If reliance interests had accumulated around one understanding of the law, they could justify continued adherence to that understanding, but the court would not toggle between old and new understandings of the same law based on the presence or absence of reliance interests in particular cases. By contrast, the theory of prospective overruling treats reliance interests in a (slightly) more fine-grained way, which results in a bifurcation of the rules of decision that the court applies. When the court states that a precedent was wrong, the court is taken to curtail legitimate reliance on the precedent; although reliance interests justify following the precedent with respect to events that occurred before the date of the court's new opinion, people are now on notice of a new understanding,

²⁰⁹ See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vand. L. Rev.* 647, 687–703 (1999).

²¹⁰ See Nelson, *supra* note 187, at 445–46 (providing a step-by-step example).

²¹¹ See Kent Greenawalt, *Reflections on Holding and Dictum*, 39 *J. Legal Educ.* 431, 436 (1989) (observing that as long as a court's opinion resolves issues "in some logical progression," what the opinion says early in its chain of reasoning "is not considered mere dictum" simply because something later in the chain "shows that the outcome of the case would have been the same even if the first issue had been resolved differently").

and so reliance interests will not require adherence to the precedent in cases about subsequent events. As a result, future courts are expected to apply one understanding of the law (stated in the old precedent) to events that occurred before the date of the new opinion and a different understanding (stated in the new opinion) to events that occur thereafter.

This is the aspect of prospective overruling that is truly an innovation. To claim that Article III forbids this innovation, however, one would have to claim that Article III addresses a very specific detail about the role of reliance interests in the federal courts' doctrines of stare decisis. In particular, one would have to claim that although Article III *does* allow reliance interests to operate in gross, Article III *does not* allow reliance interests to operate on an even slightly more transaction-specific basis. Given that Article III says nothing about stare decisis, the idea that it regulates the topic in such detail is implausible.

Indeed, even Justice Scalia does not really read Article III to prevent federal courts from bifurcating rules of decision based on reliance interests. Consider his position in *American Trucking Ass'ns v. Smith*.²¹² There, interstate truckers were seeking refunds of taxes that they had paid to Arkansas. Three years earlier, in *American Trucking Ass'ns v. Scheiner*,²¹³ the Supreme Court had held that Pennsylvania's similar tax scheme violated the dormant Commerce Clause. Justice Scalia had dissented in *Scheiner*, and he continued to believe that the majority had both misinterpreted the Constitution and overruled various prior decisions.²¹⁴ In *Smith*, however, he announced that because of "*Scheiner*'s status as precedent," he was acquiescing in *Scheiner* with respect to taxes that Arkansas had collected after the date of the *Scheiner* opinion.²¹⁵ On the other hand, he refused to acquiesce in *Scheiner* with respect to taxes that Arkansas had collected "during the period (pre-*Scheiner*) when our opinions announced it could lawfully do so."²¹⁶ Justice Scalia indicated that judges should apply what they believe to be the correct understanding of the Constitution except where the doctrine of stare decisis otherwise requires, and he did not think that stare decisis

²¹² 496 U.S. 167 (1990).

²¹³ 483 U.S. 266 (1987).

²¹⁴ See *Smith*, 496 U.S. at 202, 205 (Scalia, J., concurring in the judgment); see also *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254–55 (1987) (Scalia, J., concurring in part and dissenting in part) (characterizing *Scheiner* as "overrul[ing] a rather lengthy list of prior decisions").

²¹⁵ *Smith*, 496 U.S. at 204–05 (Scalia, J., concurring in the judgment).

²¹⁶ *Id.* at 204.

required him to follow *Scheiner* in cases about pre-*Scheiner* transactions; in his view, stare decisis is all about “protecting settled expectations,” and applying *Scheiner* to pre-*Scheiner* transactions would disturb such expectations because *Scheiner* itself had “overruled prior law.”²¹⁷ More generally, Justice Scalia opined that “a judge whose view of the law causes him to dissent from an overruling” (as he had dissented in *Scheiner*) should “persist in that position (at least where his vote is necessary to the disposition of the case) with respect to action taken before the overruling occurred.”²¹⁸ In other words, Justice Scalia thought that he should treat *Scheiner* as having overruled prior decisions only prospectively.

This position rested on Justice Scalia’s view that *Scheiner* was wrong, and so it may not contradict his statements about the temporal effect of decisions that the Court believes to be correct.²¹⁹ At the very least, though, Justice Scalia’s position in *Smith* assumes that reliance interests can justify applying one understanding of the law in cases about events that occur at one time and a different understanding of the same law in cases about events that occur at a different time, even though the underlying law has not itself been amended. That is the crucial respect in which prospective overruling differs from the normal operation of stare decisis. As a result, it is hard to see how Article III can accommodate the version of stare decisis that Justice Scalia applied in *Smith* without also accommodating the possibility of prospective overruling.

I do not mean to argue that modern federal courts are free to engage in prospective overruling. Until the twentieth century, the unwritten law of stare decisis generally forbade that practice, and perhaps the same is true today. My point is simply that Article III did not incorporate any such prohibition. The law that governs prospective overruling at the federal level is unwritten law, not constitutional law.

²¹⁷ Id. at 204–05.

²¹⁸ Id. at 205.

²¹⁹ Still, there is something odd about saying that the *Scheiner* Court could not validly have overruled precedents on a prospective basis, but that a Justice who dissented in *Scheiner* should nonetheless understand *Scheiner* to have this effect. Even if a federal court says that it is overruling a precedent “prospectively,” this statement is only “a prophecy” about the rule of decision that future courts will apply. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366 (1932). In a sense, then, to say that the Court lacks the power to overrule precedents prospectively might be to say that future courts should not treat it as having done so. On that way of thinking, Justice Scalia’s position in *Smith* is hard to reconcile with his position in *James B. Beam*.

CONCLUSION

In modern parlance, the phrase “federal common law” has become an umbrella term for many different types of unwritten law, regardless of their sources. Thus, what we currently call “federal common law” might include (1) traditional principles of common law, admiralty, or equity jurisprudence; (2) rules that reflect customary practices of other sorts; (3) rules that reflect common themes in the written laws of the fifty states;²²⁰ (4) rules that the federal courts have developed in light of the purposes behind specific federal statutes; and (5) rules that federal judges simply make up out of whole cloth.

By lumping all these different types of rules together, our current vocabulary impedes analysis. Courts surely would need quasi-legislative power in order to articulate and enforce *some* possible rules that modern lawyers would call “federal common law.” But the more strongly one believes that the common law has either external or internal sources that constrain the discretion of current courts, the more one will resist the idea that *all* possible rules of “federal common law” are equally vulnerable to this criticism. What we currently call “federal common law” is not all the same.

This way of thinking suggests the following conclusions:

1. Even in areas that lie beyond the reach of state law, certain types of unwritten law are capable of operating of their own force in federal court. Federal courts do not need to point to a delegation of quasi-legislative authority in order to draw rules of decision from those sources. To the contrary, when federal courts are exercising their ordinary judicial authority to decide cases according to the applicable law, they will sometimes have an affirmative obligation to apply rules of unwritten law (unless some superior type of law has overridden those rules).
2. Because unwritten law can operate of its own force at the federal level, it is not necessary to pretend that written federal law encompasses all issues on which courts need federal rules of decision. Federal courts can recognize some principles as a matter of unwritten law without having to read those

²²⁰ See, e.g., *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 940 (D.C. Cir. 2013) (“The Uniform Commercial Code is often used as the basis of federal common-law rules.”); Nelson, *supra* note 44, at 510–11.

principles into the federal Constitution or an individual federal statute.

3. To say that “federal common law” governs a particular question is not automatically to say that federal courts have free-floating discretion about the content of the applicable rule of decision.
4. By the same token, state courts do not necessarily have free-floating discretion about the content of *state* common law. To be sure, *Erie* tells federal courts to follow the settled precedents of each state’s highest court about the content of all aspects of that state’s law. But the fact that state courts may have the practical ability to say whatever they want does not mean that a conscientious state judge should do so. Just as state judges should not abuse the deference that they enjoy as to the meaning of *written* state laws, so too they should not abuse the deference that they enjoy as to the content of *unwritten* state law.