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INTERPRETIVE LAWMAKING

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For nearly 100 years, prevailing American legal thought has rejected the idea that there can be unwritten bodies of law that judges ascertain and apply just as they do written law. Instead, the story goes, the only preexisting sets of legal rules come from written texts; all other rules—at common law, in equity, or in filling gaps in statutory or constitutional text—are necessarily made by judges. So, when a written text fails to provide a legal rule, courts have the power to make policy decisions and create one, subject to some limitations such as the Due Process Clause.

But the Founders understood judges to be capable of resolving disputes by only finding law—a belief that persisted into the early twentieth century. Not only did judges lack the authority to make law at common law or in equity, but they also lacked authority to make law in applying written text—even when traditional methods of finding and applying written law provided no answer and even if Congress intended to delegate lawmaking power. What's more, the judicial power granted in

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Article III was not originally understood to have included a freestanding lawmaking power. And because it is possible for judges to find law, that original understanding might constrain the judiciary today. To be sure, it is often difficult to know where interpretation and application end and lawmaking begins. And the Founders' conception of the judicial role might not be binding or might have been altered by nearly a century's practice. But judges, especially originalist judges, should seriously confront the fact that, as an original matter, the Constitution granted judges no lawmaking power.

This Article also explores how several current judicial doctrines might change if courts refused to make law in applying written text. For example, Article III could offer its own prohibition against vague statutes—subject to different requirements and remedies than the conventional due process-based vagueness doctrine. A return to the original understanding of the judicial power would cast doubt on the judicial practices of interstitial lawmaking and of making law when applying so-called "common law statutes." And Erie *guesses might raise Article III concerns if the relevant state court is authorized to make law (in which case federal courts predicting such a state court would be impermissibly lawmaking). Stare decisis considerations might counsel caution in some areas. But judges should also approach the constitutional problems and doctrinal inconsistencies caused by uncritical judicial lawmaking with clear eyes.*

INTRODUCTION

Justice Oliver Wendell Holmes, Jr., derided the idea of preexisting unwritten law as belief in a "brooding omnipresence in the sky."[1] He even criticized Justice Story for being "dominat[ed]" by such a fanciful idea in *Swift v. Tyson*.[2] Shortly thereafter, the Supreme Court declared the idea a "fallacy" and disclaimed the existence of any "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[3] In the modern era, even Justice Scalia, who was otherwise considered a historical formalist, considered the idea "naive."[4] If it is true that judges routinely make law, then the basis for the Constitution's protections of judicial independence, such as life tenure, becomes unclear, as they were premised on the idea that judges would find law. And if judges are not in fact so constrained, why should those protections bind today?

[1] See S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[2] 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533–35 (1928) (Holmes, J., dissenting).

[3] *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

[4] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); Stephanos Bibas, *Blakely*'s Federal Aftermath, 16 Fed. Sent'g Rep. 333, 341–42 (2004) (noting "Justice Scalia's historical, formalist ideal"). Justice Scalia distinguished what the lawmaking legislators do by recharacterizing judicial lawfinding as a case-by-case lawmaking in which judges "discern[] what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be." *James B. Beam*, 501 U.S. at 549; see also id. at 546 (White, J., concurring in the judgment) (arguing that Justice Scalia's proposed distinction does not work and relies on "citizens who are naive enough to believe" that lawfinding is possible). But that move does not completely avoid the problem because lawfinding at the Founding was not considered to be lawmaking at all. See infra note 128.

But the tides are turning—or returning. Recent scholarship has defended the prevailing conception at the Founding that judges can find law—either as expressed in written text or as existing as authoritative unwritten law.[5] One commentator has even argued that the judicial power given to federal courts in Article III does not include the authority to make common law.[6] And a recent article advances the argument that the law does not necessarily run out, which means that a judge could only find law.[7] Formalist judges have introduced some of these underlying theories in various contexts.[8] But to date, little attention has been paid to legal interpretation in a post-realist legal order.[9] This Article fills that void.

Historically, courts distinguished between interpreting and applying law—which were permissible judicial functions—and making law when neither statute nor unwritten law provided a legal rule—which was an impermissible legislative function.[10] Although the line was not always easy to draw, courts tried to thread the needle and considered themselves to be applying only preexisting law, possible instances of judicial lawmaking notwithstanding. It was in this legal context that Article III was drafted and ratified. The judicial power referenced in Article III was not understood to contain a substantive lawmaking power—even when no law provided an applicable rule.[11] And because judges found rather than made law, they plausibly needed to be independent from political interests that would seek to influence them to create new law outside the legislative process.

[5] See, e.g., Stephen E. Sachs, Finding Law, 107 Calif. L. Rev. 527, 529 (2019) [hereinafter Sachs, Finding Law]. To be sure, seeds of dissent have been around for much longer. 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, 1514–15 (1984); Caleb Nelson, A Critical Guide to *Erie Railroad Co. v. Tompkins*, 54 Wm. & Mary L. Rev. 921, 924–37 (2013) [hereinafter Nelson, Critical Guide].

[6] See Micah S. Quigley, Article III Lawmaking, 30 Geo. Mason L. Rev. 279, 302–05 (2022).

[7] See Charles F. Capps, Does the Law Ever Run Out?, 100 Notre Dame L. Rev. (forthcoming 2025) (manuscript at 11–12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4908863 [https://perma.cc/97YH-FDPP].

[8] See, e.g., Lester v. United States, 921 F.3d 1306, 1312–13 (11th Cir. 2019) (Pryor, J., statement respecting the denial of rehearing en banc) (asserting that judges find law in the context of retroactivity in collateral proceedings).

[9] One notable recent exception is Professor Charles Tyler. See Charles W. Tyler, Common Law Statutes, 99 Notre Dame L. Rev. 669, 679–84 (2023). But he offers other reasons for using general law in interpretation, see id. at 684–92, and avoids answering the question whether Article III requires it, id. at 685 & n.92.

[10] See, e.g., Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 309 (1818).

[11] See infra Subsection II.A.3.

This conclusion has obvious relevance for cases involving unwritten law, but the Founding generation similarly understood the judicial power to be so limited in cases involving written law. When a case turned on a question of written law, courts first looked to the text—in the light of the common law and other legal customs—to find the relevant legal rule. If this textual inquiry did not provide an answer, courts could apply a rule of unwritten law (if there was one) or state law in some instances. And if there was no applicable unwritten- or state-law rule, courts considered themselves bound to simply declare that there was no legal rule and use default rules or burdens of proof to resolve the parties' dispute.[12] In a way, the lack of authority would have incentivized judges to find all the law they could in recognized sources.

Then arrived the legal realist movement, which was reflected in *Erie Railroad Co. v. Tompkins*. *Erie* declared three principles, only one of which I challenge here. First, it explained that in cases arising from diversity jurisdiction, state substantive law applied under both the Rules of Decision Act and the Constitution.[13] Nothing in this Article undermines that conclusion.[14] Second, in a departure from the first nearly 150 years of American jurisprudence, *Erie* stated that there was no American general common law.[15] Again, nothing here requires jettisoning this conclusion. If there is a general common law, then it might be within the judicial power to find and apply it; if there is no such law, judges would still have been considered bound to find law, albeit from other sources. Third, *Erie* asserted that there was no such thing as unwritten law—when judges pronounced a legal rule, they were in fact making that rule as much as a legislature would make a rule through a statute.[16] Only this part of *Erie* is implicated here. *Erie* was incorrect to conclude that finding law is impossible. Even further, by not granting the federal judiciary any lawmaking power, the Constitution necessarily envisioned a judiciary confined to finding law. So, to reiterate, nothing I say here implicates

[12] See infra Subsection II.A.3.

[13] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nelson, Critical Guide, supra note 5, at 951.

[14] For an argument that this conclusion did not support the holding in *Erie*, see Nelson, Critical Guide, supra note 5, at 951–56, 959.

[15] *Erie*, 304 U.S. at 78–79. For an argument that such general law demonstrably existed, see Fletcher, supra note 5, at 1514–21. For an argument that it persists post-*Erie*, see Caleb Nelson, The Persistence of General Law, 106 Colum. L. Rev. 503, 547–48, 548 n.216 (2006) [hereinafter Nelson, Persistence].

[16] *Erie*, 304 U.S. at 79.

Erie's conclusions that state substantive law governs in diversity cases or that there is no American general common law. Rather, my target is *Erie*'s conclusion that judicial lawmaking is inevitable. Not only is that conclusion mistaken, but Article III's grant of judicial power contemplated the opposite: a judiciary that *only* found law.

Part I explains that finding law is indeed possible. The notion that finding law is possible is a prerequisite to the argument that the Constitution put into place a system that required courts to exclusively find law. If finding law were not possible, the conceptions of judicial power held by the Framers and ratifiers of the Constitution would have little import, even under originalist theories. Part I borrows on recent scholarship by Steve Sachs, Micah Quigley, and Allan Beever, all of whom defend in different ways the possibility of finding unwritten law, and all of whom tie those theories to Founding-era legal thought.

Part II first argues that the judicial power granted to the federal judiciary in Article III did not include a freestanding lawmaking power. The Framers and ratifiers considered judges bound to find and apply preexisting law—whether written or unwritten. And that conception informs the phrase "judicial Power" in Article III. Assuming our government is one of enumerated powers, the fact that the judicial power did not include a freestanding lawmaking power entails that judges were granted only the power to find law, not make it.

Part II also responds to two forceful counterarguments that stand in the way. First, the Founding generation understood courts' power to make procedural law as consistent with the judicial role. And if Article III's judicial power allows procedural lawmaking, the argument goes, surely it allowed judges to make substantive law. Second, sometimes—explicitly or implicitly—Congress delegated its Article I lawmaking power to the judiciary. When Congress attempted to do so, an objector might argue, judges were constitutionally *obligated* to honor Congress's intent and make law. Regardless of whether this potential for delegated lawmaking justified judicial lawmaking in areas without such delegation, Article III's judicial power surely allowed judges to make law when Congress delegated that power to them.

But both counterarguments come up short. Federal courts' limited authority to make "procedural law" did not justify a freestanding substantive lawmaking power. The source of the federal judiciary's procedural lawmaking power is uncertain. It might be an incidental judicial power to the case-deciding judicial power (that is, the judicial

power granted in Article III). In other words, as a historical matter, the case-deciding judicial power necessarily entailed a procedural-lawmaking judicial power. Or it could be understood as an inherent power. Under this theory, the judiciary had the power to make procedural law because there was no way to exercise its case-deciding judicial power without making procedural law. But under either theory, courts' procedural lawmaking power (1) was strictly limited to questions of procedure and (2) could be permissibly exercised only when no other law—written or unwritten—provided a procedural rule on point.[17]

Nor was Congress understood to be able to delegate its legislative power to courts.[18] Unlike the legislative and executive branches, the judicial branch was given no role in the legislative process and no legislative powers.[19] And the structure of judicial review makes it even more unlikely that courts could have made law—even with acquiescence from the other two branches—because judges could not be neutral arbiters of the constitutionality of their own laws. To be sure, this nondelegation principle did not prohibit all judicial discretion in every context, but early courts took seriously the idea that congressional delegation did not provide a lawmaking safe harbor.

Part III addresses the admittedly murky line between applying written texts in adjudication and lawmaking. The fact that a line is difficult to discern does not mean that the distinction is hopelessly indeterminate. Though I do not purport to set forth a clear formula for determining when a court has made law or found and applied it, there are some instances in which courts have indisputably made law. I examine those examples and seek to deduce some guiding principles from which to identify judicial lawmaking.

Part IV examines some potential implications on modern judicial doctrines. In the nearly ninety years since *Erie*, many doctrines have developed in the shadow of *Erie*'s presumption that the judiciary has the

[17] See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (explaining that a procedural question within the inherent power of the judiciary could be regulated by Congress, in which case the judiciary's power was dormant); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227–28 (1821) (similar proposition for the judicial contempt power).

[18] See 1 Walter Malins Rose, A Code of Federal Procedure § 6, at 47 (1907) ("[T]he courts may not be required, nor have they a right to exercise non-judicial powers.").

[19] See U.S. Const. art. I, § 1; id. §§ 3, 7; The Federalist No. 47, at 300–05 (James Madison) (Clinton Rossiter ed., 1961) (presenting this view of the separation of powers and collecting instances of crossovers in the states, including instances of the executive branch being given limited legislative powers).

authority to make law. I examine four such doctrines here and consider how each of these doctrines might be altered if courts revived a lawfinding-only approach.

First, instead of—or perhaps in addition to—being rooted in the Due Process Clause, vagueness doctrine and its accompanying canons of statutory interpretation might have a root in Article III. Grounding vagueness doctrine in Article III would also restrict the remedies available in vagueness challenges; for example, it would cut against facial invalidation of statutes because future courts would still be obligated to apply the statute when law can be found in it.

Second, some laws are not vague in the traditional sense but still invite judicial lawmaking. These laws are so broad that no one interprets them to have their full textual scope, such as Section One of the Sherman Act.[20] Although some of these laws could be read as codifying common law principles, federal courts have not always considered themselves to be constrained by the common law at the time of enactment or the common law as developed over time. Instead, courts have taken it upon themselves to make new law and essentially create a new statute via their own judicial policy. But that arrogation of power leaves the judiciary with the legislative task of weighing policy interests to determine the reach of a duly enacted statute.

Third, written texts sometimes appear incomplete or destined to fail, such as the Banking Act of 1933, which created the Federal Deposit Insurance Corporation ("FDIC").[21] Courts in those cases have concluded that they have the power to weigh competing federal policies and fashion their own rules through "interstitial lawmaking."[22] Openly acting as policy-makers, courts create rules that protect federal interests by considering whether a uniform federal rule is needed and which one to create.[23] At bottom, courts are creating and enforcing their own legislative decisions and balancing competing interests with (at best) loose congressional guidance.

[20] See infra notes 317–22 and accompanying text.

[21] See Banking Act of 1933, Pub. L. No. 73-66, § 12B, 48 Stat. 162, 168 (1933).

[22] See Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 746–47, 747 n.42 (2001).

[23] See United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–28 (1979) ("Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947))).

And finally, although Article III does not define the powers of state courts, the prevailing lawfinding conception affects state law when federal courts perform "*Erie* guesses." One of the principles underlying *Erie* assumes that state high courts *must* always make law.[24] But if state courts make new law in adjudications, that law could not have preexisted the relevant decision. So, rather than guess what the state supreme court *would* do (thereby in a very real sense making the law that state courts would have made in the future), federal courts should state that there is no law to apply, yet. A close examination of state constitutional law, however, might reveal that state courts cannot or do not make law[25] or that even intermediate state appellate courts have some limited power to make law.

None of this is to say that these doctrines (and others premised on a judicial lawmaking power) must be undone or rejected. A return to lawfinding as the exclusive method for answering questions of substantive law would have its downsides as well. Judges might become increasingly likely to read too much into the text if they can no longer make law outside of it, our legal community might have let its lawfinding muscles decay for too long to be brought back to life, and perhaps a greater attention to unwritten law would result in a *less* constrained judiciary than one that could make law but was nonetheless bound by limiting doctrines. (Just to name a few.) As a result, stare decisis considerations might counsel against walking back any of these doctrines, especially those subject to a heightened statutory stare decisis standard. So perhaps the answer would be not to undo any of these doctrines, but to cabin them in recognition of their uneasy pedigree.

And of course, an exclusively lawfinding regime might be rejected on the ground that originalist interpretations of the Constitution in no way bind us today or that decades of practice and acquiescence have sanctioned judicial lawmaking. But even so, originalists and non-originalists alike should be open-eyed about the relationship between the original understanding of the judicial role and its more modern conception.

[24] See Nelson, Critical Guide, supra note 5, at 975–84; cf. Michael Steven Green, *Erie*'s Suppressed Premise, 95 Minn. L. Rev. 1111, 1112–13 (2011) [hereinafter Green, Premise].

[25] See Green, Premise, supra note 24, at 1126–27 (discussing Georgia practices regarding unwritten law); Jason Boatright, End Judicial Lawmaking, 24 Tex. Rev. L. & Pol. 355, 370 (2020) (discussing the same in Texas).

I. FINDING LAW IS POSSIBLE

Even assuming the Founding generation believed that the judicial power given to the federal judiciary contained no authority to make law (addressed in Part II), that belief might not be binding—even for originalists—if it is impossible to adjudicate disputes without making law. That impossibility might render lawfinding nonbinding under various theories. For example, one might conclude that, because the kind of judicial power the Founders imagined does not exist, the grant of power misfires and is of no effect—that is, the judiciary received no power because the purported power granted is nonexistent.[26] Or alternatively, one might take a position akin to Professor Chris Green's sense-reference distinction[27]: because the Article III judicial power has a core sense—the power to adjudicate disputes—the assumption that the judicial power does not include the power to make law is not binding if making law is in fact part of resolving such disputes.[28] Or perhaps one would consider a lawmaking power to be inherent in the power to decide cases and controversies and so implied in the judicial power itself.[29] In sum, whether

[26] Cf. Bertrand Russell, On Denoting, 14 Mind 479, 482–85, 490–91 (1905) (arguing that the title "the present King of France" is a misfire that fails to refer since there is no present King of France, and thus the phrase "the present King of France is not bald" is false to the extent that it means that "[t]here is an entity which is now King of France and is not bald"). Relatedly, one might argue that even if there was a successful grant of power, the judiciary could not exercise that power because it would be impossible to do so without exercising a non-granted and impermissible power. To be sure, this conclusion might lead one to wonder whether lawmaking is an inherent power (discussed below), but substantive lawmaking might be too important of a power to be implied. Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 365 (1819) ("There is an obvious distinction between those means which are incidental to the particular power, which follow as a corollary from it, and those which may be arbitrarily assumed as convenient to the execution of the power, or usurped under the pretext of necessity.").

[27] See generally Christopher R. Green, Originalism and the Sense-Reference Distinction, 50 St. Louis U. L.J. 555 (2006) [hereinafter Green, Sense-Reference].

[28] Cf. id. at 625–26 (arguing that the Constitution's language can be binding even where the Founders assumed it would apply only in narrower contexts).

[29] See Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 842 (2008) [hereinafter Barrett, Procedural Common Law] ("[I]nherent powers are those so closely intertwined with a court's identity and its business of deciding cases that a court possesses them in its own right . . . ."). Using a related approach, one might conclude that lawfinding is impossible with unwritten law but possible with written law, so courts either must apply only written law and never use unwritten law (because judges would necessarily have to make that law) or must find written law; but under either approach can make unwritten law. See, e.g., 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, 9–14 (Amy Gutmann ed., 1997) [hereinafter Scalia, Common-

judges are barred from making law might depend on whether it is possible to adjudicate disputes without doing so—that is, by finding law.

Part of the crusade against judicial lawfinding at the turn of the twentieth century was born of the premise that lawfinding was not actually possible.[30] Although judges purported to find law, the story went, judges were instead making law. And around the turn of the twentieth century, the legal community knew they were making law.[31] Lawfinding was a giant facade, hiding the real policy-makers—judges—and enabling them to avoid public scrutiny.

To be sure, even if lawfinding was a facade, lawmaking proponents might have still been incorrect that nakedly making law was appropriate or desirable. The outward story of the law is important, and consistent dedication to that story—even if counterfactual—signals an important social commitment.[32] And sometimes proffering an external explanation that differs from the underlying facts is not only instrumentally useful but also normatively desirable.[33] So, even if judges sometimes used lawfinding rhetoric as a shield to hide their lawmaking, the answer might not be to abandon the lawfinding enterprise but rather to hold those judges accountable and treat their decisions accordingly.[34]

Law Courts] (distinguishing between judge-made common law, with which Justice Scalia was "content," and statutory interpretation, in which he viewed judicial lawmaking as a "sure recipe for incompetence and usurpation").

[30] See, e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting) ("Whether [a state court] 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.").

[31] See, e.g., James B. Thayer, The Case of Gelpcke v. Dubuque, 4 Harv. L. Rev. 311, 318 (1891) ("[I]t is impossible to exercise the judicial function without such incidental legislation.").

[32] See William Baude & Stephen E. Sachs, The Official Story of the Law, 43 Oxford J. Legal Stud. 178, 180–82 (2023).

[33] Cf. Will Baude, Opinion, Can We Handle 'The Truth About SCOTUS'?, Wash. Post: Volokh Conspiracy (Apr. 17, 2017, 4:44 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/17/can-we-handle-the-truth-about-scotus/ (discussing and endorsing a thought experiment by Professor Stephen E. Sachs in which he argues that the judicial norm of objectivity is desirable even if not followed in practice).

[34] Cf. Tyler B. Lindley, The Constitutional Model of Mootness, 48 BYU L. Rev. 2151, 2159, 2175–76 (2023) (explaining that instances of the judiciary exceeding its bounds do not justify continued or further excursions).

But the impossibility argument rests on a mistaken premise. Lawfinding is possible. I start first with the common law, then proceed to equity, and conclude with written law.[35]

A. Common Law

Among the many theories of the common law, three (at least)[36] are historically plausible and do not require any lawmaking. And under each theory, there are concrete ways for judges to find unwritten law in resolving disputes.

1. Common Law as Customary Law

The common law has often been called customary law because it traditionally rested on accepted legal customs.[37] Those customs were either in turn subject to a custom that they were to be judicially enforceable, or they were made judicially enforceable through legislative enactment.[38] We confront analogous customs (even if not all are judicially

[35] I discuss the unwritten law in the context of common law and equity here, but the same principles should apply equally to unwritten law in other areas, such as admiralty and international customary law. Cf. 1 William Wait, A Treatise Upon Some of the General Principles of the Law 16–17 (Albany, William Gould, Jr., & Co. 1885) (explaining that common law courts apply new facts to old law rather than make new law and stating that that principle holds true in "cases involving the application of the law of nations, and of commercial and maritime law and usages, and even of foreign municipal law"); Nelson, Critical Guide, supra note 5, at 931 n.33 (using the "common law" as a signifier for all kinds of unwritten law, including principles of equity and admiralty).

[36] The theories I present here are not wholly separate or independent, but rather overlap and build on one another. Nonetheless, it is easier to consider them in discrete steps.

[37] See, e.g., 1 Joseph H. Beale, A Treatise on the Conflict of Laws § 4.7, at 40 (1935) ("The law of a given time must be taken to be the body of principles which is accepted by the legal profession . . . ."); Theodore F.T. Plucknett, A Concise History of the Common Law 313–14 (5th ed. 1956).

[38] Compare Ford W. Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791, 798–800, 798 n.32, 799 n.36 (1951) (discussing legislative and/or constitutional enactments in Virginia, Vermont, Georgia, Rhode Island, New Jersey, Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Pennsylvania that adopted the common law around the Founding), and Cong. Globe, 42d Cong., 1st Sess. 696 (1871) (statements of Sen. Allen Thurman (D-OH) and Sen. George Edmunds (R-VT)) (agreeing that "only the legislative power . . . can make a law" and that "courts . . . do not enforce laws that are not made by the [legislature], or not recognized as law by the [legislature], being the common law of the State"), with Quigley, supra note 6, at 298 n.89 ("A people can consent to the common law precisely by accepting and endorsing its customs."), Hall, supra, at 800 (discussing the judicial adoption of the English common law in Connecticut only insofar as it was consistent with practice within the state), and Black

enforceable) every day.[39] So it should come as no surprise that people[40] can collectively form these norms—discoverable by judges—and choose to enforce them through courts.[41]

Custom was also paired with reason. This artificial reason, which drew on "a deep, intuitive, almost aesthetic, sense of the way in which the new case 'fit[]' into the rich body of the law," allowed judges to understand how the facts of new cases fit into the preexisting custom.[42] In this way, judges did not make law when confronted with unique facts, but instead connected those facts to the old law.[43] A more modern lawyer might describe this as a kind of judicial craft, which is objective and real but not readily apparent to an outsider.

This kind of lawfinding is more than merely theoretical; it can be accomplished in concrete ways. As Professor Stephen E. Sachs has

& White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (discussing the traditional view that there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute").

[39] See, e.g., Sachs, Finding Law, supra note 5, at 531 (discussing the norms of fashion, etiquette, and natural language); Tyler, supra note 9, at 686 & n.96.

[40] The word "people" is used loosely here to mean the relevant population. As is evident below, it does not necessarily mean the public more broadly, though it can. Some customs might be relevant because they are custom among judges, a certain group of lawyers, or the legal profession more broadly. Some customs might be defined by reference to a jurisdiction or be cross-jurisdictional but still not global. And yet others might be derived from a smaller group of nonlegal professionals, such as corporate executives or construction workers.

[41] Another way to conceptualize common law as customary law might be to view judges as "precisifying" broad social norms. Precisification of social norms is still not lawmaking, though, because judges are *finding* what those social norms are, taking broader concepts and applying them to specific factual circumstances. Accordingly, a judge's common law ruling can be scrutinized against the established social norm but does not set a norm itself. Cf. Stephen E. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 789–90 (2022) (explaining that originalism offers a method to "evaluate[] legal *propositions*, not scholarly methods of discovering them"). If judges did simply make the common law, then there would be no standard against which to evaluate their decisions. I am indebted to Lawrence Solum for raising this point about precisification.

[42] Michael W. McConnell, Tradition and Constitutionalism Before the Constitution, 1998 U. Ill. L. Rev. 173, 181 [hereinafter McConnell, Tradition]. "The common law's 'reason' was not primarily based in natural law"; instead, the reason was artificial even if animated by or forming a part of natural law. Quigley, supra note 6, at 290 & n.41; see also 1 William Blackstone, Commentaries *39–40 (stating that reason was the means by which individuals discovered the natural law).

[43] Wait, supra note 35, at 6–8; see also Nelson, Critical Guide, supra note 5, at 934 (explaining that courts can use analogical reasoning to fit existing common law customs to new facts).

explained, we find norms and customs every day.[44] Consider a father telling a son that he has misspelled a word. The father is not making the rule in real time, and he cannot point to conclusive language-kings that have previously made the rule. And when there are reasonable disputes—"judgment" or "judgement," "gray" or "grey," "doughnut" or "donut"—no single person can resolve the dispute.

To be sure, most of those norms are not judicially enforceable, but legal customs can be found in much the same way.[45] In some areas of law, courts are understood to find unwritten law even today—customary international law,[46] the law of other sovereigns,[47] and possibly *Erie* guesses.[48] Maybe those decisions are also a facade, but at some point the mounting evidence that lawfinding is possible becomes sufficient to make it unreasonable to say it is *impossible*—rather than merely not done.

Further, Micah Quigley has offered a framework for analyzing whether a decision attempted to find law or purported to make law.[49] Quigley draws on Matthew Hale's description of the common law—widely accepted at the Founding[50]—to form a historically rooted and well-accepted three-part test for lawfinding. First, the common law was generally continuous, with few if any sharp breaks with previous customs.[51] The common law did change over time as the people's customs changed, but judges did not make that law when they recognized that customs had changed.[52]

Second, the common law must have been received by the realm; that is, the people must have accepted the rules pronounced by courts because

[44] See Sachs, Finding Law, supra note 5, at 531.

[45] See id. at 550 ("As it turns out, legal and nonlegal norms are remarkably similar. Almost every important feature of legal norms . . . can also be found outside the law.").

[46] See Restatement (Third) of the Foreign Rels. L. of the U.S. § 102(2) (Am. L. Inst. 1987).

[47] See Sachs, Finding Law, supra note 5, at 556, 576 & n.317.

[48] See id. at 559.

[49] See Quigley, supra note 6, at 305–12.

[50] See McConnell, Tradition, supra note 42, at 188 (citing James Wilson, Of the Common Law (1804), *reprinted in* 1 The Works of James Wilson 334, 353 (Robert Green McCloskey ed., 1967)) (noting that Wilson positively used Hale's theory of the common law).

[51] See Quigley, supra note 6, at 307 (citing Wilson, supra note 50, at 353).

[52] This recognition is different than a court overturning an incorrect decision because the incorrect decision was inconsistent with the law; under the former, both decisions can be correct, whereas under the latter, only one decision can be correct. Cf. 1 Blackstone, supra note 42, at *86 (explaining that declaratory statutes are passed "where the old custom . . . is almost fallen into disuse, or become disputable," so that the law remains the same notwithstanding the custom).

the common law was itself customary.[53] Even when judges were mistaken about the legal custom or illicitly attempted to change it, those decisions did not by themselves change the law.[54] "[D]ecisions of [c]ourts . . . [we]re, at most, only evidence of what the laws are; and are not of themselves laws."[55] And before the eighteenth century (and maybe after), even "inferior" courts did not need to follow decisions of a superior court if the superior court's decision conflicted with the custom; the superior court's decision was followed to the extent of its persuasive value.[56] The principles in those decisions could become law—even if incorrect at the time of the decisions—so long as the people adopted them into their custom.[57] But much in the same way legislative staffers do not make law when they draft a bill, even if legislators ultimately make that bill a law, judges did not make law when they propounded a principle that was ultimately made law by the people—the people did when they accepted the judicial pronouncements.[58]

Third, the common law must have been accommodated to the people's extralegal customs.[59] Legal customs were designed for the people, and they got their legitimacy by conforming to the people's own "circumstances, and exigencies, and conveniencies."[60] So the legal customs must have "take[n] adequate account of the people's [own

[53] See Quigley, supra note 6, at 308 (quoting Gerald J. Postema, Philosophy of the Common Law, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 588, 591 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004)).

[54] See id. at 318–19 (discussing *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8,441), in which Justice Marshall was skeptical of an earlier decision but adopted it only because "all other judges respect[ed] it").

[55] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842); see also Nelson, Critical Guide, supra note 5, at 935–37, 937 n.49 (describing the distinction made by Blackstone and other eighteenth-, nineteenth-, and even twentieth-century lawyers between the law and a judge's conception of the law).

[56] See Quigley, supra note 6, at 293–95 (discussing how the House of Lords's attempted judicial modification of the born-alive rule was not taken up and required a statutory provision); William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 37–39 (2019) [hereinafter Baude, Liquidation] (explaining that Founding-era precedent did not allow for a single decision to bind future courts).

[57] See *Livingston*, 15 F. Cas. at 664.

[58] See James Wilson, Of the General Principles of Law and Obligation (1804), *reprinted in* The Works of James Wilson, supra note 50, at 97, 102 (explaining that custom "involves . . . evidence, of the strongest kind, that the law has been *introduced* by common *consent*" (first emphasis added)).

[59] See Quigley, supra note 6, at 309–10.

[60] Wilson, supra note 50, at 353.

extralegal] customs."[61] For example, assume a community had an extralegal (not judicially enforceable) custom that known trespassers would not be allowed to enter anyone else's private social gathering until they had made amends for the trespass. That custom reflects a deep disdain for trespassing, and it is rooted in a belief that trespassers should be treated differently than those who enter private property with permission. A judicial ruling that trespassers were entitled to the same protection from property owners as authorized visitors would likely fail the accommodation principle.[62]

Importantly, even if Quigley's method of common lawfinding was not the predominant method in 1789 or is not the best or only method possible today, a lawfinding enterprise might still be mandatory. It seems improbable that the term "judicial Power" in Article III included any lawmaking power.[63] And "because ours is a government of enumerated powers, the judiciary by default lacks" any such power.[64] To be sure, it is too aggressive to claim that the "judicial Power" would have been so "thick"[65] as to have prescribed the precise method of common law adjudication, locking in all future courts to that method.[66] But all that is necessary is to show that the judiciary was never granted any lawmaking authority and that it is possible to fulfill its constitutional role without doing so.

One objection might be that the common-law-as-customary-law theory glosses over the problem of the natural law, its historical roots, and its

[61] See Quigley, supra note 6, at 309–10.

[62] This example is drawn from the California Supreme Court's decision in *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), in which the court held that the same standard of care is owed to licensees, invitees, and trespassers, and is inspired by Quigley's discussion of it. See Quigley, supra note 6, at 324–27. I do not mean to say that California in fact had such an extralegal trespasser custom, but the California legislature did eventually partially abrogate *Rowland* with respect to the standard of care owed to people committing certain crimes on the property. See Act of Oct. 2, 1985, ch. 1541, § 1, 1985 Cal. Stat. 5656, 5656–57 (codified at Cal. Civ. Code § 847).

[63] See infra Section II.B.

[64] Quigley, supra note 6, at 302.

[65] See John O. McGinnis, The Three Fault Lines of Contemporary Originalism, Law & Liberty (May 30, 2019), lawliberty.org/the-three-fault-lines-of-contemporary-originalism/ [https://perma.cc/JFQ7-DHER].

[66] Cf. Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1863–66 (2012) (dismissing the possibility that stare decisis is included in the meaning of "judicial Power").

modern disfavor.[67] Although the precise role of the natural law in common law is unnecessary to define for these purposes, a natural-law-infused common law could be consistent with a customary-law theory of the common law. The natural law is characterized by "its claim to authority[, which] is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles."[68] In theory, if legal customs themselves incorporate the natural law, then judges can—indeed, must—refer to the natural law in expounding the common law. In that sense, the people themselves choose to be bound by the natural law, and so the customary law incorporates the natural law wholesale. A judge could supplant what might otherwise have been the customary rule with a tenet of the natural law without making any law.

Even without wholesale incorporation, natural law could be compatible with lawfinding. It is possible that people honor the natural law[69] in their own lives such that their legal customs derive from or are consistent with the natural law.[70] If so, judges would in no sense be making law by appealing to the natural law. Of course, the customary law also could ignore the natural law altogether, in which case the natural law would drop out of the common law and judges would not be justified in using it to resolve disputes.[71]

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[67] See Brian Leiter, Politics by Other Means: The Jurisprudence of "Common Good Constitutionalism," 90 U. Chi. L. Rev. 1685, 1702–04 (2023) (arguing that the natural law does not exist); John Mikhail, Does Originalism Have a Natural Law Problem?, 39 Law & Hist. Rev. 361, 361 (2021) ("Most originalists are legal positivists, not natural lawyers. By contrast, the [F]ounders, by and large, were natural lawyers, not legal positivists.").

[68] Allan Beever, The Declaratory Theory of Law, 33 Oxford J. Legal Stud. 421, 425, 442 (2013) (quoting Henry Sumner Maine, Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas 33 (10th ed. 1920)). Blackstone, who connects the natural law to the Divine, argues that each person can "discover the purport of" the natural law. 1 Blackstone, supra note 42, at *39–40. But see Philip Hamburger, Law and Judicial Duty 224 (2008) ("Natural reason might [have been] adequate for the exercise of legislative will, but not for judgments in cases about the law of the land.").

[69] To reiterate, this law need not be a particular conception of that natural law, but merely a law that claims authority based on "the special nature of its principles." Beever, supra note 68, at 442 (quoting Maine, supra note 68, at 33).

[70] See R.H. Helmholz, Natural Law in Court: A History of Legal Theory in Practice 96–100 (2015) (discussing the evidence that English common law was considered to be consistent with or incorporating the natural law).

[71] See Hamburger, supra note 68, at 38 ("[C]ommon law was binding even if it was unreasonable or contrary to natural law."). By "justified," I do not mean to speak to the issue of whether a judge should refuse to enforce a principle of "law" that violates the natural law, which is beyond the scope of this Article. Compare J. Joel Alicea, The Moral Authority of

2. "As-If" Law

One could give ground, in a sense, and view common law judicial opinions as something slightly more than evidence of the law or "mere[] expla[nations of] the grounds for judgments" that "help[] other people to plan and order their affairs."[72] Sachs has argued that common law decisions can be considered "as-if law."[73] Under this view, future courts might need to treat a judicial decision "as if" it were law: any court must give the decision preclusive effect,[74] lower courts must give it precedential effect,[75] and the same court might need to give it some stare decisis effect.[76] But the necessity of such treatment is "judged in light of the actual legal standards, not those determined by the prior court."[77] That is, a later court does not treat the earlier decision as law because the decision became the law; it treats the prior decision as law because *actual* law requires it to do so. The earlier decision is an input, and the law uses that input to produce an output that sometimes defers to the earlier decision.

Even under this theory, courts do not make the law. Their decisions become real-world facts, and the law deals with those decisions as it does a host of other facts. Those decisions are not law themselves; their effect in future cases depends on additional law.

Compare a judicial decision to a private contract. Contract law might incorporate into its rules of decision the terms of an agreement.[78] But

Original Meaning, 98 Notre Dame L. Rev. 1, 53–55 (2022) (distinguishing between a citizen "refusing to obey an *illegitimate* [contrary to natural law] law" and judges doing so in their "official capacity"), and Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.) ("[T]he Court cannot pronounce [a duly enacted law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice."), with id. at 388 (opinion of Chase, J.) (finding legislative action "contrary to the *great first principles* of the *social compact*" outside the bounds of "*legislative* authority" and refusing to apply it). I mean only that a judge would not be justified in portending that the customary law requires using the natural law to resolve the dispute. See Hamburger, supra note 68, at 224.

[72] See William Baude, The Judgment Power, 96 Geo. L.J. 1807, 1844 (2008) [hereinafter Baude, The Judgment Power].

[73] See Sachs, Finding Law, supra note 5, at 561–63.

[74] See, e.g., B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 147 (2015).

[75] See Sachs, Finding Law, supra note 5, at 562–63.

[76] See Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 667–75 (1999) (discussing how the Marshall Court treated horizontal precedent).

[77] See Sachs, Finding Law, supra note 5, at 562–63.

[78] See Restatement (Second) of Conts. ch. 9, intro. note (Am. L. Inst. 1981) ("The terms of the agreement or promise to a large extent define the obligation created.").

those terms do not become law themselves.[79] Private parties are generally not allowed to make law (if ever);[80] rather, the law makes certain promises between private parties judicially enforceable. So, like contract law, the law of judgments, vertical precedent, and horizontal precedent makes certain judicial acts enforceable, whether or not those acts were originally (or are now) consistent with the law.

3. Positive and Higher Law

Professor Allan Beever has offered a more revisionist approach that gives even more ground and accepts that "court decisions" form a part of the positive law (or more precisely, "ignore[s]" the question).[81] He posits that although the common law does try to find the unwritten law, a body of decisions can become a sort of positive law that might or might not align with the unwritten law.[82] That positive law is then subordinated—as a matter of popular choice—to a higher law.[83] Remember, historically speaking, common law courts tried to find the unwritten law, and their decisions were not viewed as law at all because their decisions could not have changed the unwritten law.[84] But even assuming those decisions were themselves some kind of positive law, judges could not make that law alone out of sheer will, but rather they were but one part of the lawmaking process in which, from a body of decisions, law could be distilled.[85] And this positive law was not inviolate or automatically

[79] See Sachs, Finding Law, supra note 5, at 563–64.

[80] See Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 60–62 (2015) (Alito, J., concurring) (first citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); then citing Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935); and then citing Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)).

[81] See Beever, supra note 68, at 425 & n.22.

[82] Id. at 425.

[83] Beever identifies this higher law as the natural law, id., but it need not be. It could be purely secular notions of fairness and justice (such as Rawlsian justice), principles derived from custom, or any other body of unwritten law. The point is that the people choose a hierarchy of law, and when the positive law fails to reflect the higher law, the higher law preempts the positive law.

[84] See supra notes 53–58 and accompanying text.

[85] See Caleb Nelson, The Legitimacy of (Some) Federal Common Law, 101 Va. L. Rev. 1, 13–14 (2015) [hereinafter Nelson, Legitimacy] (explaining this middle-ground view); Tyler, supra note 9, at 686. Nelson offers a second middle ground (between the extremes of pure lawfinding and pure lawmaking): lawfinding with judges "making" law in a sense when they apply it or run out of law to find. See Nelson, Legitimacy, supra, at 13. This approach is similar to Hans Kelsen's view that judges make law anytime they apply the law to a concrete set of facts. Paolo Sandro, The Making of Constitutional Democracy: From Creation to Application

binding but was subordinated to a higher unwritten law and binding only if it was consistent with that higher law.

When the common law, as outlined in a body of decisions, failed to align with that higher unwritten law, what mechanisms were available for correcting the common law? One obvious answer is legislation,[86] but Beever points also to the courts of equity as a judicial corrective mechanism.[87] Under this theory, courts of equity looked at the remedies provided by the common law and considered whether those remedies adequately protected rights recognized by the higher law. "[E]quity . . . fulfil[led] the law by realizing, not positive law, [that is, court decisions,] but natural law."[88] So neither common law courts nor courts of equity made law because equity merely recognized preexisting rights that common law decisions had not adequately protected.

B. Equity

Beever's approach to the common law relates to both theories of equity addressed here. One theory views equity as a method of reviewing and correcting common law courts. The other views equity and common law

of Law 216–17 (2022). But, as Nelson correctly observes, if unwritten law can be meaningfully found, "common-law decisionmaking entails only a subsidiary type of 'lawmaking,'" and "is less analogous to *legislation* than to a species of *interpretation*." Nelson, Legitimacy, supra, at 13; see also Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 287 (2023) ("In characterizing the Court as a lawmaker, I mean to appeal to the legal and linguistic intuition that a distinction exists between judicial application of law to the facts of particular cases and judicial lawmaking with case-transcending, law-altering effects."); Wait, supra note 35, at 27–28 (distinguishing between applying unwritten law through the traditional means and "speculat[ing] upon what may be most, in [the judge's] opinion, for the advantage of the community"); infra notes 268–71 and accompanying text (arguing that it is permissible to apply a written text to a particular case even if it can be described as judicial "construction").

[86] 1 Blackstone, supra note 42, at *85–86 ("Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever."); Plucknett, supra note 37, at 159.

[87] See Beever, supra note 68, at 427 ("[W]e see equity being applied in order to produce the results called for by the principles of the common law, where the common law was unable to achieve those results because of some impediment."); Plucknett, supra note 37, at 159, 684; see also Wesley N. Hohfeld, The Relations Between Equity and Law, 11 Mich. L. Rev. 537, 564 n.10 (1913) (providing a historical example of courts in equity recognizing a remedy that the common law courts had failed to recognize); Wait, supra note 35, at 27 ("[In] some of the early cases . . . equity has very nearly; if it has not absolutely, overridden positive law.").

[88] Beever, supra note 68, at 425.

working together as equal partners toward a system consistent with the higher law. Although these theories have opposing underpinnings, they are both reflected in practice, each more prominent in some areas than others.[89] Regardless, they are similar in result for this purpose: courts of equity can find rather than make law.

1. Equity as Correcting Common Law

The first theory posits that the purpose of equity is to correct the disconnect between the actual law (or the higher law) and common law decisions.[90] Historically, equity obtained power by recognizing rights that common law courts did not, but it maintained legitimacy by adhering to the law. When equity did step in and recognize an equitable right, it recognized a preexisting right not adequately protected by the common law at that time—either because it gave no remedy at all, or because the remedy it offered was inadequate.[91] And because this theory views equity as correcting the common law, the equitable principles that were in "conflict with legal rules . . . annul or negative the [common law rules] *pro tanto*."[92] So whether a right is legal or equitable "can be understood only by reference to its historical development" and the "struggle for supremacy between the court of chancery and the courts of law."[93]

Under this theory, the law that courts of equity apply is still external to their decisions, not made by them.[94] The people have already chosen to

[89] See, e.g., F.W. Maitland, Equity: A Course of Lectures 9–10, 17, 153–54 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. rev. 1969) [hereinafter Maitland, Equity] (arguing that, while there may have been "open conflict[s]" between equity and common law before 1675, those conflicts are of the "old days").

[90] Beever, supra note 68, at 442.

[91] Id. at 427; Hohfeld, supra note 87, at 552.

[92] Hohfeld, supra note 87, at 543–44; Wait, supra note 35, at 24–25 ("[J]urisdiction [of the courts of equity] was not merely suppletory, it was also corrective. In some cases it gave relief where none could be had at law; and, in other cases it interfered to relieve against proceedings taken in courts of common law."); see also Aristotle, Nicomachean Ethics bk. V, at 141–42 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) (c. 384 B.C.E.) (explaining the relationship between legal justice and equity).

[93] See Hohfeld, supra note 87, at 546, 548; see also Maitland, Equity, supra note 89, at 2, 13–14 (explaining the historical development of equity in English courts); Plucknett, supra note 37, at 676–77, 681 (tracing the rise of courts of equity).

[94] See Wait, supra note 35, at 25 ("[R]esort was had to the general principles of equity, in the sense of natural justice, which are antecedent to all positive law."); see also 4 Blackstone, supra note 42, at *433–34 (explaining that courts of equity do not apply their own law and seek to apply the same law as the courts of law).

recognize the relevant rights, but common law courts are for whatever reason wrongly failing to adequately protect them.

2. Equity and Common Law as Equal Partners

The second theory of equity views law and equity as two "independent" parts of the same system that "gr[ew] up" side by side and are "consistent" with each other.[95] That is, both kinds of courts aim to find the unwritten law, and neither one is better than or correcting the other.[96] To be sure, equity might "require" courts to do something that the common law has left undone, but the "relation [i]s not one of conflict"—"[e]very jot and every tittle of the law [i]s to be obeyed."[97]

Throughout English and American history, chancellors and common law judges were at times innovative in recognizing new rights and at other times conservative. Chancellors innovated at first, hearing applications that "appeal[ed] to the justice of the Crown."[98] And they issued new writs for common law judges as needed.[99] But parliamentary supremacy quickly stifled that innovation,[100] and courts of law sometimes refused to

[95] C.C. Langdell, A Summary of Equity Pleading 41 (Cambridge, Charles W. Sever & Co. 2d ed. 1883); Plucknett, supra note 37, at 188–89.

[96] See C.C. Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 55, 58 (1887) ("To say that equity can ['create personal rights'] would be to say that equity is a separate and independent system of law, or that it is superior to law."); Maitland, Equity, supra note 89, at 9–10, 18; see also Henry Schofield, Discussion, 3 Am. L. Sch. Rev. 178, 178 (1912) (criticizing the idea that equity and common law were "a body of rival, clashing law, as distinguished from a body of law that forms part and parcel of the whole law of the land, viewed as a single, harmonious code"); Wait, supra note 35, at 20 ("[M]any remedies are common to both courts of law and of equity, and . . . each court has some advantages over the other in the administration of the law . . . ."); id. at 27 (explaining that equity does not "profess to criticise or review decisions of courts of law").

[97] Maitland, Equity, supra note 89, at 17; 4 Blackstone, supra note 42, at *430 (rejecting the theory that equity is meant to abate the rigor of the common law); Wait, supra note 35, at 152–53; id. at 26–27 (arguing that, no matter the relationship "at an early period," "no new doctrines in equity opposed to the rules or doctrines of courts of law have been established").

[98] See Anthony J. Bellia Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 789 (2004); see also Plucknett, supra note 37, at 164 (noting the unique powers of equity courts in their "early formative period"); Wait, supra note 35, at 26–27 (assuming that courts of equity devised new remedies at their inception, but arguing that they had since been bound by well-settled principles as much as common law courts were).

[99] See Hohfeld, supra note 87, at 548.

[100] See F.W. Maitland, The Forms of Action at Common Law: A Course of Lectures 6, 50–51, 65 (A.H. Chaytor & W.J. Whittaker eds., 1948) [hereinafter Maitland, Common Law] (comparing the "freedom" that "the king's court and the king's chancery" had to make and use new writs before the "parliamentary constitution became definitely established" with the "conservative" nature in which "[c]ourt and chancery" acted afterward).

hear new writs.[101] When the old writs became unwieldy or insufficient to recognize rights or give remedies that common law judges wanted to recognize or give, they tried to innovate within writs.[102] But that innovation was distinct from issuing new writs and happened at a much slower pace.[103] These ebbs and flows dictated whether a particular right was considered legal or equitable,[104] but the two parts worked in harmony toward realizing the higher or actual law.[105]

C. Written Law

Finally, it is much less controversial that finding law is possible when applying statutory text.[106] To be sure, questions abound about whether that law is to be found in the public meaning of the text,[107] the intent of

[101] Maitland, Equity, supra note 89, at 5; Plucknett, supra note 37, at 164.

[102] See Maitland, Common Law, supra note 100, at 6–7 (discussing old forms of action that "were theoretically possible but were never used," noting courts' "power of varying the old formulas to suit new cases," explaining that this power was used only "very cautiously," and explaining that the resulting system was "full . . . of fictions contrived to get modern results out of medieval premises"); Charles M. Hepburn, The Historical Development of Code Pleading in America and England § 23, at 23–24 (Cincinnati, W.H. Anderson & Co. 1897).

[103] See Maitland, Common Law, supra note 100, at 6; Anthony J. Bellia Jr. & Bradford R. Clark, The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute, 101 Va. L. Rev. 609, 636 (2015) (explaining that "at times" courts applied "existing forms of proceeding with enough flexibility to meet the demands of justice" and that although the "line between courts improperly creating new forms of proceeding and properly molding old ones . . . was not perfectly clear, . . . it was a line that English courts and treatise writers attempted to maintain"); Hepburn, supra note 102, § 20, at 20–21; Plucknett, supra note 37, at 28–29; see also Wait, supra note 35, at 7–8, 14 (distinguishing between "new questions" for which courts can "adapt the practice and course of proceedings" and situations in which the "common law does not give a right of action for a tort," in which case "the court cannot supply the defect and furnish a remedy").

[104] See Maitland, Equity, supra note 89, at 1.

[105] See Plucknett, supra note 37, at 188, 210–11 (recounting how law and equity were "closely involved in the working of the other" and even held "conference[] . . . for discussing difficult cases").

[106] But see Frederick Mark Gedicks, The "Fixation Thesis" and Other Falsehoods, 72 Fla. L. Rev. 219, 221–22, 224 (2020); Fallon, supra note 85, at 287–90 (arguing that judges must make law in some sense when they "reach the limits of positive law"); Nelson, Critical Guide, supra note 5, at 935.

[107] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 9 (2004); see also William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, Textualism's Defining Moment, 123 Colum. L. Rev. 1611, 1630–32 (2023) (discussing the choice between original public meaning and contemporary public meaning).

the drafter,[108] the legal tools designed for that purpose,[109] or many other forms of interpreting the text.[110] And some might wonder how much law can be derived from a text as compared to the background norms and rules that give life to what law is in the text.[111] Those questions are outside the scope of this Article, but a broad range of interpretative methods enable judges to find law.[112] The validity of any given method might in turn be determined by the unwritten or written law,[113] but those methods at least purport to tell judges how to find the written law—they do not necessarily allow them to make it.[114]

* * *

To be sure, both determining the content of unwritten law and interpreting written law are difficult. There will inevitably be disputes, not only about whether a decision was correct, but also about whether an incorrect decision was a sincere mistake or impermissible judicial

[108] See, e.g., Larry Alexander, Simple-Minded Originalism, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 87, 88 (Grant Huscroft & Bradley W. Miller eds., 2011); see also H. Jefferson Powell, The Modern Misunderstanding of Original Intent, 54 U. Chi. L. Rev. 1513, 1513 (1987) (reviewing Raoul Berger, Federalism: The Founders' Design (1987)) (describing Raoul Berger as "the most prolific and uncompromising contemporary intentionalist writer on constitutional topics").

[109] See, e.g., John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 Nw. U. L. Rev. 751, 765 (2009); William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1117 (2017) [hereinafter Baude & Sachs, Law of Interpretation].

[110] See, e.g., Badgerow v. Walters, 142 S. Ct. 1310, 1329 (2022) (Breyer, J., dissenting); Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 37–38 (2005).

[111] See generally William Baude, The 2023 Scalia Lecture: Beyond Textualism?, 46 Harv. J.L. & Pub. Pol'y 1331 (2023) (discussing extra-textual considerations that might inform textualist decision-making).

[112] Even for the interpretive methods that allow for consideration of judicial policy, such as Justice Breyer's holistic method, the aim of that consideration is to find the law that governs the case *today*. See *Badgerow*, 142 S. Ct. at 1329 (Breyer, J., dissenting); cf. Ryan D. Doerfler, Can a Statute Have More Than One Meaning?, 94 N.Y.U. L. Rev. 213, 221 (2019) (arguing that statutes can have more than one meaning depending on the audience and setting but not arguing that those meanings are untethered from the law). But see Breyer, supra note 110, at 118–19 (acknowledging that his approach could allow courts to "radically change[] the law," but implicitly defining law as judicial precedent and arguing through examples that the earlier "law" was contrary to the Constitution).

[113] See Charles L. Barzun, The Positive U-Turn, 69 Stan. L. Rev. 1323, 1337 (2017) (explaining that "some" of the "interpretive law . . . is written law" but that "much more of [it] is unwritten").

[114] And to the extent the methods prescribed by the "law" do allow judges to make law, that law might itself violate the original meaning of the Constitution. See infra Section II.C.

lawmaking.[115] But so long as there is an external standard (the law) against which to measure the answer, courts can plausibly find and apply that law without making it.[116]

II. ARTICLE III AND JUDICIAL LAWMAKING

Because it is possible for judges to decide cases and controversies by finding both unwritten and written law, the next question is whether, as a historical matter, the Founding generation viewed the judicial power as including the power to only find law and specifically as not including the power to make it. Although the propriety of judges making law has been accepted today as gospel by nearly all judicial ideologies and philosophies, the federal judiciary might not have had the power to make law at all as an original matter. To support that conclusion, one must first successfully argue that the Constitution did not expressly or implicitly grant any such lawmaking authority. Then, one must address the objection that this limitation could be overcome by a Congress-to-judiciary delegation to make the law from scratch or to make legislative decisions left unmade by Congress.

This Part addresses five distinct sub-questions about whether and when lawmaking was permissible: (1) whether judges could make law at common law; (2) whether they could make law in equity; (3) whether they could make law when applying written law; (4) whether they could make procedural law, and if so, the effect of that procedural lawmaking power; and (5) whether judges could make law if Congress explicitly or implicitly attempted to delegate its lawmaking authority to them via statute. Section II.A first makes the case that lawfinding was understood to be required in

[115] See Transcript of Oral Argument at 158–59, Moore v. Harper, 143 S. Ct. 2065 (2023) (No. 21-1271) (Justice Kagan: "I think that every single one of us on this bench has written opinions at times . . . saying that other judges, whether it's other judges on this Court or . . . lower court judges . . . , have engaged in policymaking rather than in law. And . . . it's just sort of one of the things that judges say when they really disagree with another opinion."). And even judges who are attempting to find law might end up making it. See Quigley, supra note 6, at 311–12.

[116] See Fallon, supra note 85, at 288 ("[M]any sound distinctions, such as those between night and day and hot and cold, have blurry edges."); cf. Sachs, supra note 41, at 789 ("The standard . . . 'tell[s] us what to look for,' and it gives us something 'against which to measure the success or failure of rules-of-thumb.'" (quoting R. Eugene Bales, Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?, 8 Am. Phil. Q. 257, 264 (1971))). To be sure, I depart from Fallon's view to the extent that he argues that lawmaking is permissible under the original meaning of the Constitution, but his argument that one can make meaningful distinctions despite blurry lines is insightful.

applying unwritten and written law alike. Section II.B then argues that procedural lawmaking was permitted but cabined to procedural issues when no preexisting law answered the question. So that limited power was not understood to justify a general lawmaking power. And Section II.C concludes by arguing that it was understood that this lawfinding requirement could not be evaded by a congressional delegation of lawmaking power to the judiciary.

A. Article III's Judicial Power

One fundamental and cross-ideological tenet of American constitutional law is that our government is a government of enumerated powers.[117] Either the people themselves[118] or the people through the states[119] gave up what were otherwise their rights to the federal government.[120] But they only gave up the rights that they granted to the federal government in the Constitution.[121] That is, unless the Constitution granted a power to a particular branch—"either expressly or by unavoidable implication"—that branch had no such power.[122]

To be sure, this formulation does not answer the question of how to determine which powers the Constitution grants to the federal government.[123] In fact, in the next Section, I argue that some procedural

[117] But see generally, e.g., Andrew Coan & David S. Schwartz, The Original Meaning of Enumerated Powers, 109 Iowa L. Rev. 971 (2024) (arguing that the text is at best ambiguous about whether the federal government is limited to its enumerated powers); John Mikhail, The Necessary and Proper Clauses, 102 Geo. L.J. 1045 (2014) (arguing that certain national powers were inherent in sovereignty and that the Constitution recognizes that the federal government has those powers). Even under the anti-enumerationist view, though, it is unclear whether the general legislative power would be vested in the judiciary or whether that power would be placed solely in the legislative branch.

[118] See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816) ("The [C]onstitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the [C]onstitution declares, by 'the people of the United States.'").

[119] See Thomas Jefferson, Resolutions Adopted by the Kentucky General Assembly (Nov. 10, 1798), *in* 30 The Papers of Thomas Jefferson 550, 550 (Barbara B. Oberg, James P. McClure, Elaine Weber Pascu, Shane Blackman & F. Andrew McMichael eds., 2003).

[120] See Anthony J. Bellia Jr. & Bradford R. Clark, The Constitutional Law of Interpretation, 98 Notre Dame L. Rev. 519, 540 (2022) [hereinafter Bellia & Clark, Interpretation] (arguing that the states were sovereign and "cede[d] a portion of their sovereign rights and powers . . . by ratifying the Constitution").

[121] U.S. Const. amend. X.

[122] Bellia & Clark, Interpretation, supra note 120, at 604.

[123] See Coan & Schwartz, supra note 117, at 992 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819)).

lawmaking *is* permissible (but that it does not justify general lawmaking), perhaps as an inherent power or a judicial power incidental to the case-deciding judicial power. But in Part I, I explained that the grant of judicial power could not have included a general or substantive lawmaking power on the basis that adjudicating disputes inherently requires making substantive law, so the inherent-power avenue is unavailable.[124] And in this Section, I argue that the "judicial Power" granted in Article III was not understood or intended to have included—directly or incidentally—a general lawmaking power, so those avenues are similarly closed.

Because the grant itself did not include that power and that power cannot be implied, the Constitution did not authorize federal judges to make law. And if federal judges can only exercise the powers granted to them by the Constitution originally authorized, then they cannot make law.

1. Common Law

The main font of supposed judicial lawmaking is the common law.[125] Judges and scholars have long pointed to the common law and asserted that common law judging "consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."[126] Sometimes, to be sure, "a well-established commercial or social practice could form the basis for a court's decision," but those cases, the narrative goes, were the exception, not the rule.[127]

That cynicism was far from the consensus in 1789; in fact, the consensus was that judges *did not and could not* make law in common law cases. The lawfinding "conception of the common law was adopted as orthodoxy by American lawyers of the founding period."[128] Justice Iredell famously stated "that the distinct boundaries of law and Legislation [must not] be confounded, in a manner that would make Courts arbitrary, and in effect makers of a new law, instead of being (as certainly they alone ought to be) expositors of an existing one."[129] In sum,

[124] See supra Part I.

[125] See, e.g., Alexander Volokh, Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law, 66 Emory L.J. 1391, 1395–96 (2017) (stating that "[f]ederal courts have a lot of inherent powers" including "their inherent power to make federal common law").

[126] Scalia, Common-Law Courts, supra note 29, at 7.

[127] Id. at 4.

[128] McConnell, Tradition, supra note 42, at 188.

[129] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 448 (1793) (opinion of Iredell, J.) (emphasis omitted); see also Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 309 (1818) ("We have nothing to

Founding-era "American lawyers agreed wholeheartedly with their English forebears that the common law was a body of custom that judges discovered."[130]

It is unclear exactly when judges and legal scholars shifted their mindset to view common law judges as de facto legislators, but the lawfinding conception persisted well into the 1800s. Professor Morton J. Horwitz has argued that "the shift started in the 1790s and was mostly finished by 1820."[131] But Horwitz's account is contested,[132] and it appears to have conflated at least some evidence of a popular-sovereignty justification for the common law and a judge-made common law.[133] Indeed, there is evidence that as late as 1871, it was an uncontestable proposition, even among legislators, that "courts . . . do not enforce laws that are not made by the [legislature] or not recognized as law by the [legislature], being the common law of the State" because "only the legislative power . . . can make a law."[134] And as late as 1907, one treatise acknowledged that "the technical correctness of" the conclusion—that

do but to expound the law as we *find* it; the defects of the system must be remedied by another department of the government." (emphasis added)); Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849) ("It is the province of a court to expound the law, not to make it.").

[130] Quigley, supra note 6, at 296. To be sure, an objector might point to certain judges, perhaps Lord Mansfield, who supposedly thought it acceptable to make law rather than find it. See, e.g., James Oldham, Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders, 8 Green Bag 2d 269, 271, 273–74 (2005) (arguing that Lord Mansfield engaged in judicial activism, including by making new law). Some, though, have argued that Lord Mansfield's supposed innovations were not as innovative as one might think, see David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain 99–100 (1st ed. 1989), and surely the same could be argued for other apparently innovative common law judges. But even taking some of the accounts of Lord Mansfield at face value, it is not so clear that Lord Mansfield made law so much as recognized preexisting custom. See Oldham, supra, at 271 ("Mansfield . . . managed to absorb mercantile customs into the common law . . . ."); Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harv. L. Rev. 943, 967 (1927) ("Did not Lord Mansfield make law . . . when he incorporated into the common law the customs and practices of merchants?"). And in any event, however Lord Mansfield's legacy should be viewed, our modern view of him does not defeat the overwhelming evidence that finding law is possible and that the Founders viewed judges as lawfinders, not lawmakers.

[131] Quigley, supra note 6, at 298 (citing Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 9, 30 (Stanley N. Katz ed., 1977)).

[132] See, e.g., Stewart Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003, 1060 n.284, 1061 n.290, 1072 n.339 (1985).

[133] See Quigley, supra note 6, at 298 n.89 (offering this critique).

[134] Cong. Globe, 42d Cong., 1st Sess. 696 (1871) (statements of Sen. Allen Thurman (D-OH) and Sen. George Edmunds (R-VT)); see also Wait, supra note 35, at 27–28 (saying that "[i]t is the province of the judge to expound the law only: the written, from the statutes; the unwritten law from" precedent, treatises, the legal community, and reason).

"[d]ecisions . . . do not constitute laws but are at most evidence of what the laws are"—could "not be questioned."[135]

2. Equity

Another supposed source of lawmaking power is the realm of equity, but that supposition also turns out to be overstated as a historical matter. First, none of the Founding-era sources that state that judges must find (unwritten) law distinguish equity or acknowledge that equity includes a lawmaking power. Statements such as Justice Iredell's that judges are "expositors" of the law did not limit themselves to common law, nor did they mention the ten-thousand-pound elephant in the room that would be a freewheeling equitable lawmaking power.[136]

Second, as Beever has explained, chancellors in equity were not traditionally viewed as making law, but as fulfilling the unwritten law where common law judges had failed to do so.[137] There were two parts of the system, working together (or competing with each other) to fulfill the unwritten law.[138] Chancellors strove to find a preexisting law just as much as common law judges did.[139]

[135] Rose, supra note 18, § 12[b], at 105; see also id. (stating that, although there is no difference between written and unwritten laws with respect to federal courts' obligation to apply state law under the Rules of Decision Act, "as decisions are merely evidence of the local law[,] the Federal courts may exercise an independent judgment as to the satisfactory nature of such evidence").

[136] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 448 (1793) (opinion of Iredell, J.).

[137] Beever, supra note 68, at 425 (first citing John Hamilton Baker, An Introduction to English Legal History 102 (4th ed. 2002); and then citing Norman Doe, Fundamental Authority in Late Medieval English Law 108, 130 (1990)).

[138] See Baker, supra note 137, at 102 ("In making such decrees, medieval councillors or chancellors did not regard themselves as administering a system of law different from the law of England."); 4 Blackstone, supra note 42, at *433–34 (rejecting that courts of equity "[rose] above all law" to become "a most arbitrary legislator," instead explaining that equitable principles were "founded in the same principles of justice and positive law" as the common law); Maitland, Equity, supra note 89, at 5–6, 18, 20–21 ("Chancellors [did not] consider[] that they had to administer any body of substantive rules that differed from the ordinary law of the land."); see also Wait, supra note 35, at 27 (explaining that courts of equity had principles that were "very well settled" and that they had "no more discretionary power than courts of law").

[139] See Beever, supra note 68, at 426–27; 1 Blackstone, supra note 42, at *61–62; Plucknett, supra note 37, at 692.

3. Written Law

Lawfinding was similarly expected in the context of legal interpretation, a less objectionable enterprise.[140] Consider, for example, Justice Story's opinion in *United States v. Coolidge*[141] while riding circuit. There, the court confronted the scope of the jurisdiction of federal courts over admiralty crimes.[142] In expounding his opinion that the court had subject matter jurisdiction, Justice Story explained that "[C]ongress has provided for the punishment of murder, manslaughter and perjury, . . . but it has [nowhere] defined these crimes."[143] He then argued that the definitions of those crimes were to "be sought and exclusively governed by the common law."[144] Justice Story found this conclusion to be obvious because, otherwise, "the judicial power of the United States would be left, in its exercise, to the mere arbitrary pleasure of the judges, to an uncontrollable and undefined discretion."[145] That is, for Justice Story, an open-ended and undefined criminal prohibition must have been defined and shaped by the common law because judges could not make—or fill in—the law themselves.[146]

Justice Washington expressed a similar sentiment while riding circuit. In that case, a federal statute prohibited "making a revolt."[147] He had an intuitive definition, but nonetheless he refused to apply it.[148] Neither the

[140] To be sure, both examples below come in the context of penal statutes, which were subject to the rule "that penal statutes are construed strictly." United States v. Open Boat, 27 F. Cas. 354, 357 (Story, Circuit Justice, C.C.D. Me. 1829) (No. 15,968). And other statutes, such as remedial statutes, might have been subject to more lenient rules of construction. Taylor v. United States, 44 U.S. (3 How.) 197, 210 (1845). But the point of these examples is less concerned with how far a court must go into its toolkit before declaring that there is no (written) law to apply and more concerned with what judges near the Founding did once they reached the end of that toolkit. And these examples suggest that judges did not consider themselves free to make law.

[141] 25 F. Cas. 619 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857), *rev'd on other grounds*, 14 U.S. 415 (1816).

[142] Id. at 619, 621.

[143] Id. at 620.

[144] Id.

[145] Id.

[146] Justice Story left unstated what would happen if there was no common law meaning to give to those terms. But unless one would suppose that judges were allowed to become "arbitrary" and "uncontrollable," see id., Justice Story's answer appears to be that courts could not enforce such a law (or that there was no law at all).

[147] United States v. Sharp, 27 F. Cas. 1041, 1043 (Washington, Circuit Justice, C.C.D. Pa. 1815) (No. 16,264).

[148] Id.

common law, nor admiralty, nor the civil law provided a definition.[149] And the linguists' definitions were sufficiently "multifarious" that the outcome would change based on the definition selected.[150] So Justice Washington refused to define the statute altogether, ostensibly on the grounds that doing so in that case would be legislative.[151]

In addition to where Congress had legislated, this principle applied equally to where "Congress ha[d] not legislated fully or not acted at all."[152] In those cases, it was "[p]lain[]" that judges could not "assume any of the legislative powers constitutionally conferred upon Congress."[153] To be sure, "[i]t [wa]s not easy to draw the line between judicial legislation forbidden by the distribution of powers in the constitution, and the more strictly judicial function of interpretation, definition and construction."[154] But even still, "the distinction [wa]s important."[155]

4. Constitutional Structure

Allowing judicial lawmaking in any context would have made hogwash of the structure of judicial review.[156] Consider the justification for judicial review. Chief Justice Marshall explained that the judiciary was to resolve disputes,[157] but judges could not resolve those disputes without deciding what the law was, as "expositors of . . . existing [law]."[158] Measuring a statute or tenet of the unwritten law against the Constitution was simply a necessary aspect of determining what the law was. If a statute or unwritten-law principle conflicted with the Constitution, then it must have been set aside and the dispute resolved

[149] Id.
[150] See id.
[151] See id.
[152] Rose, supra note 18, § 13[c], at 116.
[153] Id.
[154] Id.
[155] Id.
[156] Cf. Luther v. Borden, 48 U.S. (7 How.) 1, 40 (1849) ("Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them.").
[157] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
[158] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 448 (1793) (opinion of Iredell, J.); see also Hamburger, supra note 68, at 379–80 (recounting the Founding-era practice of judicial review by lower courts and arguing that this practice establishes that judicial review is a necessary part of exercising the judicial power to resolve cases).

without consideration of the unconstitutional "law."[159] Only after all three branches agree that a law is constitutional can it be enforced against an individual.[160] And the judiciary, as an independent branch detached from the lawmaking process,[161] was in the position to make the final and ultimate determination (in that case) because it had made neither the Constitution, nor the statute, nor the unwritten law.

But if courts were making law, they would have been foxes guarding a henhouse.[162] A judge who makes a law would have to consider whether his newly made law was unconstitutional,[163] an awkward position for a judge who had just determined in "the brilliance of [his] own mind" that "th[e] law[] . . . ought to govern mankind."[164] In this sense, it would have violated the separation of powers not only because the judiciary unlawfully exercised Congress's legislative power, but also because such lawmaking infringed on the judiciary's own duty to judge the rights of the parties before it and to be independent "expositors" of the law.[165]

This conundrum could not have been resolved by allowing future judges to determine the constitutionality of the rule. Even setting aside the problems of stare decisis and deference that might shield a rule from review,[166] that evasive maneuver allows the judiciary to impose its will on the parties before it with the promise that some *future* parties *might* get independent review of the rule. That is cold comfort coming from the

[159] See William H. Pryor Jr., The Unbearable Rightness of *Marbury v. Madison*: Its Real Lessons and Irrepressible Myths, 12 Engage 94, 96–98 (2011).

[160] Frank H. Easterbrook, Presidential Review, 40 Case W. Rsrv. L. Rev. 905, 910 (1990).

[161] See The Federalist No. 78, supra note 19, at 469 (Alexander Hamilton) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors . . . .").

[162] Cf. id. at 467 (rejecting the argument that the legislature is the ultimate judge of its constitutional authority); Stringer v. Whitley, 942 F.3d 715, 725 (5th Cir. 2019) (Ho, J., concurring) ("As Americans, we have never trusted the fox to guard the henhouse.").

[163] But see, e.g., Landcastle Acquisition Corp. v. Renasant Bank, 57 F.4th 1203, 1228 n.10 (11th Cir. 2023) (refusing to consider whether its own common law rule violated the Takings Clause—as the dissent had suggested); id. at 1259–61 (Pryor, C.J., dissenting).

[164] See Scalia, Common-Law Courts, supra note 29, at 7.

[165] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 448 (1793) (opinion of Iredell, J.); The Federalist No. 78, supra note 19, at 465–70 (Alexander Hamilton); Luther v. Borden, 48 U.S. (7 How.) 1, 53 (1849) ("[The political branches] are, by their pursuits and interests, better suited to make rules; we, to expound and enforce them, after made.").

[166] Cf. Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 25–28 (1994) (explaining how the doctrines of stare decisis and deference can alter what judges would otherwise decide).

supposed neutral arbiter protecting individuals from unlawful infringements on their legal rights.[167]

Even if we, as a society, think that judges should be authorized to make law, allowing (and enabling) them to usurp that power creates structural and doctrinal problems. If instead we formally removed that internal lawfinding constraint and sanctioned a lawmaking power, we would be able to simultaneously consider whether and which external constraints to impose to offset and limit that power,[168] constraints which might otherwise be unlawful today. Allowing judges to usurp a lawmaking power without any countervailing measures stresses our system, which was premised on judges finding law.[169] It should come as no surprise that many people who think that judges descriptively do make law[170] or that they normatively should make law[171] also advocate for substantial Supreme Court reform.[172]

* * *

[167] See The Federalist No. 78, supra note 19, at 465–70 (Alexander Hamilton).

[168] See Tyler B. Lindley, Remedial Limits, Constitutional Adjudications, and the Balance of Powers, 58 Wake Forest L. Rev. 655, 699–701 (2023) [hereinafter Lindley, Remedial Limits].

[169] Cf. Beever, supra note 68, at 438–39 ("The common law . . . entails either that the common law routinely imposes retrospective duties and obligations on individuals in flagrant violation of the rule of law or that the declaratory theory of law is true. . . . It is a dilemma we cannot escape.").

[170] See, e.g., F. Andrew Hessick, Saying What the Law Should Be, 48 BYU L. Rev. 777, 811–15 (2022); Eric J. Segall, Constitutional Change and the Supreme Court: The Article V Problem, 16 U. Pa. J. Const. L. 443, 451 (2013) (arguing that in some contexts, the Court has "effectively amend[ed] the Constitution" by "ignor[ing] or distort[ing]" "perfectly clear" text).

[171] See Fallon, supra note 85, at 292–93 (arguing that when the law does not answer the question, "the Justices should do what is morally best under the circumstances"); Hessick, supra note 170, at 816 ("Courts . . . often *should* say what the law should be.").

[172] See, e.g., Eric J. Segall, Foreword II: To Reform the Court, We Have to Recognize It Isn't One, 2023 Wis. L. Rev. 461, 462; Andy Hessick (@AndyHessick), X (Sept. 28, 2020, 7:32 PM), https://x.com/AndyHessick/status/1310724131269357568 [https://perma.cc/6TF6-G2W8]; Andy Hessick (@AndyHessick), X (Apr. 14, 2017, 2:57 PM), https://x.com/AndyHessick/status/852958984495648768 [https://perma.cc/K6P5-Q3FH]; Andy Hessick (@AndyHessick), X (Nov. 13, 2017, 7:20 AM), https://x.com/AndyHessick/status/930047831834021888 [https://perma.cc/G7AR-6X6N]; Justice Forever—Life Tenure: An Interview with Prof. Richard H. Fallon, Jr., TalksOnLaw, https://www.talksonlaw.com/talks/justice-forever-life-tenure-on-the-supreme-court [https://perma.cc/6XD9-DZXA] (last visited Jan. 12, 2025). I take no position on whether, in the absence of both the will to expressly grant judges lawmaking power and the ability to prevent them from doing so, court reform would be desirable. But it is unclear to me whether either condition obtains today.

Judges as lawfinders was the official story of the law until well into the twentieth century.[173] Even if some judges and commentators thought that finding law was a facade and that judges were in fact making law, judges were portraying themselves as lawfinders,[174] an implicit recognition that lawmaking was illicit and that judges needed to hide what they were doing. Perhaps the judiciary extra-constitutionally obtained that power, or maybe the original terms of the grant of judicial power are irrelevant today. But those who consider constitutional actors bound to some form of the Constitution's original meaning should be wary of merely acquiescing in this kind of judicial power grab. Instead, they should try to hold judges who make law accountable for exceeding their power.

B. Procedural Law

One fundamental and important objection to my entire enterprise is that judges have long made the procedural law that governs dispute resolution in their courts. Judges have, the objection goes, established procedural rules in cases and announced the procedural rules that would apply in future cases. So, if judges could make this kind of law at the Founding, why would there be an objection to judges making more substantive laws, at least in limited instances?[175]

[173] It appears unlikely to be a mere coincidence that the explicit embrace of judicial lawmaking and some of the Court's most aggressive substantive due process decisions occurred at the same time. See Anthony B. Sanders, The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline, 55 Am. U. L. Rev. 457, 471–73 (2005) (noting the early twentieth-century rise of substantive due process); John Hart Ely, Democracy and Distrust 132–33 (1980) (discussing the same as contemporary with a strong view of nondelegation); cf. Stephen E. Sachs, Harvard L. Sch., Life After *Erie*: A Lecture Delivered on the Occasion of the Author's Appointment as Antonin Scalia Professor of Law 15 (Nov. 1, 2023), http://ssrn.com/id=4633575 [https://perma.cc/CG66-LNLH] (arguing that the *Erie* world "was constructed *deliberately*, by those who viewed rule by judges as a superior mode of governance to rule by legislatures").

[174] See, e.g., Donovan v. Pennsylvania Co., 199 U.S. 279, 300 (1905); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 526–28 (1928).

[175] It might be that procedural law, as distinguished from substantive law, see Hohfeld, supra note 87, at 547, 552, 558 (differentiating between substantive law and adjective—or procedural—law), is a separate type of law such that it is not truly law in the relevant sense. But see id. at 569 (positing that the separation of substance—both antecedent rights and remedial rights—and procedure is merely helpful for exposition and does not reflect any "essential differences as to their intrinsic character"). But relying on that narrow conception of law would be unsatisfying. It is unclear whether the Founders held that conception—and whether the Founders' belief about the nature of law (assuming it separated the two) would be

Federal courts cannot make every kind of procedural law as defined by the *Erie* substance-procedure distinction.[176] Some law that we call procedural is not really procedural at all, at least for these purposes. As then-Professor Amy Coney Barrett explained, when procedural law is defined broadly as "primarily concerned with the regulation of court processes and in-courtroom conduct," that law includes doctrines such as abstention, forum non conveniens, stare decisis, remittitur, and preclusion.[177] These doctrines, though, were traditionally "drawn from the general law," "which courts understood themselves to apply rather than make."[178] And even if no such rules existed, courts would still have been able to decide cases and controversies—the court could refuse to abstain, for example.

Instead, I focus on the kind of "discretionary rules" which "addressed narrower questions" and "which courts understood themselves to make."[179] It was necessary to make these rules because without these kinds of intra-court procedural rules, courts could not have exercised the case-deciding judicial power. Courts traditionally understood themselves to "have the power under Article III 'to regulate their practice.'"[180] But even in English practice, court-regulated process was guarded by Parliament, which was "jealous of all that look[ed] like an attempt to legislate" substance under the guise of regulating process.[181] And even in this narrow area, courts were still required to apply preexisting law where it existed, reflecting a general distaste for even otherwise necessary judicial lawmaking.[182]

It is unclear—but ultimately irrelevant—whether this limited procedural lawmaking power was an incidental judicial power that was

binding if we disagreed today. And further, it is an unnecessary sidestep because even a full-blown procedural lawmaking power would not necessarily entail a substantive one.

[176] Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 427–28 (1996) (explaining that under *Erie*, a rule might be procedural if it "significantly affect[s] the result of a litigation" (quoting Guaranty Tr. Co. v. York, 326 U.S. 99, 109 (1945))). To be sure, that distinction might not line up with the historical understanding of "procedure," but nevertheless, the exact demarcation does not alter these general principles.

[177] Barrett, Procedural Common Law, supra note 29, at 822–24.

[178] Id. at 884.

[179] Id.

[180] Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[181] See Maitland, Common Law, supra note 100, at 6.

[182] See, e.g., *Wayman*, 23 U.S. (10 Wheat.) at 43–44.

historically exercised,[183] an inherent power necessarily granted in Article III,[184] or part of the case-deciding judicial power.[185] If it was an incidental power, then a substantive lawmaking power would have had to pass muster on its own (which it could not). If procedural lawmaking was an inherent power, it could not be used to justify an additional, unnecessary power, and so substantive lawmaking would have to qualify on its own (which it cannot). And although it is unlikely that the "judicial Power" is thick enough to speak to procedural lawmaking powers, Article III's "judicial Power" did not include a substantive lawmaking power.[186] So, however procedural lawmaking might be justified, its existence does not undermine the conclusion that Article III granted the judiciary no general lawmaking power.[187]

C. Delegation

The Constitution established a then-unique distribution of governmental powers.[188] It first separated and provided each branch with a particular part of government power: the legislative power included in the Constitution to Congress, the executive power to the president, and the judicial power to the Supreme Court. And the general rule was that a branch can exercise only its respective power. But the Constitution was

[183] Cf. Julian Davis Mortenson, The Executive Power Clause, 168 U. Pa. L. Rev. 1269, 1325–34 (2020) (explaining the traditional view that the appointment power is an incidental, inseparable part of the executive power).

[184] Cf. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228–29 (1821) (acknowledging the existence of an inherent legislative contempt power because it is necessary for Congress to fulfill its constitutional legislative function).

[185] But see Sachs, supra note 66, at 1864 (dismissing the possibility that stare decisis is included in the meaning of "judicial Power" because it reads too much into the text (quoting U.S. Const. art. III, § 1)).

[186] See supra Section II.A.

[187] The judiciary's procedural lawmaking power raises many related questions: whether courts can announce procedural rules in advance, whether Congress can authorize one court (such as the Supreme Court) to impose procedural rules on other courts (such as inferior courts), whether district courts can overrule individual judges on procedural matters, whether Congress's regulations override courts' procedural rules given that Congress's power to regulate executive processes is limited, and the nature of appellate review of procedural lawmaking. But none of these questions are implicated here.

[188] Rebecca L. Brown, Accountability, Liberty, and the Constitution, 98 Colum. L. Rev. 531, 574 (1998).

"[f]ar from perfectly Montesquieuian"[189] in that "[p]owers [we]re not so much separated as duplicated and distributed."[190]

The Constitution gave the other branches and other governmental units some of these powers. For instance, Congress is authorized to give the judicial power to inferior courts on its own terms.[191] The president has a limited veto power over Congress's legislative actions.[192] The president nominates judicial officers, and the Senate advises and consents to those nominations.[193] Congress can establish executive offices, to be filled only after the Senate consents to the president's nominees, or, for inferior officers, to be placed in a different government body.[194] These are just a few examples of the Constitution's explicit mixing of the legislative, executive, and judicial powers. But notably, the Constitution does not explicitly give the judiciary any role in the lawmaking process. So there is no justification based on constitutional text alone for allowing the judiciary to play a role in the lawmaking process.

In addition to constitutional text, historical practice might justify certain crossovers between branches and their respective powers. For example, there is evidence that the executive traditionally exercised some level of what might be characterized as legislative power (in the sense that the executive action defines the rights and obligations of individuals) as part of its executive role.[195] The boundaries of the role the executive played are unclear, but such a historical practice—if it really occurred—

[189] Lindley, Remedial Limits, supra note 168, at 697.
[190] Easterbrook, supra note 160, at 929.
[191] U.S. Const. art. I, § 8; id. art. III, § 1.
[192] Id. art. I, § 7.
[193] Id. art. II, § 2.
[194] Id.
[195] See, e.g., Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 332–66 (2021) [hereinafter Mortenson & Bagley, Delegation]; see also Quigley, supra note 6, at 299–301 (cataloging colonial and state practices). See generally Chad Squitieri, Towards Nondelegation Doctrines, 86 Mo. L. Rev. 1239 (2021) (arguing that delegations should be assessed by reference to Congress's enumerated power and the Necessary and Proper Clause). But see generally Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490 (2021) (arguing for the existence of the nondelegation doctrine at the Founding); Joseph Postell & Paul D. Moreno, Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine, 3 Const. Stud. 41 (2018) (arguing for the existence of the nondelegation doctrine in early American history and asserting its relevance in early state and federal cases). Some have similarly argued that there is historical practice for other branches exercising the judicial power, see William Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1516–17 (2020) [hereinafter Baude, Article III] (collecting sources), but perhaps the better understanding is that these non-Article III courts did not exercise the judicial power of the United States at all, see id. at 1525–57.

might justify some role for the executive in the lawmaking process when Congress delegates its legislative powers.[196] But there is no analogous historical practice that allows the judiciary to exercise substantive lawmaking power, even when Congress tries to marshal the judiciary to its service. In fact, Justice Story appears to reject the idea as unfathomable.[197] In sum, among all the mixing and matching of power, "the line-crossing in the colonies and in the Constitution only goes one way," and the judicial power would not "have been understood by contemporaries to include lawmaking power."[198]

All of this is hard to square with the conventional wisdom today, which concludes that Congress can delegate to federal courts the power to make law—either to fill gaps or to give meaning to a vacuous statute.[199] Some judges have justified this lawmaking as a necessary incident of legislation; that is, effective legislation is impossible without delegating some degree of lawmaking power to judges to make the statute work.[200] Others have argued that judicial lawmaking in interpretation is a normative good that judges can and do fulfill in our system.[201] And finally, some have argued that some congressional delegation is acceptable because the lawmaking power is ancillary to the power to make substantive common law.[202]

Even on the conventional account, there are some outer limits on this delegative power. Professor Alexander Volokh has argued that where the delegated power is ancillary to an inherent power—such as, in his view, legislative lawmaking is ancillary to the judiciary's inherent common-lawmaking power—a delegation is permissible with only an intelligible principle.[203] Professor Richard Fallon has argued that the Court's

[196] The source of this power is unclear, but perhaps it could be justified as implicit in the executive power itself, cf. Mortenson, supra note 183, at 1325–34 (explaining that some powers were seen as implicit in the executive power), or as derived from the constitutional grants of power to Congress, see Squitieri, supra note 195, at 1258–64.

[197] United States v. Coolidge, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857).

[198] Quigley, supra note 6, at 301.

[199] See Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 355 ("Frankfurter and his allies have lost the battle against delegated judicial lawmaking.").

[200] See, e.g., D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring).

[201] See, e.g., Hessick, supra note 170, at 811–15.

[202] See Volokh, supra note 125, at 1457.

[203] See id. at 1443–44.

lawmaking power must "begin[] with a backward-looking focus."[204] Others have offered a somewhat more restricted nondelegation doctrine with respect to the judiciary as compared to the executive,[205] but even these accounts allow some room for Congress to delegate lawmaking power to the judiciary.

Although the conventional account imposes some limitations, the better and more coherent way to approach the historical question is to unmoor the delegation doctrine from the federal courts' supposed lawmaking power consistent with the prevailing view at the Founding. That is, if the starting premise is that judges have no lawmaking power at all, then the traditional justifications for delegation begin to fall apart. For example, Volokh relies on the judiciary's common-lawmaking power to tentatively justify legislative delegation as part of an ancillary power, which then requires only the most minimal intelligible principle.[206] But absent that common-lawmaking power, the connection becomes more attenuated. Instead, the justification would need to stem from an inherent or incidental, *procedural* lawmaking authority, which would then justify delegating a *substantive* lawmaking authority. Even assuming holding one power can justify delegations of an "ancillary" power,[207] the argument that an inherent power addressing a completely different issue can supply that basis appears much less plausible.

The potential for Congress to dilute the judiciary's ability to exercise its judicial power is another distinction that is relevant under conventional wisdom. Congressional delegation of lawmaking power to the judiciary would inhibit the judiciary's capacity to exercise judicial review, which strikes at the heart of the "dilution" or "undermining" concern of modern nondelegation doctrine.[208] As discussed above, the structure of the Constitution and the judicial branch point toward not allowing judicial lawmaking because judicial review is inhibited when the judiciary is

[204] Fallon, supra note 85, at 289.

[205] See, e.g., Aaron Nielson, *Erie* as Nondelegation, 72 Ohio St. L.J. 239, 280 (2011); Andrew S. Oldham, Sherman's March (In)to the Sea, 74 Tenn. L. Rev. 319, 371–79 (2007).

[206] Volokh, supra note 125, at 1457. Volokh reserves judgment on the correctness of the ancillary power doctrine generally, but he offers a descriptive account and conceptual justification. See id. at 1458–59.

[207] See id. at 1396 (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)); Martin H. Redish, The Constitution as Political Structure 140 (1995).

[208] Cf. Morrison v. Olson, 487 U.S. 654, 695–96 (1988) (addressing the dilution concern in the context of a congressional delegation of power that purportedly undermined executive power).

forced to review its own rules.[209] If Congress could delegate its lawmaking power, then it could dilute the judiciary's ability to perform one of its key functions (judicial review[210]) in a different—and more serious—way than a similar delegation to the executive would.

So where does that leave the line between permissible and impermissible delegations to the judiciary? Justice Gorsuch's approach to executive delegations in his dissent in *Gundy v. United States*[211] provides a helpful framework.[212] In *Gundy*, Justice Gorsuch offered three categories of permissible delegations: (1) Congress can "make[] the policy decision[]" and "authorize another branch to 'fill up the details'"; (2) "Congress [can] prescribe[] the rule governing private conduct" and "make the application of that rule depend on executive fact-finding"; and (3) "Congress may assign the executive and judicial branches certain non-legislative responsibilities" if Congress's legislative authority "overlaps with [the] authority . . . vest[ed] in another branch."[213] Although *Gundy* concerned delegations to the executive, Justice Gorsuch also addressed delegations to the judiciary. I address each prong in turn, arguing that the judiciary's power to "fill up the details" is more limited than Justice Gorsuch would allow, that Congress might be able to condition law on judicial factfinding, and that Congress can "delegate" its legislative power to the judiciary when that power is overlapping.

First. The judiciary could not make substantive law and likely could not make any law when there was preexisting law to apply. Justice Story explained that even where Congress has made the policy decision—such as to prohibit and punish murder—courts cannot make the law up themselves by defining broad terms.[214] Filling up the details is a legislative activity. Deciding what a statute prohibits or regulates and how

[209] See supra notes 156–72 and accompanying text.

[210] Charles L. Black, Jr., The People and the Court: Judicial Review in a Democracy 80, 86 (1960).

[211] 139 S. Ct. 2116 (2019).

[212] Serious objections to the historical accuracy of Justice Gorsuch's approach have been lodged. See generally, e.g., Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding: A Response to the Critics, 122 Colum. L. Rev. 2323 (2022) [hereinafter Mortenson & Bagley, Response] (suggesting that Justice Gorsuch's (and others') argument fails in not taking into account that at the Founding a power could be both executive and legislative depending on which branch exercised the power). Nonetheless, Justice Gorsuch's approach offers a nice framework for analyzing delegation questions.

[213] *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting).

[214] United States v. Coolidge, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857).

requires unrestrained[215] interest weighing and policy-making, which are both legislative in nature. To be sure, some statutes require judges to fill up the details *with preexisting law*,[216] but there is a difference between telling judges *which* law to apply and telling judges to *make* law. For example, as Professor Charles Tyler has explained, using general law to fill gaps in underdetermined statutes prevents judges from making law and promotes the democratization of that non-codified law.[217] So, with respect to substantive law, the need to "fill up the details," standing alone,[218] does not justify judicial lawmaking.[219]

Second. Justice Gorsuch argued that it is permissible for legislative decisions to hinge on *executive* fact-finding,[220] but, in a sense, legislative decisions might also permissibly hinge on *judicial* fact-finding. Consider severability clauses. The rule that governs depends on whether the judiciary finds a part of the law unconstitutional.[221] Assume a statute provides that if provision *x* is held unconstitutional by the Supreme Court, then none of the provisions in the statute are in effect.[222] So Congress has in effect made the legislative decisions for two future hypothetical worlds: one in which the Court determines that provision *x* is unconstitutional, and one in which the Court either makes no determination or determines that provision *x* is constitutional. The Court does not make the law, but its judicial function is an input for the outcome (binding law).

[215] By unrestrained, I do not mean literally unrestrained because, of course, judges are restrained even when lawmaking, by factors including public opinion and, in extreme cases, impeachment. Rather, I mean unrestrained by traditional legal constraints that would apply even when the law allows judges to consider policy rationales.

[216] See, e.g., 42 U.S.C. § 1988(a).

[217] Tyler, supra note 9, at 686, 690–92.

[218] Filling up the details might be permissible when judges would otherwise be able to make that law. See infra notes 224–29 and accompanying text.

[219] Another possible distinction is that often, for the executive, "filling up the details" looks very similar to setting enforcement priorities and announcing the executive's general understandings of the law to promote clarity. Judicial delegations have no such appearance.

[220] Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

[221] Abbe R. Gluck, Reading the ACA's Findings: Textualism, Severability and the ACA's Return to the Court, 130 Yale L.J.F. 132, 160–61 (2020) (describing these statutes as nonseverability clauses).

[222] See id. at 159 & n.97 (collecting statutes that contain these kinds of provisions). The contingency might be phrased as a court's holding of unconstitutionality or the mere fact that the provision is unconstitutional, but those two contingencies are different. See William Baude, Severability First Principles, 109 Va. L. Rev. 1, 14–15 (2023) [hereinafter Baude, Severability].

One might object that Congress is not delegating any power to the judiciary because the judiciary would have determined provision *x*'s constitutionality anyway and that Congress's legislation merely depends on *future* facts, not delegated fact-finding.[223] To be frank, I have no objection to this framing. Though I do think the more natural framing is that Congress did delegate some power of legislative significance to the judiciary beyond that exercised in a standard case, such power is not a legislative power. In either event, delegated fact-finding does not support a congressional power to direct courts to make law.

Third. As already discussed, Congress can likely allow the judiciary to make decisions that it would otherwise be able to make without the legislative enactment.[224] Congress can decline to legislate on these matters, and it can supplant any rules the courts have made with its own.[225] So it would make little sense to argue that it is an impermissible delegation for Congress to declare that the judiciary can exercise its constitutional power or even to set boundaries on that exercise.

It is in this context that we must understand Chief Justice Marshall's analysis in *Wayman v. Southard*[226] that distinguished between "important subjects, which must be entirely regulated by the legislature itself," and matters of "less interest, in which a general provision may be made, and power given . . . to fill up the details."[227] *Wayman* concerned one of the lesser-interest matters—court procedure—and so the Court concluded that the statute was not an impermissible delegation to the judiciary.[228] In addition, courts could have regulated that particular question of procedure in the absence of congressional enactments.[229]

Two contextual details prevent these statements from justifying a broader lawmaking delegation. First, court procedure was an overlapping power, so *Wayman*'s application to judicial delegations might be limited to overlapping powers. Second, Chief Justice Marshall stated that a matter in question is either important or not and that *only* the less important matters could be generally provided for and left to be filled by other

[223] Baude, Severability, supra note 222, at 15 n.62 ("[I]t seems more accurate to see [nonseverability provisions] as another form of contingent legislation . . . .").
[224] See *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).
[225] See supra notes 17, 182 and accompanying text.
[226] 23 U.S. (10 Wheat.) 1 (1825).
[227] Id. at 43.
[228] Id. at 43–46.
[229] See id. at 43, 45.

branches.[230] It is unclear that *Wayman* can stand for a principle that *all* legislative subjects—including important ones—can be provided for generally and the details left to be filled in.

Professors Julian Davis Mortenson and Nicholas Bagley inversely argue that *Wayman* cannot stand for *any* limitation on delegation among the federal government.[231] In fact, they argue that *Wayman* is a case about federalism and not delegation,[232] even though Chief Justice Marshall treated the federalism and delegation questions separately.[233] In addition, they appeal to Justice Story's later opinion in a case about a delegation of military powers to the executive,[234] even though Justice Story had also expressed that Congress could not delegate lawmaking power to the judiciary.[235] Whatever the merit of Mortenson and Bagley's arguments about delegations to the executive at the Founding, they do not give extended treatment to the potential difference between delegations to the judiciary and delegations to the executive.[236] And even though they argue that *Wayman* was disconnected from Founding-era delegation principles and without support,[237] they do not consider whether any such practice might have been "liquidated"[238] by historical practice and settlement (including *Wayman* itself).[239]

[230] See id. at 43 (distinguishing between "important *subjects*, which must be *entirely* regulated by the *legislature itself*" and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details" (emphases added)).

[231] See Mortenson & Bagley, Response, supra note 212, at 2359–62.

[232] See id. at 2362, 2364.

[233] Compare *Wayman*, 23 U.S. (10 Wheat.) at 43 (discussing delegation to the federal judiciary), with id. at 47–50 (discussing the federalism objection and relying on the comparison between the delegation objection and the federalism objection).

[234] See Mortenson & Bagley, Response, supra note 212, at 2362–64 (discussing *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827)).

[235] See United States v. Coolidge, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857); supra text accompanying note 197.

[236] See, e.g., Mortenson & Bagley, Delegation, supra note 195, at 281–83.

[237] See Mortenson & Bagley, Response, supra note 212, at 2362 (quoting David P. Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev. 646, 715 (1982)).

[238] See Baude, Liquidation, supra note 56, at 4.

[239] See, e.g., Cong. Globe, 42d Cong., 1st Sess. 696 (1871) (statements of Sen. Allen Thurman (D-OH) and Sen. George Edmunds (R-VT)) (agreeing that "only the legislative power . . . can make a law" and that "courts . . . do not enforce laws that are not made by the [legislature], or not recognized as law by the [legislature], being the common law of the State"); Rose, supra note 18, § 6, at 47 ("[T]he courts may not be required, nor have they a right to exercise non-judicial powers . . . .").

Mortenson and Bagley do point to one Founding-era law that appears to direct judges to make law.[240] The Northwest Ordinance instructed the territorial governor and its three judges to "adopt . . . such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district" until a legislature was formed and subject to congressional "disapprov[al]."[241] The policy-driven discretion to choose among which state laws to adopt is likely a legislative act.[242] But it is unclear whether these judges were considered to be acting through their judicial office, especially considering that they were merely individual parts of a separate, non-judicial body, which also included the territorial governor.[243] Nor is it clear that territorial judges fell under Article III. Territorial courts were not understood to have exercised the judicial power of the United States; rather, they exercised the judicial power of the territory in which they sat, which would have arguably exempted them from Article III's limitations.[244]

In sum, congressional delegation was no backdoor for judicial lawmaking. And making law based on policy concerns is strictly legislative even if courts call those concerns "*judicial* polic[ies]."[245] So Congress could not refuse to make the law and instead have courts make it for them. As is often the case, the line is not always easy to draw, and the principal constraint is internal to the judiciary, but would-be judicial lawmakers cannot find shelter by divining a congressional intent for courts to make the law themselves.[246]

[240] See Mortenson & Bagley, Delegation, supra note 195, at 334–36; Mortenson & Bagley, Response, supra note 212, at 2354–57.

[241] See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51.

[242] But see infra note 246.

[243] Cf. Quigley, supra note 6, at 300 (quoting The Federalist No. 47, at 254 (James Madison) (George W. Carey & James McClellan eds., 2001)) (explaining that several states at the Founding "allowed one individual to exercise legislative and judicial power concurrently, *albeit in separate offices*" (emphasis added)).

[244] See Baude, Article III, supra note 195, at 1525–33.

[245] See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) (emphasis added).

[246] Discretion in choosing between preexisting laws is at least arguably different than discretion in creating new laws. It is true that one could characterize such discretion as a lawmaking power because it is the exercise of discretion that determines which law applies. But, even here, judges are not necessarily "selecting a norm on the basis simply of its merits and prescribing it *ex nihilo*," John Harrison, The Power of Congress Over the Rules of Precedent, 50 Duke L.J. 503, 508 n.17 (2000); rather, judges are merely choosing which preexisting law applies. Even then, perhaps unfettered discretion or discretion outside the procedural context, see Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825), might raise the same constitutional problems.

III. WHAT IS IMPERMISSIBLE LAWMAKING?

Even if I am correct that the judiciary had no lawmaking power when applying written text, that conclusion does little to answer the question when courts permissibly interpret and apply text (and unwritten law as necessary) and when they impermissibly make law. Interpretation is not adjudication, and there is no inherent way to resolve disputes by *solely* interpreting legal texts.[247] But determining when application of text turns into lawmaking is not easy. In this Part, I set forth a few guiding principles and clear examples of lawmaking by discussing five areas (by no means exhaustive) in which courts make or risk making law in legal interpretation. The question whether something is permissible lawfinding or impermissible lawmaking is a historical one. Sometimes, though, history merely provides a set of criteria, and new methods of interpretation must be fit into that framework. To be sure, within these areas, the lines might be blurry, especially at the margins. But the analysis is not hopelessly indeterminate—sometimes courts clearly make law, and sometimes they clearly find law.

First. One easy-to-identify instance of lawmaking is when courts decide to make law because the scheme established by the text purportedly will not work or because judges believe that Congress is unable or unwilling to fix a problem with the law.[248] In these cases, courts recognize that the rules they are making are legislative.[249] Absent court

[247] See Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 495–96 (2013) (explaining that a judge engages in interpretation when she finds the meaning of the text and construction when she gives that meaning "legal effect").

[248] See, e.g., D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) ("Were we bereft of [federal, judge-made] common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself."); Jamelle C. Sharpe, Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence, 18 Geo. Mason L. Rev. 367, 409 & n.266 (2011); Barany v. Buller, 670 F.2d 726, 731–32 (7th Cir. 1982); Downriver Cmty. Fed. Credit Union v. Penn Square Bank, 879 F.2d 754, 760–61 (10th Cir. 1989); PM Grp. Life Ins. Co. v. W. Growers Assurance Tr., 953 F.2d 543, 546 & n.3 (9th Cir. 1992).

[249] See, e.g., *D'Oench*, 315 U.S. at 468 (Jackson, J., concurring) ("There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common-law sources."); Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (explaining that sometimes "state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts"). I use the term "legislative" in its basic form: "Giving laws; law-giving." 2 Samuel Johnson, A Dictionary of the English Language (London, W. Strahan 1755).

intervention, the legislature would need to make (or not make) the rule necessary to the scheme or update the outdated rules. But, seeking to protect "uniquely federal interests,"[250] courts use their own "judicial policy" to weigh interests and impose what they believe the rules *should* be.[251]

Second. Courts sometimes weigh policy outside of legal rules that permit them to do so[252] to resolve ambiguities in the text.[253] Sometimes when courts confront an ambiguity, they consider which interpretation would create a better world, even though no interpretative rule, substantive canon, or semantic canon tells judges to consider these policy arguments.[254] When a text is semantically ambiguous, legal rules might still provide one legal meaning. So, by bucking those legal rules in exchange for policy considerations, judges make the law in a very real sense.[255]

Third. Even when a text directs courts to apply some form of unwritten law, courts cannot choose to make that law.[256] General theories of adjudicating questions of unwritten law and when judges make law rather than find it are both outside the scope of this Article. But as discussed above, Quigley has proposed a Hale-ian litmus test for unwritten-law decisions.[257] And sometimes a decision is uncontroversially judicial lawmaking because courts by their own admission are making the law.[258]

[250] *Boyle*, 487 U.S. at 504 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

[251] See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

[252] I discuss substantive canons below. See infra notes 261–67 and accompanying text.

[253] See Pillsbury Co. v. Conboy, 459 U.S. 248, 273–74 (1983) (Blackmun, J., concurring in the judgment) (criticizing the Court for "seek[ing] to adjust the[] interests and arrive at a solution satisfactory to all" because it is not "an appropriate method of statutory interpretation"); see also id. at 288 (Stevens, J., dissenting) (criticizing the Court for allowing "policy judgments" to affect its "interpretation of the Fifth Amendment").

[254] See id. at 257–58 (majority opinion) (looking to the competing interests of the individual and the government to make a judgment about the best legal answer).

[255] If unwritten law allows for explicit policy-weighing, the lawmaking concerns are different though still present. Cf. Quigley, supra note 6, at 312–14 (explaining that even if the unwritten law allows explicit recourse to the natural law, judges can still make law by imposing their own policy preferences in place of natural law principles).

[256] See Rose, supra note 18, § 13, at 113 (explaining that within "matters of national concern" there is room for an "unwritten Federal law" so long as courts do "not usurp legislative powers vested by the Constitution in Congress").

[257] See supra notes 49–62 and accompanying text.

[258] See, e.g., infra notes 317–49, 354–57, 370–97 and accompanying text.

Fourth. Traditional methods of interpretation are generally acceptable because they define the legal meaning of the text rather than impose a judge-specific law. Semantic canons, for example, are generally considered means to an end—determining the ordinary meaning (to the extent the law recognizes the ordinary meaning).[259] So semantic canons and similar linguistic tools are permissible attempts at lawfinding—successful attempts only to the extent that they discover the relevant kind of ordinary meaning.[260]

Substantive canons, on the other hand, are closer to the line. Although the validity of substantive canons has been questioned,[261] they do not necessarily cause judges to make law so long as they apply across cases and are not made unilaterally. Either they are part of the law of interpretation themselves,[262] or they are the backdrop against which law is enacted such that it defines the legal meaning of the text.[263] In either case, judges do not make substantive law when they apply substantive canons in interpretation.

To be sure, it might be ideal if all substantive canons were historically rooted or grounded in constitutional principles, but so long as judges do not use an invented substantive canon to obfuscate an otherwise bare legislative decision, the use of an unhistorical canon is not judicial lawmaking. One such example might be the first case in which the modern iteration of the major questions doctrine was applied,[264] or the parallel case for the Indian canon.[265] Even so, future uses of the canon might be

[259] Baude & Sachs, Law of Interpretation, supra note 109, at 1121–25.

[260] Cf. id. ("[L]inguistic canons live or die by their usage.").

[261] See, e.g., Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 110–11 (2010) [hereinafter Barrett, Canons]; Benjamin Eidelson & Matthew C. Stephenson, The Incompatibility of Substantive Canons and Textualism, 137 Harv. L. Rev. 515, 521 (2023).

[262] Baude & Sachs, Law of Interpretation, supra note 109, at 1127.

[263] John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 125 (2001) (quoting Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Rsrv. L. Rev. 581, 583 (1990)).

[264] See MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231–32 (1994); Kevin O. Leske, Major Questions About the "Major Questions" Doctrine, 5 Mich. J. Env't & Admin. L. 479, 485 (2016). But see T.T. Arvind & Christian R. Burset, "Major Questions" in the Common Law Tradition, Yale J. on Regul.: Notice & Comment (July 7, 2023), https://www.yalejreg.com/nc/major-questions-in-the-common-law-tradition-by-t-t-arvind-christian-r-burset/ [https://perma.cc/3S6F-8HAL] (arguing that the major questions doctrine mirrors the interpretive framework from the eighteenth century).

[265] See Patterson v. Jenks, 27 U.S. (2 Pet.) 216, 229 (1829); Barrett, Canons, supra note 261, at 151.

permissible to the extent the canon became part of the law of interpretation[266] or if Congress or the public relies on the substantive canon in drafting the relevant text.[267]

Fifth. It is hard to distinguish between construction and lawmaking in filling in gaps or resolving unanswered questions. Some forms of construction consist of merely creating a test to help judges apply a textual meaning determined through interpretation to the facts before them—which might also be called doctrine.[268] For example, the Fourth Amendment prohibits unreasonable seizures,[269] and one can determine what the term "seizure" meant in 1791 through normal methods of interpretation. But even after determining that meaning, judges must then apply it to actual cases. So, to decide whether someone has been seized within the meaning of the Fourth Amendment, courts have asked whether a reasonable person in the same context would have felt free to ignore the government official and leave.[270] This kind of construction is not necessarily lawmaking. The law of the Fourth Amendment remains the same no matter the construction (and indeed defines the permissible scope of construction), but judges must decide how a particular set of facts fits into the Fourth Amendment's legal framework to resolve the dispute before them.[271]

[266] Because the law of interpretation is an unwritten and at least partially customary law, an *ultra vires* breach of that law might become part of the law to the extent the breach is incorporated by the relevant community. Compare Baude & Sachs, Law of Interpretation, supra note 109, at 1138–39 (stating that the unwritten law of interpretation might be customary and thus found), with Quigley, supra note 6, at 331–32 ("A rule that has enjoyed long and uninterrupted acceptance is binding, even if courts never should have adopted it in the first instance.").

[267] It is unclear to what extent texts should be construed according to the interpretive theories then in use, even if those theories have fallen out of favor or were at some level *ultra vires*. See Baude & Sachs, Law of Interpretation, supra note 109, at 1135–36 (exploring this issue). Even on a theory of original meaning, that meaning might be informed by the context—including the judicial interpretative philosophies then prevalent (even if mistaken or subpar). See id.

[268] Kermit Roosevelt III, Interpretation and Construction: Originalism and Its Discontents, 34 Harv. J.L. & Pub. Pol'y 99, 103–08 (2011); Solum, supra note 247, at 468–69.

[269] U.S. Const. amend. IV.

[270] See, e.g., United States v. Mendenhall, 446 U.S. 544, 553–54 (1980). To be sure, the *Mendenhall* Court might not have arrived at the test through an originalist or textualist method, but the example illustrates that even if one defines "seizure," a court must still find a way to apply that definition to the facts before it. See id. at 552, 554–55.

[271] Alternatively, one might say that a law necessarily leaves some level of discretion in its application, and the doctrine announces to the world how courts will exercise that discretion so that parties can "order their affairs." See Baude, The Judgment Power, supra note 72, at

Construction has also been defined as the method judges use to resolve ambiguity or resolve unanswered questions,[272] but even there, judges can find law. If there is unresolvable linguistic ambiguity, a court could look to burdens of proof or tiebreaking rules that are provided by preexisting law.[273] And if there are questions that remain unanswered by the text (setting aside applying that meaning to facts), courts can either find law from other sources—state law or unwritten law, for example—or declare that there is no law and step out of the picture. There is no inherent necessity for judges to make the law they wish the text provided or think that the text should provide.

IV. IMPLICATIONS FOR PRACTICE

This Part examines five broadly defined areas of current doctrine that would be affected if judges returned to an understanding of the judicial power that took seriously the idea that they cannot make law. Much could be written about the theory behind each area, their variations, and notable dissenting views. But this Part only briefly discusses each doctrinal area to identify the lawmaking features of each doctrine and offer some possible paths forward that would not involve judicial lawmaking.

Section IV.A discusses the vagueness doctrine as explained by the Supreme Court and rooted in the Due Process Clause, including available remedies and its applicability to state courts and state law. A commitment to finding law would replace or add an Article III limitation on applying vague statutes. Section IV.B then addresses the practice of fashioning the scope of what some commentators have called "common law statutes,"[274] or statutes that plausibly refer to a common law concept. Section IV.C explains the justifications for federal courts' interstitial lawmaking, when

1844 ("Opinions merely explain the grounds for judgments, helping other people to plan and order their affairs."). And application "might sometimes amount to subordinate legislation by the courts" if they "adjust[]" the "detail" of a statute, such as the equity of the statute. Plucknett, supra note 37, at 335; see also Manning, supra note 263, at 64–102 (arguing that the equity of the statute was rejected in post-constitutional America precisely for its requirement that judges make law contrary to the legislatures).

[272] See, e.g., Solum, supra note 247, at 469.

[273] See Intisar A. Rabb, Response, The Appellate Rule of Lenity, 131 Harv. L. Rev. F. 179, 192 (2018) (explaining that lenity can work "like a tiebreaker when . . . there is no other means of resolving the meaning of a disputed provision of a criminal statute"); Capps, supra note 7 (manuscript at 26–27) (discussing background closure rules).

[274] See, e.g., Hillel Y. Levin & Michael L. Wells, Qualified Immunity and Statutory Interpretation: A Response to William Baude, 9 Calif. L. Rev. Online 40, 45–48 (2018).

courts can do so, and how they decide which rule to create. It concludes that interstitial lawmaking is in fundamental conflict with a vision of finding law. Finally, Section IV.D discusses the practice of *Erie* guesses and argues that federal courts cannot apply an *Erie*-guess rule if a state court that is authorized to make the rule has not yet made it.

A. Vagueness

Under current precedent, the Due Process Clause prevents legislatures from enacting, the executive from enforcing, and the judiciary from applying vague statutes.[275] Due process requires fair notice that a certain conduct is proscribed, and when a law is vague, "ordinary people" do not have such notice.[276] The doctrine is a prophylactic protection against "arbitrary or discriminatory law enforcement by insisting that a statute provide standards."[277] And it requires legislatures to be the body that defines sanctionable conduct.[278] Because the doctrine is rooted in the Due Process Clause, a law is unconstitutionally vague only when it causes a person's "life, liberty, or property" to be deprived and "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement."[279]

Early in the life of modern vagueness doctrine, the Supreme Court differentiated between the remedies for facial challenges and as-applied challenges. A facial challenge would be sustained only if the law was "impermissibly vague in all of its applications."[280] And that standard reflected the disfavored nature of facial challenges because a court interpreting state law "must . . . consider any limiting construction that a state . . . enforcement agency has proffered."[281] Facial challenges also faced the traditional rule that "a challenger must prove that the statute is

[275] Although the standards might differ, the vagueness doctrine applies to criminal and civil penalties. See Sessions v. Dimaya, 138 S. Ct. 1204, 1212–13 (2018) (plurality opinion). It is unclear why, if the doctrine is rooted in the Due Process Clause, any different standard would apply based on the nature of the deprivation. See id. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment).

[276] Id. at 1212 (plurality opinion).

[277] See id.

[278] Id.

[279] Johnson v. United States, 576 U.S. 591, 595 (2015).

[280] Id. at 636 (Alito, J., dissenting) (emphasis omitted) (quoting Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494–95 (1982)).

[281] *Hoffman Ests.*, 455 U.S. at 494 n.5.

vague as applied to him."[282] By contrast, an as-applied remedy did not require any evidence on how the law applied to other cases.[283]

Two developments, however, have complicated the issue. First, the Court held—without imposing a new vagueness standard—that a facial challenge could be successful without a showing that the law was always impermissibly vague.[284] Second, some Supreme Court decisions have suggested that the overbreadth doctrine of the First Amendment—which allows facial invalidation if the impermissible applications are "substantial" even if the case at hand is a permissible application—could apply to all "constitutionally protected" activity.[285] But read that broadly, almost any activity is constitutionally protected in that it cannot be proscribed or punished without due process. And even if it is limited to specific rights protected by substantive due process, this development would also appear questionable as an original matter.[286]

Justice Thomas has argued that any supposed vagueness doctrine should work as a canon of statutory interpretation (the rule of lenity), not a constitutional prohibition.[287] But that re-envisioning comes with its own consequences. The rule of lenity applies only to penal laws, while vagueness doctrine applies more broadly.[288] Further, states could abolish canons of statutory interpretation, but they cannot avoid vagueness doctrine.[289] To be sure, some substantive statutory canons might be required by underlying constitutional rules such that they are mandatory for federal and state courts.[290] But it is unclear whether, if any such canon exists, the rule of lenity is one of them.[291]

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[282] See *Dimaya*, 138 S. Ct. at 1250 (Thomas, J., dissenting) (collecting cases).

[283] See United States v. Mazurie, 419 U.S. 544, 550 (1975).

[284] *Johnson*, 576 U.S. at 602–03. Because it did not attempt to explain when a law is sufficiently vague to be facially vague, some circuit courts have continued to apply something similar to the vague-in-all-applications standard. See, e.g., SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1327–28 (11th Cir. 2022).

[285] See, e.g., City of Chicago v. Morales, 527 U.S. 41, 52–55 (1999) (plurality opinion); *Johnson*, 576 U.S. at 621 (Thomas, J., concurring in the judgment).

[286] See McDonald v. City of Chicago, 561 U.S. 742, 811–12 (2010) (Thomas, J., concurring in part and concurring in the judgment).

[287] See *Dimaya*, 138 S. Ct. at 1242–45 (Thomas, J., dissenting). In *Dimaya*, Justice Gorsuch presented a competing historical analysis. See id. at 1224–27 (Gorsuch, J., concurring in part and concurring in the judgment).

[288] See id. at 1244 (Thomas, J., dissenting).

[289] See id.

[290] See Barrett, Canons, supra note 261, at 169–70.

[291] The rule of lenity might be required under a corollary of the premise that the legislature has to affirmatively act to criminalize conduct. See id. at 178.

But Article III originally offered its own prohibition on courts applying vague statutes, which might solve some of the puzzles in current vagueness doctrine. If neither traditional methods of statutory interpretation nor preexisting background law provides rules governing a dispute, judges necessarily have to make any law that they wish to apply.[292] The original understanding of Article III would restrict such lawmaking, whether or not there is a penalty and regardless of whether the penalty is civil. Instead, courts were simply to acknowledge that there is no law to apply.[293]

Rooting our vagueness doctrine in Article III—and phasing out the Due Process Clause rationale[294]—would also undermine the principles underlying facial vagueness challenges and First Amendment-style "overbreadth" challenges. Assuming that facial challenges might be acceptable in some cases,[295] litigants should be required to establish that any application of the statute would require judicial lawmaking and therefore that the litigant's case is necessarily one of those applications. If only some applications might require judicial lawmaking, the legislature has still enacted a valid law that the judiciary must enforce when implicated by a case.[296]

Indeed, if a law has a core that would not require judicial lawmaking, future courts might have an obligation to apply that law even if a previous court had held that the law was facially unconstitutional.[297] If an earlier conclusion was not tied to a particular case, it is at best a prediction of how the court would view the statute in a future case.[298] And a declaration of unconstitutionality—even if directly related to the case—does not

[292] Justice Thomas dismissed this justification for the vagueness doctrine, but he did so because it does not align with the current doctrine, not because he rejected it as an original matter. See *Dimaya*, 138 S. Ct. at 1249–50 (Thomas, J., dissenting).

[293] See supra Subsection II.A.3.

[294] If the Due Process Clause rationale is valid, then it could still work in tandem with the Article III limitation. But to the extent the vagueness doctrine is a creature of substantive due process, recognizing Article III's limitation might foreclose such a substantive due process doctrine. See Graham v. Connor, 490 U.S. 386, 395 (1989); Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion).

[295] See Baude, Severability, supra note 222, at 32–33; Lindley, Remedial Limits, supra note 168, at 666 n.51.

[296] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (justifying judicial review only to the extent that a statute conflicts with the Constitution because otherwise it is the "province and duty" to state that the statute is the law).

[297] See Lindley, Remedial Limits, supra note 168, at 666 n.51.

[298] Id. at 673.

erase the statute such that it cannot be considered by a future court.[299] So it is unclear if future courts would be obligated to treat the unconstitutionality decision as binding.

It might be helpful to consider a state court interpreting and applying federal law. On one hand, it seems deeply unsatisfying to admit that state courts can make federal law. But state courts have to adjudicate federal questions, and it is unclear why state courts should behave differently than federal courts when applying the same law. Otherwise, litigants would achieve different outcomes based on which court they were in.[300] So it is unlikely that state courts can make law in applying federal written law any more than federal courts can.[301]

Importantly, the Article III limitation would apply only to federal courts, and perhaps federal law more generally. Article III does not prohibit state courts from making law when applying written or unwritten state law, including when confronted with a truly vague state statute.[302] So federal courts, always bound by Article III, would be prohibited from treating such state statutes in the same way state courts might be able to.

One alternative constitutional limitation on state courts' power to make law when interpreting and applying state law might have originally come from the Ex Post Facto Clauses, which apply to the federal and state governments.[303] An ex post facto law is a retroactive law that turns

[299] Id. at 666 n.51.

[300] To be sure, different results in different fora are not fatal to an enterprise, but it is particularly striking in light of the proposition that it is a "judicial anomaly" to have "one rule . . . in the Federal courts, and another and a different one in the courts of the State" and is "contrary to the uniform spirit of the National jurisprudence from the adoption of the Judiciary Act of 1789 down to the present time." Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506 (1870).

[301] It is unclear how a pro-judicial-lawmaking advocate would advise state courts to adjudicate these issues as a matter of first impression: Would they become federal agents who would have to weigh federal policy concerns? Would they apply the rule that is best for their state? Would they make a reverse *Erie* guess based on what the Supreme Court would do? Could they not make any rule at all? And if state courts cannot make law to adjudicate disputes involving federal law, why would federal courts be authorized to make it? Cf. Nelson, Critical Guide, supra note 5, at 983 ("When a state supreme court interprets a federal statute in a way that sets a precedent for lower courts in the same state, has the state supreme court made state law or federal law?"). Recall the concept of judicial uniformity that *Stewart* invoked. *Stewart*, 78 U.S. (11 Wall.) at 506. One way to bring both court systems into accord is for federal courts to stop making law and to keep state courts from making law.

[302] See U.S. Const. art. III.

[303] See id. art. I, §§ 9–10. If the federal Ex Post Facto Clause prohibited the federal judiciary from making law in some circumstances, it would be largely duplicative of the wider Article III limit. But it would provide an additional constitutional hurdle to making law in some instances.

previously lawful conduct unlawful, making it impossible for individuals to conform their conduct to the law,[304] and a judge-made law applied in the same case is necessarily a retroactive law. Before the legal realist turn, the Supreme Court explained that the federal Ex Post Facto Clause, "as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts."[305] More modern decisions have changed the standard from "legislative action"[306] (perhaps even pursuant to the state constitution), concluding that the Clauses apply only to the legislature but that their principles apply with different standards to the judiciary through the Due Process Clause.[307] But if federal or state judiciaries are openly taking "legislative action,"[308] it is unclear why the Clauses should not apply. To be sure, the Clauses refer to "pass[ing]" laws,[309] which might be a basis for limiting them to legislatures and not legislative action more broadly. But it is far from clear that laws made by an openly lawmaking judiciary should be judged by different standards than statutes, whether under the Ex Post Facto Clauses or the Due Process Clause.[310]

Applying the Ex Post Facto Clauses to judicial lawmaking might provide answers for other doctrinal oddities. For example, assuming the Clauses originally applied to both civil and criminal laws,[311] applying the Clauses to judicial lawmaking might resolve Justice Gorsuch's objection

[304] See Evan C. Zoldan, The Civil Ex Post Facto Clause, 2015 Wis. L. Rev. 727, 728–29.

[305] Frank v. Mangum, 237 U.S. 309, 344 (1915).

[306] See id.

[307] See, e.g., Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964) (state statute); Marks v. United States, 430 U.S. 188, 191–92 (1977) (federal statute); Rogers v. Tennessee, 532 U.S. 451, 456–58 (2001) (state unwritten law).

[308] See *Frank*, 237 U.S. at 344.

[309] See U.S. Const. art. I, §§ 9–10.

[310] But see *Rogers*, 532 U.S. at 458–62 (offering a justification for differing standards based on the case-specific limitation on judicial lawmaking and the nature of the common law system).

[311] Compare, e.g., 1 William Winslow Crosskey, Politics and the Constitution in the History of the United States 324–51 (1953) (arguing that from Founding-era history, it was clear that ex post facto laws included civil laws), and John Mikhail, James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto Law", 17 Geo. J.L. & Pub. Pol'y 79, 82 (2019) (using a particular historical example to develop the same argument), with, e.g., Michael W. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure, 76 Calif. L. Rev. 267, 278–81 (1988) (noting Founding-era views that ex post facto laws applied only to criminal cases).

to treating criminal and civil prohibitions differently.[312] In addition, if the Clauses apply to civil laws, they would implicate what some members of the Court have called unconstitutional judicial takings—judicial changes to property rights.[313] But rooting this doctrine in the Takings Clause raises complicated practical and legal questions: Who provides compensation? If it is the legislature, what can courts do if the legislature refuses to pay? Must judges formally request payment from the legislature and hold their decision until it is answered?[314] If the Supreme Court were to root judicial takings in the Ex Post Facto Clauses rather than the Takings Clause, it could avoid these questions and "simply reverse"[315] the relevant state court.

B. Common Law Statutes

Courts are sometimes called to interpret statutes that are so broad that Congress could not have intended them to bear their full semantic scope. Perhaps Congress could not coalesce on a single meaning or effect. Or perhaps, Congress attempted to adopt a common law principle. It might have done so successfully, or it might have failed—perhaps because there was no such common law principle. Whatever the cause, courts in those instances have not treated the semantic meaning of the text as binding.

In some cases, courts have felt constrained to some degree by the common law referent, but sometimes they view the reference to the common law as an invitation to make any kind of law they please. These statutes are not necessarily vague, but courts refuse to apply them according to their unambiguous terms or to tether them to the common law (past or present).[316] Instead, they have crafted the statute's reach through their own policy-based rationale.

Consider the Sherman Antitrust Act.[317] Section One of that Act provided that "[e]very contract, combination in the form of trust or

[312] See Sessions v. Dimaya, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

[313] See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713–28 (2010) (plurality opinion) (Scalia, J., joined by Roberts, C.J., Thomas & Alito, JJ.).

[314] See id. at 740–42 (Kennedy, J., concurring in part and concurring in the judgment) (raising some of these questions). These questions likely arise from the fact that the Founders did not envision judges being allowed to make law. See id. at 722 (plurality opinion).

[315] See id at 722–23 (plurality opinion).

[316] I use the term "common law" here, but it could apply to any kind of unwritten law. See, e.g., 15 U.S.C. § 1115(a), (b)(9) (codifying equitable defenses to trademark infringement).

[317] Sherman Act, ch. 647, 26 Stat. 209 (1890).

otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[318] Section One provided for criminal penalties and Section Seven provided a private cause of action.[319]

The Supreme Court has long recognized that "the language of [Section One] of the Sherman Act . . . cannot mean what it says."[320] If the language were taken literally, it "would outlaw the entire body of private contract law."[321] Contracts are by definition in "restraint of trade" because "their very essence" is "[t]o bind, to restrain."[322] So, instead, the Court has relied on the Act's "legislative history" that purportedly shows that Congress "did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations."[323] Congress, the Court concluded, "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[324]

But even then, the Supreme Court has not "focus[ed] on the [admittedly] evolving content of the common law" or the common law circa 1890, but rather has "treated the common law as a jumping-off point for independent policy analysis."[325] For example, Justice Scalia concluded one Sherman Act decision by stating that the decision relied on economic policy: "In sum, economic analysis supports the view, and

[318] Id. § 1.

[319] See id. §§ 1, 7.

[320] See Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687 (1978); see also Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("[T]he legality of an agreement . . . cannot be determined by . . . whether it restrains competition.").

[321] *Pro. Eng'rs*, 435 U.S. at 687–88. Of course, interpreting "restraint of trade" this way might itself be a strict-constructionist (and out-of-favor) approach to textualism. A modern textualist may not come to this conclusion. See Scalia, Common-Law Courts, supra note 29, at 23 ("Textualism should not be confused with so-called strict constructionism . . . . A text should not be construed strictly [or leniently]; it should be construed reasonably, to contain all that it fairly means."); see also infra note 361 and accompanying text (arguing that a textualist approach can produce "a coherent and reasonably comprehensive antitrust policy" (quoting Hovenkamp, Text, infra note 342, at 1129)). Regardless, my point here is merely that one possible reading of "restraint of trade" is its literal meaning—i.e., that it applies to all contracts.

[322] *Bd. of Trade*, 246 U.S. at 238.

[323] *Pro. Eng'rs*, 435 U.S. at 688.

[324] Id.

[325] See Margaret H. Lemos, Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?, *in* Intellectual Property and the Common Law 89, 97 (Shyamkrishna Balganesh ed., 2013); see also Everett N. Curtis, Manual of the Sherman Law: A Digest of the Law Under the Federal Anti-Trust Acts § 125, at 60–61 (1915) (collecting decisions).

no precedent *opposes* it, that a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels. Accordingly, the judgment . . . is *Affirmed*."[326] The proffered justification for departing from the text is that Congress (actual or imagined) "invoke[d] the common law itself"[327] and could not have intended to "forbid all contracts or combinations in restraint of trade or commerce."[328] But neither has the Court "linked its decisions to contemporary common law," instead "treat[ing] the Sherman Act as 'an exercise in applied economics,' . . . 'without regard to the strictures of the common law.'"[329]

The earliest decisions of the Court interpreting Section One refused to resort to the common law and instead "applied a literal interpretation."[330] It rejected an argument that would read into the statute an "unreasonable" requirement or other limitation or exception; it rejected any argument that the statute was to be tied to the common law; and it argued that any such action "would be tantamount to . . . engaging in *judicial legislation* by engrafting upon the plain wording of the statute a limitation that was not intended."[331]

The Court slowly but steadily reversed course in four steps. First, it "loosen[ed] somewhat its insistence upon a strictly literal interpretation" because of its potentially far-reaching effect by emphasizing that the Act "'must have a reasonable construction.'"[332] Second, five Justices (despite a plurality opinion to the contrary) concluded that "[i]nstead of holding that the [Sherman Act] included all contracts, reasonable or unreasonable,

[326] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735–36 (1988) (Scalia, J.) (first emphasis added).

[327] Id. at 732.

[328] United States v. Debs, 64 F. 724, 747 (C.C.N.D. Ill. 1894).

[329] Lemos, supra note 325, at 101–02 (quoting 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, 639 (2005)). Economic analysis itself is not the problem; a case can be evaluated against the standard set by law using economic analysis as a kind of fact-finding analysis. But I do not think that can explain the Court's approach to the Sherman Act. There, the Court does not purport to be applying economic analysis to assess whether a certain legal benchmark has been met—consumer choice, efficiency, prices, output, a certain level of redistribution, etc.—but rather using economic analysis to determine whether a practice is unreasonable as compared to its view of what good economics would require. See *Bus. Elecs.*, 485 U.S. at 732–33.

[330] 1 The Legislative History of the Federal Antitrust Laws and Related Statutes: Part 1: The Antitrust Laws 370 (Earl W. Kintner ed., 1978).

[331] Id. at 370–71 (emphasis added) (discussing *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897)).

[332] Id. at 371 (quoting United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898)).

in restraint of interstate trade," the Court should have concluded that "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld."[333] Third, in *Standard Oil Co. v. United States*,[334] Chief Justice White (an earlier dissenter) wrote for the court that Section One applies only to agreements constituting "an undue restraint" which violates the "'standard of reason' which had been applied to such arrangements at common law."[335] And finally, the Court re- and mischaracterized the common law[336] and determined that "[r]easonableness is not a concept of definite and unchanging content" but is "controlled by the recognized purpose of the Sherman [Act] itself."[337] The Court thus completed its transformation of the statute into a "formless vessel to be filled with the Supreme Court's own theories of economic policy."[338]

Professor Herbert Hovenkamp has explained the development that enabled the courts to make freewheeling policy decisions in this way:

> Congress' own notion that the Sherman Act simply federalized the common law cut the courts free from the Act's [language and] legislative history, but [then-Judge William Howard] Taft's [opinion in *United States v. Addyston Pipe & Steel Co.*[339]] effectively freed the courts from the substance of the historical [and modern] common law. From that point on, federal courts forged their own set of antitrust rules

[333] See N. Sec. Co. v. United States, 193 U.S. 197, 361 (1904) (Brewer, J., concurring); id. at 403–06 (Holmes, J., dissenting, joined by Fuller, C.J., Peckham & White, JJ.) (discussing the meaning of the text in light of the common law); see also id. at 331 (plurality opinion) (stating that the Sherman Act "embraces *all* direct *restraints*" of trade, not just unreasonable ones).

[334] 221 U.S. 1 (1911).

[335] The Legislative History of the Federal Antitrust Laws and Related Statutes, supra note 330, at 372–73 (quoting *Standard Oil*, 221 U.S. at 59–60); see also United States v. Am. Tobacco Co., 221 U.S. 106, 178–80 (1911) (explaining why the rule of reason is the correct rule of construction for the Sherman Act).

[336] See, e.g., 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 104d, at 90–94 (3d ed. 2006) (discussing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899)).

[337] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[338] Farber & McDonnell, supra note 329, at 642.

[339] 85 F. 271 (6th Cir. 1898).

> through an essentially common law process in which only [their] Sherman . . . Act precedents counted.[340]

Section Two of the Sherman Act presents similar issues. That section subjects to punishments any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of the trade or commerce among the several States."[341] Unlike Section One's "in restraint of trade," the term "monopoly" or "monopolize" had no plausible common law meaning, and it was not defined by statute.[342] If Congress sought to codify a common law meaning, it failed to do so, and courts could not have applied a nonexistent common law concept. The Court found the plain meaning—to the extent it was adequately non-vague—similarly unappealing: monopolies were generally understood narrowly to be created by a grant of privilege by the government, and if the terms were broadly defined, the Sherman Act would eliminate many enterprises that were economically beneficial.[343]

As in Justice Story's example, courts found themselves left to their own "uncontrollable and undefined discretion."[344] But rather than declining to subject the country to their own "arbitrary pleasure,"[345] they put on their economist hats and got to policy work. Erecting complex rules about when monopolization is impermissible, the Court took over as the principal antitrust legislature in the country.[346]

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[340] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 2.1, at 77–78 (5th ed. 2016). Although Professor Hovenkamp's description is confined to the Sherman Act's legislative history and historical common law, the description extends equally well to the Sherman Act's text and modern common law.

[341] Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 2).

[342] See Herbert Hovenkamp, The Antitrust Text, 99 Ind. L.J. 1063, 1077–78 (2024) [hereinafter Hovenkamp, Text] ("At the time the [Sherman] Act was passed, no body of legal rules existed for determining [Section Two's] principal offenses: namely, what it means to 'monopolize' or 'attempt to monopolize.'").

[343] See id. at 1078–79 (explaining that no definition fit squarely and that the Court "effectively severed the concept of 'monopoly' from the requirement of a government grant," leaving a clean slate).

[344] United States v. Coolidge, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857).

[345] See id.

[346] See Milton Handler, The Supreme Court and the Antitrust Laws: A Critic's Viewpoint, 1 Ga. L. Rev. 339, 353 (1967) ("In interpreting antitrust legislation, the Court at times starts with the answer rather than with a question, thus placing its own policy predilections above statutory language and legislative history." (footnote omitted)).

The Court has treated other federal statutes similarly. The Taft-Hartley Act governing labor law, securities fraud statutes, and the Lanham Act are oft-cited examples.[347] Section 1983 has also been described as a common law statute in which Congress authorized federal courts to make their own law based on policy grounds and unrestrained from historical or modern common law.[348] Other statutes including the Copyright Act, the Federal Trademark Dilution Act, and the Patent Act have, to some degree, been described as common law statutes in that judges can make law to give meaning to the text and carry out the purpose of the statute.[349]

By contrast, the Court has taken a different approach with other statutes that call on common law concepts. Consider the Federal Employers' Liability Act enacted in 1908.[350] In 1988, the Supreme Court considered whether the statute allowed for recovery of prejudgment interest.[351] Because "Congress' silence as to the availability of interest on an obligation created by federal law d[id] not . . . 'manifes[t] an unequivocal congressional purpose that the obligation shall not bear interest,'" the Court considered whether the common law in 1908 would have authorized prejudgment interest.[352] After concluding that it did not, the Court refused to update the statute even though modern common law would have allowed it in some cases.[353]

Another related approach would assume that Congress "incorporate[d] something akin to a choice-of-law rule, which directs courts to apply rules of [unwritten law] as they continue to evolve."[354] The Court has taken a

[347] See Lemos, supra note 325, at 89–90 (collecting sources); Levin & Wells, supra note 274, at 49 (discussing the Lanham Act).

[348] See Levin & Wells, supra note 274, at 51–54; Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 421–22 (1989). There is good reason to believe that as a historical matter, the language was much clearer and more exhaustive than current interpreters have surmised. See Tyler B. Lindley, Anachronistic Readings of Section 1983, 75 Ala. L. Rev. 897, 908–09 (2024) [hereinafter Lindley, Section 1983].

[349] See Lemos, supra note 325, at 90 & n.7 (collecting sources).

[350] See Act of Apr. 22, 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51–60).

[351] See Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 336–40 (1988).

[352] Id. at 336–37 (quoting Rodgers v. United States, 332 U.S. 371, 373 (1947)).

[353] Compare id. at 336–39 (justifying the Court's denial of prejudgment interest as consistent with the common law in 1908), with id. at 345–48 (Blackmun, J., concurring in part and dissenting in part) (tying the common law's evolution since the passage of the Federal Employers' Liability Act to the idea that prejudgment interest may be necessary for full compensation).

[354] See Nelson, Persistence, supra note 15, at 548 n.216 (emphasis omitted) (citing Smith v. Wade, 461 U.S. 30, 34 & n.2 (1983)).

version of this approach in certain issues arising in Section 1983 litigation, albeit with great deference to the original common law.[355] In those areas, the Court uses the general common law of torts in 1871 as a starting point but accounts for later developments that make up part of the body of common law today and adjusts the original common law as "necessary to carry out the purpose and policy of the statute."[356] Although the Court has not clearly "confront[ed]" this "interpretive . . . question"—whether to apply the "static" common law at the time of enactment or the "dynamic" common law over time—either answer is consistent with a lawfinding-only regime because both require judges to find an external common law rather than make their own policy choices.[357]

If courts want to resist judicial lawmaking, they can take three approaches to these kinds of statutes: (1) judges can apply traditional tools of statutory interpretation to find additional law that might not be apparent from an initial read; (2) judges can find and apply common law without making any law; and (3) judges can approach these statutes like they approach vague statutes, refusing to apply them to the extent there is no law to apply.

First, sometimes the text is not as broad as it appears from a non-rigorous read.[358] For example, Section 1983 sounds broad to our modern ears, but understanding the historical context reveals that, contrary to modern belief, it did not leave many (if any) gaps.[359] Similarly, traditional

[355] See, e.g., *Smith*, 461 U.S. at 34 & n.2.

[356] See id. at 34. One interesting possibility in using this approach arises when the dynamic common law approach is paired with the modern conception that common law is made by judges based at least in some part on their own conceptions of good policy. See Harrison, supra note 246, at 509 n.20, 526 n.71 (arguing that "[c]ommon law judges at once follow and make law," though seeking to distinguish this power from a legislature's lawmaking). In that case, it becomes much more like the approach taken in applying, for example, the Sherman Act, wherein judges are free to impose their own views of the best policy measures to achieve the judicially identified purposes of the statute.

[357] See Nelson, Persistence, supra note 15, at 531 n.145, 548 n.216.

[358] Cf. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) ("Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved.").

[359] See generally Lindley, Section 1983, supra note 348 (arguing that the original understanding of Section 1983 was robust and describing the implications for that conclusion for modern practice). Similarly, another recent article has argued that the phrase "unfair methods of competition" in the Federal Trade Commission Act has significant meaning from the common law background that should guide the Act's interpretation and application today. See generally Samuel Evan Milner, Defining Unfair Methods of Competition in the Federal Trade Commission Act, 2023 Wis. L. Rev. 109.

methods of interpreting and applying written text can be used to resolve ambiguities in the Sherman Act that were previously thought to be intractable.[360] Hovenkamp has recently argued that although the language of the Sherman Act appears to be brief and broad, "an antitrust 'textualist' could develop a coherent and reasonably comprehensive antitrust policy simply by using the natural meaning of the statutory text, the forensic tools whose use they imply, and established rules of statutory interpretation."[361] Thus, judicial lawmaking might be unnecessary to give effect to the Sherman Act's text.

Some commentators have argued that most common law statutes are "old" because our modern statutory regime is much more specific and leaves less room for judicial lawmaking,[362] but that gets things backwards if the goal is to seek congressional intent.[363] Old statutes were enacted when it was a commonly held belief that judges were finding law and could not make it.[364] So courts should view old statutes as *less*—not more—likely to have invited this kind of "common-lawmaking."

Second, judges could find and apply the common law without making any law. That common law could be the static law, locked in at the time of enactment. Or it could be the modern law, so long as courts are finding

[360] See Hovenkamp, Text, supra note 342, at 1067 (offering ways to "infer[]" "standards of legality . . . directly from the texts of the Sherman and Clayton Acts").

[361] Id. at 1129; see also id. at 1067 ("The language of the antitrust laws, although very brief, says more than is commonly acknowledged. Further, they are statutes and should provide the first place to look for declarations of enforcement policy. Too often, it seems, people do antitrust analysis and litigation without even looking at the statutes."). Tyler also addresses both Section 1983 and the Sherman Act and argues that a kind of general law—there, looking at state laws on the question—can fill those statutory gaps without recourse to judicial lawmaking. See Tyler, supra note 9, at 701–16.

[362] See Levin & Wells, supra note 274, at 46, 48.

[363] Contra id. at 48 (arguing that in the nineteenth and early twentieth centuries "legislators themselves did not intend or understand that putting something into a statute would result in disempowering the courts from gap-filling and elaborating on the law in the common law tradition"). This assertion has some truth to it, but it mixes the traditional understanding of the common law with judges as lawfinders (held by nineteenth- and early twentieth-century legislators) with the modern notion of judges as lawmakers (held by most modern legal scholars). Compare Cong. Globe, 42d Cong., 1st Sess. 696 (1871) (statements of Sen. Allen Thurman (D-OH) and Sen. George Edmunds (R-VT)) (agreeing that "only the legislative power . . . can make a law"), with Harrison, supra note 246, at 509 n.20 ("Common law judges at once follow and make law.").

[364] See Cong. Globe, 42d Cong., 1st Sess. 696 (1871) (statements of Sen. Allen Thurman (D-OH) and Sen. George Edmunds (R-VT)).

that common law and not making it up as they go along.[365] Further, courts could look to either general law or state-specific law. Although the modern approach tends to favor some sort of general law,[366] late-eighteenth- and nineteenth-century courts also applied state law when the question was one of local rather than general law.[367]

Third, judges could approach the statute like they approach vague statutes. If the common law concept Congress sought to incorporate does not exist, then judges could simply state that there is no law to apply. As Justice Story explained, if an undefined term is not defined by the common law (and its ordinary meaning is insufficiently definite), judges would necessarily need to make law if they were to apply the statute.[368]

Common law statutes are not necessarily inconsistent with a lawfinding regime, but courts cannot take a reference (or an attempted reference) to a common law term or a broadly worded text as an excuse to make new law. The best approach for these types of statutes depends on the particular statute and theory of interpretation.[369] But for originalists, one thing is sure: courts cannot become roving legislatures at the behest of Congress.

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[365] Some early statutes gave federal courts the discretion to choose between older state law and contemporary state law in the procedural context. See, e.g., Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. So perhaps courts could oscillate between static and dynamic conceptions of the common law if Congress gave them some kind of guidance as to when to do so or if the delegation was in an area of overlapping powers. See supra note 246.

[366] *Erie Railroad Co. v. Tompkins* concluded that there was no federal general common law in the sense that it is binding, 304 U.S. 64, 78–79 (1938), but federal courts still use a form of what they call general law, which looks at the binding law in each state, Tyler, supra note 9, at 683 (collecting examples); neither form of general law necessarily implicates judicial lawmaking.

[367] See, e.g., Campbell v. Haverhill, 155 U.S. 610, 614–15 (1895); see also Nelson, Critical Guide, supra note 5, at 943 (noting this practice).

[368] See supra notes 141–46 and accompanying text.

[369] For example, Professor James Phillips appears to argue that ordinary-meaning textualism requires a static common law because the meaning of the text is "fixed at the time of enactment." See James C. Phillips, Ordinary Meaning as Last Resort: The Overlooked Meaning of "Undue Hardship" in Title VII, 49 BYU L. Rev. 1319, 1325 (2024). But it appears to me that Phillips's presupposition at most justifies a static-common-law presumption because it is unclear that Congress lacks the power to specify that courts should apply the common law as it evolves over time; the sense of the statute is fixed, and only the referent changes. Cf. Green, Sense-Reference, supra note 27, at 559–60 (developing the sense-reference distinction and applying it to originalism). Specifically, the meaning is fixed, but the meaning merely enacts a rule that directs courts to reference a certain body of law (here, the modern common law).

C. Interstitial Lawmaking

Another area in which federal courts have claimed the authority to make law is known as "interstitial lawmaking."[370] Courts make interstitial law when they determine that a uniform "federal rule of decision is 'necessary to protect uniquely federal interests,'" often including a federal statutory scheme.[371] Federal courts have determined that questions relating to federal statutory schemes are governed exclusively by federal law.[372] But sometimes "there is little need for a nationally uniform body of law," so "state law [is] incorporated as the federal rule of decision" where the statute is silent.[373] On the other hand, "federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules."[374] In choosing what that uniform rule should be, federal courts do not necessarily select a rule from the set of state-law rules to apply nationwide, which would satisfy the need for uniformity.[375] Instead, they seek to address policy concerns and fashion new rules altogether, loosely guided by supposed congressional purposes.[376]

Interstitial lawmaking is related to so-called common law statutes but operates under a different justification. The practice of implementing common law statutes at least plausibly rests on congressional intent as reflected in the meaning of the expressed text of the relevant statute. But the justification for interstitial lawmaking is that Congress cannot foresee all possible problems its schemes will confront, so federal courts must make law on Congress's behalf.

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[370] See, e.g., DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 171–72 (1983).

[371] See Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726–27 (1979) (explaining the rationale for applying that test to federal programs).

[372] See *Kimbell Foods*, 440 U.S. at 727–28 (stating that "[c]ontroversies directly affecting the operations of federal programs" are "governed by federal law" (citing Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943))).

[373] Id. at 728.

[374] Id. (quoting United States v. Yazell, 382 U.S. 341, 354 (1966)).

[375] Finding a uniform pre-*Erie* general law would require more than just 50-state surveys, although it is derived at least in part from states' practices; sometimes state statutes replace "the principle[s] which would obtain in their absence," and it is those principles that matter with respect to the general law. See United States v. Chambers, 291 U.S. 217, 226 (1934).

[376] See, e.g., Gunter v. Hutcheson, 674 F.2d 862, 869–73 (11th Cir. 1982).

Consider the common law *D'Oench* doctrine created in 1942.[377] That doctrine protects the Federal Deposit Insurance Corporation from certain unwritten claims and defenses after it purchases a bank asset or becomes a receiver for a failed bank.[378] The text of the Banking Act of 1933 nowhere mentioned this protection.[379] Rather, the Court considered it necessary to the effective operation of the FDIC and so created the doctrine itself.[380] From its birth in 1942, the doctrine has grown in almost every circuit,[381] and at each step of its growth federal courts have engaged in a policy determination about whether extended protection is necessary for the FDIC to achieve its "purpose."[382]

Interstitial lawmaking also often occurs when courts impose statutes of limitations on federal claims.[383] Consider the Court's decision in *DelCostello v. International Brotherhood of Teamsters*.[384] There, the Court considered what statute of limitations should apply to a federal claim where no limitations period was statutorily specified.[385] The Court said that it had the power to balance the federal policies at stake and choose among many possible limitations periods.[386] Sometimes that

[377] The *D'Oench* doctrine is named after the Supreme Court case in which it was created. See D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). It was at least partially codified by Congress, see 12 U.S.C. § 1823(e), so some aspects of the doctrine no longer rest solely on the common law. But the common law is still alive and well in many circuits and extends beyond the statute, see, e.g., Landcastle Acquisition Corp. v. Renasant Bank, 57 F.4th 1203, 1221 (11th Cir. 2023) ("*D'Oench* is a federal common-law doctrine that extends well beyond [Section] 1823(e) . . . ."), so it is instructive here.

[378] See Langley v. FDIC, 484 U.S. 86, 92–93 (1987).

[379] See Banking Act of 1933, Pub. L. 73-66, 48 Stat. 162.

[380] See *D'Oench*, 315 U.S. at 469 (Jackson, J., concurring) (acknowledging that the doctrine could not be derived "from federal statutes alone").

[381] Some circuits have reevaluated the propriety of the doctrine in light of Congress's codification and more recent Court decisions narrowing the scope of federal common law. See Murphy v. FDIC, 61 F.3d 34, 38–40 (D.C. Cir. 1995); DiVall Insured Income Fund Ltd. v. Boatmen's First Nat'l Bank of Kan. City, 69 F.3d 1398, 1401–02 (8th Cir. 1995); FDIC v. Deglau, 207 F.3d 153, 170–71 (3d Cir. 2000); see also Ledo Fin. Corp. v. Summers, 122 F.3d 825, 828–29 (9th Cir. 1997) (holding that the common law doctrine no longer applies to the FDIC when it acts as a receiver for a failed institution).

[382] See *Landcastle*, 57 F.4th at 1226–27 (rejecting an "approach" in part because it "would defeat *D'Oench*'s equitable purposes" which were derived from the federal banking scheme).

[383] This problem arises mostly in applying older statutes, as Congress passed a residual statute of limitations for all federal claims created after 1990. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313, 104 Stat. 5089, 5114–15 (codified as amended at 28 U.S.C. § 1658).

[384] 462 U.S. 151 (1983).

[385] Id. at 158.

[386] Id. at 159 n.13, 162.

meant borrowing the analogous state statute of limitations;[387] other times that meant borrowing statutes of limitations prescribed for *other* federal claims.[388] But even that decision is defined by a judge's view of the appropriateness of competing limitations periods in light of the "federal policies at stake and the practicalities of litigation."[389] That is, the entire enterprise is one in which the judiciary "fashion[s] remedial details" in the "interstices of . . . federal enactments."[390]

Other examples of federal courts stepping in to fill "the interstices of [a] federal enactment[]" with their own rules abound.[391] For example, the Supreme Court has created a privilege protecting federal officers from libel and defamation claims.[392] It has held "that the rights and duties of the United States on commercial paper which it issues are governed by federal law . . . 'fashion[ed]'" by "'federal courts . . . according to their own standards.'"[393] And when the federal government acquires land located in states for public use, federal law governs because applying the normal state-law rules would "deal a serious blow to the congressional scheme contemplated by . . . all . . . federal land acquisition programs."[394]

After the Supreme Court held in *Erie* that federal courts had no general lawmaking power and that lawfinding was impossible,[395] some wondered whether this kind of interstitial law was still lawful.[396] But shortly after

[387] Id. at 158 & n.12.

[388] Id. at 169.

[389] Id. at 172.

[390] See Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

[391] See *DelCostello*, 462 U.S. at 158–59 (quoting *Holmberg*, 327 U.S. at 395); Motorcity of Jacksonville, Ltd. v. Se. Bank N.A., 83 F.3d 1317, 1328 (11th Cir. 1996) (en banc) (collecting examples), *vacated*, Hess v. FDIC, 519 U.S. 1087 (1997), *reinstated*, Motorcity of Jacksonville, Ltd. v. Se. Bank N.A., 120 F.3d 1140, 1145 (11th Cir. 1997) (en banc).

[392] Howard v. Lyons, 360 U.S. 593, 597 (1959).

[393] *Motorcity*, 83 F.3d at 1328 (quoting Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943)).

[394] United States v. Little Lake Misere Land Co., 412 U.S. 580, 597 (1973). It is true that some decisions might be justified on the alternative grounds that the general law both applies and requires a different rule than local law would have provided. But courts have not relied on this justification, and it is unclear whether either of those conditions obtain. Rose, supra note 18, § 10, at 66–100 (discussing which matters are determined by local law, including property, statutes of limitations, and alterations of rights and liabilities); id. § 13[c], at 116–17 (explaining that courts might not be able to recognize suits concerning "matters within [the] national legislative power on which Congress has not acted" even though the common law might forbid the alleged action).

[395] See supra notes 13–16 and accompanying text.

[396] See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's the Federal Courts and the Federal System 696–98 (5th ed. 2003).

Erie, the Supreme Court asserted that *Erie* was limited to cases governed by state substantive law, and when federal substantive law controls, federal law governs every question.[397] So federal courts, having been freed from lawfinding in *Erie*, were free to make law whenever the claim arose under federal law.

But interstitial lawmaking is just that—lawmaking. There is no plausible argument that interstitial lawmaking merely gives meaning to words; rather, it presumes Congress's refusal or failure to provide a federal rule.[398] So courts put on their legislative hats and make the policy decisions for them. To be sure, courts appeal to the legislative purpose and national interests.[399] But because "[n]o statute pursues a single policy at all costs,"[400] judges are left to decide which costs are worth it. And Congress might not weigh the competing policies in the same way or choose the same rule to pursue an interest.[401] Even setting aside problems with finding a non-codified congressional purpose,[402] the decisions that courts are making are inherently legislative.

Of course, courts could look to some form of general law or state law for the supposedly necessary rules without making law. Traditionally, statutes worked in tandem with the unwritten law; the unwritten law

[397] In *Clearfield Trust Co. v. United States*, the Court adopted the relevant part of Justice Jackson's concurrence in *D'Oench*. See *Clearfield*, 318 U.S. at 366 ("[T]he rule of *Erie* . . . does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal law rather than local law."); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471–72 (1942) (Jackson, J., concurring) (arguing that federal common law applies to gaps or questions left unanswered in a federal statutory scheme); see also Holmberg v. Armbrecht, 327 U.S. 392, 394–95 (1946) ("We have the duty of federal courts . . . to apply their own principles in enforcing an equitable right created by Congress."). Although outside the scope of this Article, the total-federal-law approach appears questionable because historically rules of federal and state law applied in the same case. See, e.g., Campbell v. Haverhill, 155 U.S. 610, 614–15 (1895). That is, the law of the forum applied, and federal law preempted state law only to the extent that there was a preexisting federal rule. See Lindley, Section 1983, supra note 348, at 912–13, 917–19. This approach has also led to the courts' questionable conclusion that even where state law applies in litigating a federal claim, it applies only as a matter of *federal* law. *Clearfield*, 318 U.S. at 367 ("In our choice of the applicable federal rule we have occasionally selected state law.").

[398] See, e.g., *Holmberg*, 327 U.S. at 395 ("The rub comes when Congress is silent.").

[399] See, e.g., *D'Oench*, 315 U.S. at 457–62.

[400] See Bartenwerfer v. Buckley, 143 S. Ct. 665, 675 (2023).

[401] Cf. Baude, Severability, supra note 222, at 23 (explaining that in the severability context, "most modern judges are not willing to say that unwritten counterfactual intent is law").

[402] Statutes that contain enacted purpose statements are less problematic. See Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L. Rev. 669, 674–76 (2019).

remained in force so long as a statute did not specifically override it.[403] But under current doctrine, all unwritten law is necessarily judge-made law, so there is no impediment to judicial lawmaking.[404] Similarly, state law traditionally governed some questions in some cases, even where the claim of right was founded in federal law.[405] But according to modern doctrine, state law applies only as a matter of federal law if federal courts decide that adopting state law best promotes federal interests.[406]

Finally, interstitial lawmaking cannot be justified as an inherent power. These kinds of interstitial rules are not necessary to resolve disputes. Consider the *D'Oench* doctrine. Courts could conclude that the FDIC is not entitled to special, non-statutory protections even if they believe that the federal banking insurance scheme will fail without such protections. In other words, "[i]f th[e] requirement[s of the Constitution] make[] some regulatory programs unworkable in practice, so be it—[a court's] role is to enforce the [Constitution] as written."[407]

D. Erie *Guesses*

In *Erie*, the Court decided that, despite a rich American tradition to the contrary, state supreme court decisions necessarily *were* the law and could not be considered mere evidence of a preexisting, independent law—state law to the contrary notwithstanding.[408] So, where the source of the underlying substantive right was state law, federal courts were to apply

[403] See Francis Lieber, Legal and Political Hermeneutics 170 (Boston, Charles C. Little & James Brown 1839) ("Custom of the country, where the law was made, supplies the deficiency of words."). The extent to which the statute had to be clear to derogate the common law is unclear and shifted over time. See Alexander A. Reinert, Qualified Immunity's Flawed Foundation, 111 Calif. L. Rev. 201, 221–34 (2023) (discussing the Supreme Court's application of the derogation doctrine over time and concluding that the doctrine "has always stood on shaky footing"). Regardless, the unwritten law worked in the background, even in an area governed to some degree by statute.

[404] See Boyle v. United Techs. Corp., 487 U.S. 500, 512–13 (1988) (finding as a matter of federal law that state law should be displaced and fashioning a new rule based in part on the Court's view of "sound policy").

[405] See Lindley, Section 1983, supra note 348, at 912–13, 917–19.

[406] United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979).

[407] Cf. Knick v. Township of Scott, 139 S. Ct. 2162, 2180 (2019) (Thomas, J., concurring) (internal quotation marks omitted) (citation omitted) (arguing that the Takings Clause should be enforced despite the practical difficulties such enforcement might create). Although Justice Thomas's argument was made in the context of the Takings Clause, the same logic applies to the Constitution more broadly.

[408] See Sachs, Finding Law, supra note 5, at 573–77; Nelson, Critical Guide, supra note 5, at 980–82.

state substantive law as explained by the relevant state supreme court.[409] That is, the state supreme court made law in its decisions, and that law was to be applied in diversity jurisdiction, equally so in decisions of unwritten law as well as decisions of statutory interpretation.[410]

But that approach leaves open the question of what to do when the state supreme court has not yet opined on the question at issue. Because *Erie* rejected the "fallacy" that any judge could apply a preexisting unwritten law,[411] federal courts are no more able to apply their own conceptions of state law before than after the state supreme court weighs in. So courts must perform what is called an "*Erie* guess" and apply the law that the highest state court would hypothetically make.[412]

There are several kinds of *Erie* guesses. First, some *Erie* guesses require merely applying well-established rules to a new set of facts. For example, sometimes there are settled rules of interpretation that must be applied to a new statutory text or a contract.[413] Although the state supreme court has not answered the precise question, it has dictated the method it (and lower state courts) would use to answer the question.[414] Second, in some challenges to the constitutionality of a state law, federal courts must find a limiting construction that would avoid the constitutional problem

[409] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

[410] Id.

[411] Id. at 79.

[412] See, e.g., Howe ex rel. Howe v. Scottsdale Ins. Co., 204 F.3d 624, 627 (5th Cir. 2000). In performing *Erie* guesses, some evidence is deemed highly relevant while other evidence is irrelevant. For example, decisions by intermediate state appellate courts are highly probative, and federal courts will follow those decisions absent some specific indication that the highest court would disagree. See West v. AT&T Co., 311 U.S. 223, 237 (1940) (directing that an intermediate appellate state court decision "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise"). State supreme courts are also sometimes presumed to follow the majority view among states. See SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London, 32 F.4th 1347, 1358 (11th Cir. 2022) (collecting cases). But state trial level decisions are given significantly less weight (if any). See Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 698 n.167, 699 (1995) (observing this trend, but noting its apparent incongruity with the theory of *Erie* guesses); McGlothin v. State Farm Mut. Ins. Co., 925 F.3d 741, 746 (5th Cir. 2019).

[413] See, e.g., *SA Palm Beach*, 32 F.4th at 1356–57, 1361.

[414] See Royal Palm Vill. Residents, Inc. v. Slider, 57 F.4th 960, 973 (11th Cir. 2023) (Newsom, J., concurring in the judgment) ("Although it hasn't squarely decided the issue, the Florida Supreme Court has signaled that [a term] should be defined in a [particular] way . . . .").

before holding the state statute unconstitutional.[415] The justification for this practice appears to rest on the presumption that the state supreme court would not construe the state statute in a way that made it unconstitutional.[416] And third, sometimes the question is completely unanswered by previous precedent and cannot be answered by seeking to preserve the constitutionality of a state statute. In such an instance, the federal court must look at past state supreme court decisions, high court decisions from similar states, and general trends in the law.[417]

Although federal courts can sometimes certify these kinds of novel questions to the state supreme court,[418] *Erie* guesses are unavoidable. Some state laws restrict the type of questions state supreme courts can accept, and state courts can decline to answer certified questions.[419] And all state courts have a limited capacity to handle certified questions.[420] Further, many states do not allow federal district courts to certify questions to state courts.[421]

Sachs has argued that courts do not make law when making an *Erie* guess but that *Erie* guesses are an implicit recognition that courts can and

[415] See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

[416] See, e.g., Henry v. Att'y Gen. of Ala., 45 F.4th 1272, 1292 (11th Cir. 2022) (explaining the balance between a limiting construction and ignoring plain text, and justifying the limiting construction in part because the attorney general had adopted the limiting construction). Otherwise, federal courts would be making state law in a way that might be contrary to what the state supreme court would have done. If the state supreme court would have held that the limiting construction was not the correct interpretation and instead held the law unconstitutional, a federal court decision to the contrary would make the limiting construction the law despite what the state supreme court would have said about that very same statute. See Dream Defs. v. Governor of Fla., 57 F.4th 879, 893–95 (11th Cir. 2023) (certifying a question of statutory interpretation to the Florida Supreme Court rather than adopting a limiting construction on its own). And that result would appear to violate the most fundamental (and uncontroversial) tenets of *Erie*. Nelson, Critical Guide, supra note 5, at 941–43.

[417] See Dorf, supra note 412, at 701–04.

[418] See Rebecca A. Cochran, Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study, 29 J. Legis. 157, 166 (2003).

[419] See, e.g., Fla. Const. art. 5, § 3(b)(6) (giving the Florida Supreme Court discretion to answer certified questions, but only if the question "is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida"); Fla. Stat. Ann. § 25.031 (West 2024) (giving the Florida Supreme Court power to exercise its constitutional discretion through court rule); Fla. R. App. P. 9.150 (West 2024) (exercising that power).

[420] See Rain v. Rolls-Royce Corp., 626 F.3d 372, 378 (7th Cir. 2010) (addressing the respect necessary for state courts' crowded dockets).

[421] See Cochran, supra note 418, at 167–68.

must (in some cases) find law.[422] If he is correct, *Erie* guesses do not implicate the Article III problem identified here. But that argument just fights the *Erie* conclusion rather than accepting it.[423] The theory behind *Erie* guesses presupposes that federal courts step into the state supreme court's shoes and make up the law to apply to that case. Of course, if federal courts cannot make law, the new law will be applied only to future federal cases under a theory of "as-if" law, but it would still be impermissible for the federal court to purport to make it in the first instance.[424]

So federal courts' *Erie* practice—whether the state-law question arises under written or unwritten law—depends on the nature of state constitutional law. If the relevant state constitution gives the courts the power to make law, federal courts can no more apply that law before the state court makes it than federal courts could apply a state statute before it is duly enacted—whether or not it is termed a "prediction."[425] Then again, some scholars have questioned whether state constitutions do grant that power and argued that they require state courts to find law.[426] If so, federal courts can find the same law state courts are commissioned to find without any lawmaking.[427]

CONCLUSION

For far too long, federal courts have uncritically assumed that they have the power to make law, especially when implementing written text. Perhaps the assumption is based on the judicial power itself, on a

[422] See Sachs, Finding Law, supra note 5, at 559.

[423] See id. at 536 (explaining that in the *Erie* context, "if judge-found law didn't exist, *Erie* would have us invent it").

[424] See supra Subsection I.A.2.

[425] But see Hessick, supra note 170, at 802 n.107 (arguing that federal courts permissibly make state law in the sense that federal circuit courts' decisions on novel questions of state law are "binding on lower federal courts," but distinguishing between more aggressive forms of lawmaking).

[426] See, e.g., Nelson, Critical Guide, supra note 5, at 983–84; Green, Premise, supra note 24, at 1125–27; Boatright, supra note 25, at 370.

[427] Under current doctrine, state intermediate appellate court decisions are merely evidence of what the law would be once the state supreme court has made it. See supra note 412. But perhaps some state constitutions also empower intermediate courts of appeal to make law under certain circumstances (if a state supreme court denies review, a certain number of judges concur, etc.). If so, then courts are currently misapplying *Erie*, but could be justified in doing something similar to *Erie* "guesses" (they would no longer be guesses) if state law had already been made by the intermediate court.

historically rooted incidental power to make law, or on an inherent necessity in order to exercise its case-deciding judicial power. But the original understanding of the Constitution granted no such power. And courts' arrogation of that power has created many problems with the structure of our federalist government and rule-of-law principles, particularly as the Court refocuses on the Constitution's original meaning.

None of this is to say that courts must return to a lawfinding-only regime. Perhaps federal courts have acquired that power outside the Constitution—fiat, popular cession, etc. And to be sure, stare decisis considerations might counsel in favor of retaining the doctrinal areas in which judicial lawmaking presently exists, even if judges should resist expanding those areas of judicial lawmaking.[428] Moreover, on a practical level, ending judicial lawmaking might encourage judges to purport to find their preferred policies expressed in the text, rather than acknowledge that they are the true source. But, at the very least, judges who tie the judiciary's power to the original meaning of Article III should be disconcerted with this undisguised exercise of lawmaking power.

[428] Cf. Christopher J. Walker & Scott T. MacGuidwin, Interpreting the Administrative Procedure Act: A Literature Review, 98 Notre Dame L. Rev. 1963, 1989–96 (2023) (calling for statutory originalism on open questions and stare decisis for settled ones).